# CHILD SEXUAL ABUSE MATERIAL (CSAM): AN ANALYSIS OF ARTICLE 374 OF THE ROMANIAN CRIMINAL CODE IN LIGHT OF DIRECTIVE 2011/93/EU AND THE LANZAROTE CONVENTION

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**Abstract**

*This study analyses the offence under Article 374 of the Romanian Criminal Code from the perspective of European standards on combating the sexual exploitation and sexual abuse of minors, with particular emphasis on Directive 2011/93/EU and the Lanzarote Convention. The research proceeds from the premise that the traditional term "child pornography" no longer adequately reflects the legal, social and criminological nature of the phenomenon, since the materials targeted by criminalisation are not merely obscene products, but forms through which the sexual abuse of minors is represented, preserved, circulated and perpetuated. From this perspective, the use of the concept of child sexual abuse material (CSAM) allows for a more accurate understanding of the protected legal interests and of the seriousness of the criminalised conduct. The study examines the extent to which the current regulation of Article 374 of the Criminal Code complies with European requirements from a terminological, systematic and normative standpoint. It addresses the main forms of criminalised conduct - production, possession, acquisition, storage, distribution, making available and accessing such materials - as well as the issue of sexual performances involving minors. The analysis also engages, to a limited extent, with the debate concerning the protected legal interest of the offence, in the sense that, although the provision is placed in Title VIII of the Criminal Code, its substantive purpose is to protect minors against sexual exploitation and continuous victimisation. Particular attention is paid to the digital environment, self-generated material involving minors, intentional or accidental access, and simulated, manipulated or AI-generated material. Finally, the study draws on comparative-law benchmarks and formulates de lege ferenda proposals for adapting Romanian criminal law to the CSAM paradigm.*

**Keywords***: child sexual abuse material, CSAM, child pornography, Article 374 of the Criminal Code, sexual exploitation of children, sexual abuse of children, Directive 2011/93/EU, Lanzarote Convention.*

## 1. Introduction

The offence under Article 374 of the Romanian Criminal Code is currently undergoing conceptual and normative reassessment. Although the Romanian Criminal Code continues to use the marginal heading "child pornography", recent developments in European and international law show that this terminology is no longer fully adequate to describe the phenomenon at issue. What is criminalised is not, in essence, a form of pornography in the ordinary meaning of the term, nor merely obscene content, but a range of conduct through which the sexual abuse or sexual exploitation

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of a minor is produced, recorded, stored, transmitted, accessed or perpetuated.

From this perspective, the concept of child sexual abuse material (CSAM) provides an analytical framework that more accurately reflects the legal and criminological reality of the phenomenon. Terminology is far from marginal. Legal scholarship has shown that the debate on "child pornography" is, in reality, a debate about language, the definition of the offence, criminal sanctions and social consequences, since the terms used influence both the perception of the phenomenon and the delimitation of the criminalised conduct[1]. Similarly, it has been observed that the term "child pornography" is inappropriate, as it may suggest an analogy with adult pornography, although such materials do not express a form of consensual sexuality, but rather document or reproduce the sexual abuse of a child[2].

The use of the CSAM concept shifts the focus from the apparently obscene nature of the material[3] to the harm caused to the child and to the continuing victimisation generated by the circulation of such materials. The image, recording or representation is not merely the object of criminal conduct, but becomes the means through which the abuse is preserved, multiplied and reactivated.

This change of perspective is confirmed by the main European instruments applicable in this field. Directive 2011/93/EU[4] and the Lanzarote Convention[5] do not treat child pornography as a mere manifestation contrary to public morals, but as a form of sexual abuse and sexual exploitation of children, imposing on States obligations concerning criminalisation, prevention, victim protection and cooperation. In the same vein, the interpretative documents adopted within the Council of Europe recommend the use of CSAM terminology precisely in order to avoid minimising the seriousness of the acts and to place the child at the centre of legal protection[6].

In Romanian criminal law, Article 374 of the Criminal Code covers a plurality of forms of conduct: producing, possessing, acquiring, storing, distributing, making available and accessing materials, as well as certain conduct relating to the participation of minors in sexual performances. This normative diversity raises issues not only of terminology, but also of the structure of criminalisation, the proportionality of the sanctioning regime and the adaptation of the law to new forms in which the phenomenon

[1] Hessick, Carissa Byrne. "Introduction." In *Refining Child Pornography Law: Crime, Language, and Social Consequences*, edited by Carissa Byrne Hessick. University of Michigan Press, 2016, p. 1-16 http://www.jstor.org/stable/j.ctt1gk08jr.4

[2] Cassell, Paul G., James R. Marsh, and Jeremy M. Christiansen. "Not Just 'Kiddie Porn': The Significant Harms from Child Pornography Possession." In *Refining Child Pornography Law: Crime, Language, and Social Consequences*, edited by Carissa Byrne Hessick. University of Michigan Press, 2016. http://www.jstor.org/stable/j.ctt1gk08jr.11

[3] Păun Costică, în V. Dobrinoiu și alții (coord.), Noul Cod penal comentat. Partea specială, Ed. a III-a, Ed. Universul Juridic, București, 2016, p. 938

[4] 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, https://eur-lex.europa.eu/legal-content/RO

[5] Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, https://rm.coe.int/1680084822

[6] Terminology Guidelines for the Protection of Children from Sexual Exploitation and Sexual Abuse Adopted by the Interagency Working Group in Luxembourg, 28 January 2016, https://www.unicef.org/media/66731/file/Terminology-guidelines.pdf

manifests itself in the digital environment. At present, computer systems, online platforms and electronic communications networks are no longer merely an incidental means of commission, but the predominant framework in which CSAM materials are produced, distributed and accessed.

An analysis of Article 374 of the Criminal Code cannot avoid the issue of the protected legal interest of the offence, especially since the provision is placed in Title VIII of the Criminal Code, which concerns offences affecting social coexistence. However, in the present study, this issue is not the main object of inquiry, but rather a necessary reference point for a broader assessment of the compatibility of the Romanian regulation with the CSAM paradigm. To the extent that the protected value is understood by reference to the minor used for sexual purposes or represented in such materials, it also becomes necessary to reconsider the terminology, the structure of criminalisation and the applicable legislative solutions.

The topicality of this research is also reinforced by the existence of a legislative proposal to amend Article 374 of the Criminal Code, which seeks to abandon the term "child pornography" and to rethink the offence around the notion of child sexual abuse material. This initiative confirms the need for a broader discussion on how Romanian criminal law should respond both to new European standards and to the challenges generated by self-generated material involving minors, accidental access, simulated representations, manipulated images and AI-generated content.

Accordingly, the present study aims to analyse Article 374 of the Criminal Code in light of Directive 2011/93/EU and the Lanzarote Convention, with a view to identifying the limits of the current regulation and possible directions for reform. The methodology used is doctrinal and normative-comparative, based on the analysis of domestic law, relevant European instruments, interpretative documents and recent literature on the CSAM phenomenon. The purpose of the research is to formulate benchmarks for a clearer, more proportionate and more appropriate regulation, capable of ensuring the effective protection of children against sexual exploitation and sexual abuse.

## 2. Article 374 of the Criminal Code in its current form: normative architecture and difficulties of application

### 2.1. The current normative configuration

In its current form, Article 374 of the Romanian Criminal Code regulates the offence of "child pornography" through a broad structure, covering several categories of criminalised conduct within the sphere of criminal wrongdoing. The provision starts from a principal form, laid down in paragraph (1), which criminalises the production, possession, acquisition, storage, display, promotion, distribution and making available, by any means, of pornographic materials involving minors.

In addition to this principal form, Article 374 of the Criminal Code separately regulates conduct relating to pornographic performances involving minors[7]. On the one hand, it sanctions inducing or recruiting a minor for the purpose of participating in such a performance, obtaining benefits from such a performance or exploiting the minor for its performance; on the other hand, it sanctions the viewing of pornographic performances in which minors participate. The provision thus seeks to cover both the conduct of the person who attracts or exploits the minor in a sexual

[7] See Art. 374 para. (1¹) and para. (1²) Criminal Code

activity that is transmitted or displayed, and the conduct of the person who consumes such content.

The regulation also contains an aggravated form, applicable where the acts referred to in paragraph (1) are committed through a computer system or by another means of storing computer data. It also criminalises unlawful access to pornographic materials involving minors through computer systems or other means of electronic communication, provisions through which the legislature sought to adapt the norm to the digital environment.

At the same time, the provision establishes an aggravating regime for certain circumstances that increase the seriousness of the acts. Thus, the special limits of punishment are increased where the acts are committed by a family member or by a person cohabiting with the victim, by a person in whose care, protection, education, custody or treatment the minor was placed, or by a person who abused a position of trust or authority over the minor. The aggravation also applies where the act endangered the life of the minor or where the offender has previously committed certain offences against sexual freedom and integrity against a minor, offences of child pornography or offences of pimping involving a minor.

Another important component of the provision is the criminalisation of a request made by an adult to a minor to record, produce, distribute, display or transmit images, videos or other pornographic materials depicting that minor in sexually explicit conduct or credibly simulating a minor engaged in such conduct. This hypothesis reflects the legislature's concern with conduct involving solicitation or grooming, including in the digital environment.

Finally, Article 374 of the Criminal Code includes the definition of pornographic materials involving minors and of pornographic performance, as well as a provision on the punishability of attempt. Pornographic materials involving minors are defined by reference to the depiction of a minor, or of an adult presented as a minor, engaged in sexually explicit conduct, as well as to representations that credibly simulate a minor engaged in such conduct or to the representation of a child's genital organs for sexual purposes. A pornographic performance is defined as a live display addressed to an audience, including by means of information and communication technology, of a child engaged in sexually explicit conduct or of the child's genital organs for sexual purposes.

### 2.2. Difficulties of application and limits of the current provision

This normative architecture shows that Article 374 of the Criminal Code does not criminalise a single form of conduct, but rather a set of acts connected with the production, preservation, circulation, accessing and consumption of pornographic materials involving minors, as well as with the exploitation of minors in pornographic performances. The breadth of the provision is justified by the complexity of the phenomenon. However, its current wording raises a number of difficulties of application and normative limits, which will be analysed below. These concern not only the terminology used, but also the internal coherence of the criminalisation, the proportionality of the sanctioning regime and the ability of the norm to respond to present technological realities, in accordance with the relevant European and international instruments.

A first difficulty concerns the terminology itself. The marginal heading "child pornography", as well as the expressions "pornographic materials involving minors" and "pornographic

performance", keep the provision within a paradigm close to adult pornography and to the obscene nature of the material. Yet, where minors are concerned, the legal issue does not lie in the obscenity of the content, but in the use of the minor in a sexual context and in the perpetuation of the harm through the production, preservation, accessing or circulation of the material. In addition, the alternating use of the terms "minor" and "child" within the same article is questionable from the standpoint of terminological consistency, especially in an area in which the norm must be as clear and foreseeable as possible.

Beyond the marginal heading of the offence, one of the main difficulties concerns the lack of internal coherence of the sanctioning regime, since Article 374 paragraph (1) of the Criminal Code subjects forms of criminalised conduct with different degrees of danger and seriousness to the same penalty.

In its current form, production, possession, acquisition, storage, display, promotion, distribution and making available are sanctioned uniformly, although they do not have the same significance within the economy of the criminal phenomenon. The production of the material has the highest degree of seriousness, since it lies at the origin of the entire circuit: without the creation of the material, the subsequent conduct consisting in possession, storage, distribution, promotion, display, making available or accessing would have no object. Promotion and display, in turn, involve an additional degree of danger compared with the mere preservation or transmission of the material, since they increase the visibility of the content and facilitate its dissemination. By contrast, acquisition, possession and storage mainly express the maintenance of the material within the criminal circuit, while distribution and making available ensure its circulation to other persons. Therefore, the problem with the current provision is not that it criminalises these forms of conduct, but that it subjects them to the same sanctioning regime, without reflecting the differences in seriousness between them.

Another difficulty concerns the classification of the use of a computer system as an aggravated form. Under the current regulation, the commission of the acts referred to in paragraph (1) through a computer system or by another means of storing computer data attracts a more severe penalty. This solution was understandable at a stage when the digital environment could be regarded as a particular mode of commission. At present, however, in the field of child sexual abuse material, computer systems are no longer an exceptional circumstance, but the ordinary framework in which materials are produced, stored, transmitted, distributed and accessed. In these circumstances, the aggravated form risks becoming the typical form of commission, thereby weakening the distinction between the basic form and the aggravated form and affecting the coherence of the sanctioning regime.

A separate problem arises from the use of the expression "other means of electronic communication". This expression is not defined in the Criminal Code or in the Code of Criminal Procedure and is used in isolation in Article 374 of the Criminal Code, which may generate uncertainty as to its scope of application. In an area in which materials may be accessed, transmitted or stored through messaging applications, online platforms, cloud services, social networks or encrypted channels, the criminal-law norm must use clear, foreseeable and technologically neutral terminology. In the absence of such clarification, the application of the provision risks depending excessively on the interpretation of judicial authorities.

As regards the content of paragraph ($1^1$), which sanctions inducing or recruiting a minor for the purpose of participating in a pornographic performance, obtaining benefits from such a performance or exploiting the minor for the production of pornographic performances, it may be observed that these alternative modalities of criminalisation do not include the hypothesis of coercing the minor. This omission is debatable, since the European standard distinguishes between inducing or recruiting a child to participate in pornographic performances and coercing or forcing the child to participate in such performances. Moreover, in terms of seriousness, coercion represents a more severe form of interference with the minor's freedom and should be expressly reflected in the content of the norm. The absence of such a reference may generate difficulties of legal classification or may require the judicial authority to rely on other criminalisation provisions, although the conduct naturally belongs to the sphere of the exploitation of minors in sexual performances.

The same area also includes the problem of delimiting Article 374 of the Criminal Code from the offence of trafficking in minors. Paragraph ($1^1$) uses notions such as recruitment, obtaining benefits and exploitation of the minor, elements which form part of the constituent content of trafficking in minors. Where the minor is recruited or exploited for the purpose of participating in pornographic performances, the question may arise whether the act should be classified exclusively under Article 374 of the Criminal Code, within the sphere of trafficking in minors, or as a concurrence of offences. The difficulty is not purely terminological, but concerns the delimitation of the scope of the norms and the avoidance of overlaps between criminalisation provisions.

A separate perspective concerns the grooming of minors for sexual purposes, referred to in the specialist literature as grooming. The current paragraph ($3^2$) concerns the act of an adult who requests a minor to produce or transmit materials depicting that minor. The criminalisation provision does not, however, cover the hypothesis in which the request concerns materials relating to another minor, nor the hypothesis in which the perpetrator is himself or herself a minor. In addition, an issue of proportionality arises where the request, not followed by the production of the material, is sanctioned more severely, by imprisonment from 5 to 12 years, than certain completed forms of conduct relating to materials already produced, which are punishable by imprisonment from 3 to 10 years. From the perspective of the logic of criminal law, conduct consisting in solicitation should not ordinarily receive a more severe sanctioning regime than the completed form of the principal conduct.

A particular problem concerns situations in which minors are involved as perpetrators or recipients of self-generated materials. The current provision does not offer sufficient criteria for distinguishing between conduct involving exploitation, coercion, manipulation or non-consensual distribution and situations in which minors close in age and maturity produce, possess or transmit, in a private and consensual setting, materials concerning themselves exclusively. Yet a modern regulation must avoid both the impunity of abusive conduct and the disproportionate criminalisation of minors in situations that rather call for measures of protection, education and prevention.

With regard to simulated, manipulated or AI-generated materials, the legal text raises additional difficulties. The current definition of pornographic materials involving minors includes representations

which, although they do not depict a real person, credibly simulate a minor engaged in sexually explicit conduct. However, the norm does not expressly refer to materials generated by artificial intelligence systems, nor does it distinguish between situations in which the image of a real minor is altered, combined or integrated into a representation of a sexual nature.

The difficulty is not merely terminological, but concerns the delimitation of different technical hypotheses, with distinct consequences for legal classification and proof. Materials generated or manipulated by artificial intelligence may include representations based on the image of a real minor, representations combining features derived from several persons, entirely artificial but realistic representations, or materials in which an adult is presented as a minor. Where there is an identifiable real minor, the harm caused to that minor is direct, even if the act represented did not take place in reality. Where the material is entirely artificial, the difficulty shifts towards establishing the credible nature of the representation and delimiting the scope of protection of the criminal-law norm. In addition, judicial authorities may encounter difficulties in distinguishing real materials from artificially generated ones, which may affect both the identification of victims and the proof of the constituent elements of the offence.

Another problem concerns the definition of pornographic performance. The current text refers to a live display addressed to an audience, which may generate restrictive interpretations in the case of transmissions made to a single person, especially by digital means. In the field of protecting minors against sexual exploitation, the seriousness of the conduct does not depend on the public nature of the display, but on the involvement of the minor in a live sexual activity, regardless of the number of recipients.

Finally, Article 374 of the Criminal Code does not separately regulate tools facilitating the commission of such acts, such as computer programs, guides, manuals, instructions or other materials designed for producing, accessing, distributing or concealing the materials. This absence is relevant in the digital environment, where the criminal circuit is supported not only by the materials themselves, but also by infrastructures for access, anonymisation, avoidance of detection or content generation.

Therefore, the current form of Article 374 of the Criminal Code has the merit of covering a broad spectrum of conduct, but remains dependent on a normative architecture built on partially outdated terminological and technical premises. Its shortcomings concern terminology, the gradation of the forms of criminalised conduct, the regime of accessing, the treatment of situations involving minors, the definition of technologically generated or manipulated materials, the configuration of online performances and the criminalisation of facilitating tools.. These difficulties justify a reassessment of the provision not merely through a change of name, but through a coherent reconstruction within the CSAM paradigm.

### 3. The Protected legal interest of the offence and its relevance to the CSAM paradigm

The analysis of Article 374 of the Criminal Code within the paradigm of child sexual abuse material cannot be separated from the issue of the protected legal interest of the offence. Although this issue is not the main focus of the present research, identifying the protected social value is indispensable for understanding why the traditional formula of “child pornography” is

insufficient and why the concept of CSAM more accurately reflects the legal nature of the act[8].

The placement of Article 374 of the Criminal Code in Title VIII of the Criminal Code, devoted to offences affecting relations concerning social coexistence, may suggest that the principal protected value is public order, public morals or decency. Such a conclusion would, however, be incomplete. The systematic positioning of the norm is an indication of legislative technique, but it cannot prevail over the concrete content of the criminalisation. In the case of Article 374 of the Criminal Code, the central element is not the indecent nature of the material, but the use of the minor for sexual purposes and the circulation of representations that express, preserve or reactivate a form of abuse or exploitation.

The view has also been expressed in legal scholarship that Article 374 of the Criminal Code would rather tend to sanction conduct regarded as profoundly immoral, which would create only a potential risk - and one insufficiently supported by empirical evidence - for children who might become subjects of child pornography in the future[9]. Such an interpretation naturally starts from the placement of the provision within the category of offences against public order and peace and from the abstract nature of the danger associated with the circulation of such materials. However, it cannot satisfactorily explain all the situations criminalised by Article 374 of the Criminal Code, especially those in which the material concerns a real minor, whether identifiable or subsequently identifiable, or those in which the production, distribution, storage or accessing of the material prolongs the effects of the initial abuse. In such cases, the issue is not merely the repression of immoral conduct or the prevention of a future risk, but the protection of a person already affected by being used in a sexual context and by the maintenance of the material within the criminal circuit.

This perspective is confirmed by the evolution of international and European instruments. Directive 2011/93/EU treats child pornography within the broader context of the sexual abuse and sexual exploitation of children, while the Lanzarote Convention includes it within the measures designed to protect children against sexual exploitation[10]. Consequently, criminalisation cannot be satisfactorily explained solely by reference to the protection of collective morality. The protected value must be related, first and foremost, to the freedom, sexual integrity, dignity and development of the minor.

In this logic, the minor is not a mere contextual element of the offence, but the substantive reference point of criminal-law protection. The materials covered by Article 374 of the Criminal Code are not mere media of an obscene nature, but means through which the child is represented or used in a sexual context. Even where the act does not involve direct contact between the perpetrator and the minor, the conduct may contribute to maintaining the criminal circuit and prolonging the harmful effects. For this reason, the protected legal interest of the offence must be understood by reference to the protection of the minor against being

[8] see Nicolae-Cătălin Magdalena, The Legal Object of the Crime of Child Pornography – Between the Protection of the Person and the Protection of Public Order, Universul Juridic Magazine no. 4/2026

[9] Sergiu Bogdan, Doris Alina Șerban, Criminal Law. The special part. Crimes against Patrimony, Against Authority, Corruption, Service, Forgery and Against Public Order and Tranquility, Universul Juridic Publishing House, 2020, p. 590

[10] Directive 2011/93/EU of the European Parliament and of the Council on combating the sexual abuse and sexual exploitation of children and child pornography; Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, Lanzarote, 25 October 2007

used for sexual purposes, and not merely by reference to public order in the abstract sense.

An essential element of this criminalisation is the continuing nature of the harm, namely revictimisation. In the case of materials involving minors, the harm is not exhausted at the moment when the material is produced. On the contrary, through each subsequent act of storage, distribution, making available or accessing, the material may reactivate the consequences of the initial abuse and keep the minor in a state of exposure and vulnerability. This reality is also emphasised in the documents of the Lanzarote Committee, which show that child sexual abuse material may continue to circulate online long after the abuse has been committed, being difficult to remove and generating an additional form of harm[11].

The same perspective is also supported in legal scholarship. It has been shown, on the one hand, that the possession and subsequent viewing of images are not neutral forms of conduct in relation to the victim, but may cause harm in themselves, through the repeated invasion of privacy and the reactivation of the trauma generated by the initial abuse[12]. On the other hand, the harm caused by such materials is not limited to the physical or psychological harm generated at the moment of their production, but also includes harm to dignity: by its very existence and circulation, the material turns the child into an object of the gaze and sexual use of others. From this perspective, not only the producer, but also those who receive, possess, view or contribute to the circulation of the material participate in maintaining an interference with the dignity and private life of the child represented[13].

This idea explains the connection between the protected legal interest and the terminological shift. If the material is viewed merely as an obscene product, the analysis remains confined to the paradigm of public morality. If, by contrast, it is viewed as child sexual abuse material, the focus shifts to the affected child and to the effect of continuing victimisation. In this sense, the CSAM paradigm is not merely a correction of language, but a consequence of the reassessment of the protected social value.

The issue becomes more complex in the case of simulated, manipulated or AI-generated materials. The analysis must distinguish between at least three situations: materials generated on the basis of the image or features of a real minor, real materials concerning existing but unidentified minors, and entirely artificial representations of non-existent minors[14]. In the first situation, the connection with the victim is direct: even if the act represented did not occur in reality, the child's image is used in a sexual context. Technology changes the manner in which the

[11] Lanzarote Committee, *Interpretative Opinion on the Applicability of the Lanzarote Convention to Sexual Offences against Children Facilitated through the Use of Information and Communication Technologies (ICTs)*, adopted by the Lanzarote Committee on 12 May 2017, https://www.coe.int/en/web/children/adopted-documents-and-activity-reports

[12] Cassell, Paul G., James R. Marsh, and Jeremy M. Christiansen. "Not Just 'Kiddie Porn': The Significant Harms from Child Pornography Possession." In *Refining Child Pornography Law: Crime, Language, and Social Consequences*, edited by Carissa Byrne Hessick. University of Michigan Press, 2016. http://www.jstor.org/stable/j.ctt1gk08jr.11

[13] Rogers, Audrey. "The Dignitary Harm of Child Pornography—From Producers to Possessors." In *Refining Child Pornography Law: Crime, Language, and Social Consequences*, edited by Carissa Byrne Hessick. University of Michigan Press, 2016. http://www.jstor.org/stable/j.ctt1gk08jr.10

[14] Parti Katalin, and Judit Szabó. 2024. The Legal Challenges of Realistic and AI-Driven Child Sexual Abuse Material: Regulatory and Enforcement Perspectives in Europe. Laws 13: 67., p 1 https://doi.org/10.3390/laws13060067

material is created, not the harm caused to the minor.

In the case of real materials concerning unidentified minors, the difficulty does not concern the nature of the protected value, but proof and victim identification. The fact that the minor cannot be individualised in the course of criminal proceedings does not transform the protected value into a collective one. Behind the material there remains a real child, and the impossibility of identifying that child cannot alter the nature of criminal-law protection. The Lanzarote Committee also emphasises the difficulty of the victim-identification process and the need for international cooperation in cases involving materials distributed through information and communication technologies[15].

More difficult is the case of entirely artificial representations, which do not correspond to a specific minor. It might be argued that, in the absence of a real victim, the basis of criminalisation shifts towards public morality. Such a conclusion would, however, be premature. Even in this situation, the material reproduces the image of the child as the object of conduct of a sexual nature, may fuel demand for real materials and may contribute to the normalisation of the use of minors for sexual purposes. Recent literature on AI-generated materials shows that they should not be treated as a harmless substitute for real materials, but as a phenomenon that forms part of the same logic of consumption and symbolic exploitation of the child[16].

Accordingly, the emergence of AI-generated materials does not require abandoning the thesis that the protected value has a personal character, but only nuancing it. Where there is an identifiable real minor, the personal character of the protection is direct. Where the minor is real but unidentified, the personal character remains, even if protection is confronted with evidentiary difficulties. Where the representation concerns a non-existent minor, the connection with the protection of the person becomes mediated, but does not disappear entirely, since the criminalisation remains oriented towards protecting the child against sexual exploitation and against being represented as a sexual object.

This conclusion is also supported by the recent guidance of the Lanzarote Committee, which draws attention to offences facilitated by emerging technologies, including materials generated or modified by artificial intelligence[17]. Recent developments in European Union law point in the same direction, tending to treat artificially generated sexual representations of minors in a manner close to traditional child sexual abuse material[18].

[15] Lanzarote Committee, The protection of children against sexual exploitation and sexual abuse facilitated by information and communication technologies (ICTs): Addressing the challenges raised by child self-generated sexual images and/or videos, 10 March 2022, p. 72, https://www.coe.int/en/web/children/adopted-documents-and-activity-reports

[16] Andresen, Claire, Artificially Generated, Genuinely Harmful: Prosecuting AI-Generated Child Sexual Abuse (July 22, 2024). University of Hawai'i Law Review, Volume 47, p. 55-56, Available at SSRN: https://ssrn.com/abstract=5381736 or http://dx.doi.org/10.2139/ssrn.5381736

[17] Lanzarote Committee - Declaration on protecting children against sexual exploitation and sexual abuse facilitated by emerging technologies Adopted by the Lanzarote Committee at its 43rd meeting (6-8 November 2024), https://www.coe.int/en/web/children/adopted-documents-and-activity-reports

[18] Amendments adopted by the European Parliament on 17 June 2025 on the proposal for a directive of the European Parliament and of the Council on combating the sexual abuse and sexual exploitation of children and child sexual abuse material and replacing Council Framework Decision 2004/68/JHA (recast) (COM(2024)0060 – C9-0028/2024 – 2024/0035(COD)). The ordinary legislative procedure has not been completed, and the act is not, at this stage, a directive in force. https://www.europarl.europa.eu/doceo/document/TA-10-2025-06-17_EN.html

There remains, however, the issue of the placement of Article 374 of the Criminal Code in Title VIII. The fact that the protected legal interest has a personal core does not automatically entail the need to move the provision into the category of offences against the person. The norm covers very different situations: materials involving identified victims, materials involving unidentified victims, simulated representations, artificially generated content, conduct consisting in possession or accessing, and situations in which there is no direct contact with the minor. A reconstruction based exclusively on the logic of a specific injured person could create practical difficulties, especially in cases involving a large number of materials, victims located in other jurisdictions or persons who cannot be identified.

Moreover, if the full application of the norm were made conditional upon the individualisation of each victim, this would lead to an excessive rigidity of the procedural mechanism. In cases involving large archives, thousands of files or materials originating from different jurisdictions, identifying all the minors represented may be impossible or disproportionately difficult. Such a requirement could affect the effectiveness of criminal prosecution and would turn criminal-law protection into a mechanism dependent on an evidentiary element which, in CSAM cases, is frequently absent for objective reasons.

There is also the risk of revictimising the identified minor. Child sexual abuse material may circulate for a long time, in separate cases and across different jurisdictions. If every case in which the material reappears required the minor to be summoned, heard or repeatedly involved, procedural protection could turn into a new form of exposure of the victim. For this very reason, the functionality of the norm should not be made conditional, in all cases, upon the identification and procedural participation of all the children represented in the materials.

This solution does not, however, diminish the status of the identifiable minor. On the contrary, where the child represented can be individualised, that child must be recognised as a victim of the offence and as an injured party in the criminal proceedings. This conclusion is also supported by domestic provisions. Article 111 paragraph (7) of the Code of Criminal Procedure refers to the hearing of injured parties who were victims of the offence under Article 374 of the Criminal Code, while Law No. 211/2004 includes child pornography among the offences that may give the victim access to financial compensation granted by the State. It follows that the minor is not an element external to the criminalisation, but may, where identified, have the full procedural position of an injured party.

From this perspective, classifying the minor as a secondary passive subject allows the two levels of analysis to be reconciled. On the one hand, Article 374 of the Criminal Code must also operate in situations in which the victim cannot be identified, in which the materials circulate across borders, or in which the representation is simulated or artificially generated. On the other hand, where the child is identifiable, that child must be recognised as a victim directly affected by the criminalised conduct. This solution preserves the functionality of the norm without denying the personal dimension of criminal-law protection.

Therefore, maintaining Article 374 of the Criminal Code in Title VIII may be explained by reasons of legislative technique and procedural functionality. This solution should not, however, be confused with a denial of the personal dimension of criminal-law protection. Formally, the provision is placed within the category of offences concerning social coexistence; substantively,

however, it is oriented towards protecting minors against being used for sexual purposes, against interferences with their dignity and integrity, and against the continuing victimisation produced by the circulation of the materials. This understanding justifies the shift from the terminology of "child pornography" to the CSAM paradigm and provides the basis for reassessing the current regulation.

### 4. Relevant European Standards

The European standards applicable to child sexual abuse material must be analysed thematically, according to their impact on Article 374 of the Criminal Code. Directive 2011/93/EU, the Lanzarote Convention, the Explanatory Report to the Convention and the documents of the Lanzarote Committee outline several main requirements: the criminalisation of the entire circuit of materials, the distinction between intentional and accidental access, the comprehensive regulation of performances involving minors, the nuanced treatment of self-generated material produced by children, the use of CSAM terminology and the adaptation of criminalisation to emerging technologies.

As regards the scope of the criminalised conduct, both the Lanzarote Convention and Directive 2011/93/EU cover the full range of operations through which materials are produced, obtained, possessed, distributed, transmitted, offered, made available or accessed. The Explanatory Report to the Lanzarote Convention clarifies the role of these forms of conduct: production is criminalised in order to combat the phenomenon at its source; offering and making available may include placing materials online or facilitating access to them; distribution and transmission involve active dissemination; acquisition entails obtaining the material; and possession is sanctioned in order to hold accountable each participant in the chain that fuels the phenomenon[19]. This approach is relevant for Romanian law because it confirms the need to criminalise the entire circuit of materials, but it does not justify treating all forms of conduct as equivalent in terms of seriousness.

With regard to accessing such materials, the Explanatory Report to the Lanzarote Convention states that the criminalisation of access is aimed at persons who view materials online without downloading them, so that their conduct cannot always be classified as acquisition or possession. Criminal liability, however, presupposes the intention to access a source where such materials are available and knowledge that they may be found there. The report expressly states that sanctions should not be applied to persons who accidentally access such content[20]. In the same logic, Directive 2011/93/EU refers to knowing access. The European standard therefore requires access to be understood as a conscious act, not as the mere technical or involuntary appearance of the material on a device or in a digital stream.

As regards performances involving minors, the European instruments are not limited to criminalising the production or circulation of materials, but treat the exploitation of children in pornographic performances as a distinct matter. The Explanatory Report to the Lanzarote Convention shows that the provisions on performances concern both the organisation or facilitation of the child's participation and

[19] Explanatory Report to the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, CETS No. 201, Lanzarote, 25 October 2007, paras. 133–139; Article 20 of the Lanzarote Convention; Article 5 of Directive 2011/93/EU

[20] Explanatory Report to the Lanzarote Convention, para. 140.

the conduct of the spectator, including situations involving means such as webcams[21]. Directive 2011/93/EU is relevant because it distinguishes between causing or recruiting a child to participate, obtaining profit from or otherwise exploiting the child, coercing or forcing the child to participate, threatening the child for that purpose, and knowingly attending such performances[22]. This structure indicates that the hypothesis of coercion, force or threat must be dealt with expressly, as a distinct and more serious form of interference with the minor's freedom.

With regard to the solicitation of children for sexual purposes, European standards provide important benchmarks for delimiting the criminalised conduct. The Explanatory Report to the Lanzarote Convention describes grooming as the process of preparing a child for sexual abuse, which may involve gradually approaching the minor, gaining the child's trust, discussing intimate matters, exposing the child to sexual material and even causing the child to produce pornographic material[23]. In the original form of the Convention, the offence presupposes the proposal of a meeting and material acts leading to that meeting. Subsequently, Recommendation II-10 of the Lanzarote Committee invited States to consider criminalising the solicitation of children for sexual purposes even where it does not lead to a face-to-face meeting or to the production of child sexual abuse material[24]. This development is important for the analysis of Article 374 paragraph (3²) of the Criminal Code, since requests made online are not always reducible to the classic scenario of a physical meeting.

With regard to self-generated material produced by children, the Recommendations of the Lanzarote Committee require a differentiated approach. Recommendation II-2 invites States to introduce explicit references in domestic law to conduct involving self-generated sexual images or videos of children and to identify situations in which children should not be held criminally liable or should be prosecuted only as a last resort[25]. Recommendation II-6 requires that a child not be prosecuted for possessing his or her own self-generated material, for possessing another child's self-generated material with that child's informed consent, or for passively receiving such material[26]. Recommendation II-8 concerns voluntary and consensual sharing intended exclusively for private use between children[27]. Finally, Recommendation II-9 indicates that the distribution or transmission by children of self-generated material of other children, where such material qualifies as child pornography under the Convention, should be prosecuted only as a last resort[28].

These standards do not eliminate criminal liability in all situations involving minors. They do, however, require a distinction between cases of exploitation, coercion, manipulation, blackmail or non-consensual distribution and situations involving private interactions between minors who are close in age and maturity. From this perspective, criminal law must

[21] Explanatory Report to the Lanzarote Convention, paras. 146–150; Article 21 of the Lanzarote Convention
[22] Article 4 para 2-4 of Directive 2011/93/EU
[23] Explanatory Report to the Lanzarote Convention, paras. 155–160
[24] Lanzarote Committee, *The Protection of Children against Sexual Exploitation and Sexual Abuse Facilitated by Information and Communication Technologies (ICTs): Addressing the Challenges Raised by Child Self-Generated Sexual Images and/or Videos*, Implementation Report, adopted on 10 March 2022, Recommendation II-10.
[25] Ibid., Recommendation II-2
[26] Ibid., Recommendation II-6
[27] Ibid., Recommendation II-8
[28] Ibid., Recommendation II-9

remain an instrument of protection, not a mechanism of secondary victimisation of the child.

From a terminological and technological standpoint, recent European documents indicate both the need to use the concept of CSAM and the need to adapt criminalisation to emerging technologies. Recommendation II-1 of the Lanzarote Committee invites States to use the term "child sexual abuse material" — CSAM — for materials that represent acts of sexual abuse of children or focus on the child's genital organs, since the term "child pornography" may be misleading and may diminish the seriousness of the acts[29]. In its factsheet on Romania, the Committee expressly notes that Romanian legislation uses the term "child pornography" and invites Romania to use the term CSAM and to introduce an appropriate definition[30].

As regards new technologies, the Explanatory Report to the Lanzarote Convention is relevant in that it accepts the inclusion of simulated representations and draws attention to the rapid development of technology, which allows the production of highly realistic images[31]. The Lanzarote Committee's Declaration on emerging technologies, in turn, supports the need for criminal-law protection not to depend on the technical means used, including in the case of materials generated or modified by artificial intelligence, virtual reality or other digital tools[32]. The standard that emerges is one of technological neutrality: the norm must cover new forms of content creation and manipulation, without sacrificing the requirements of clarity and foreseeability.

This orientation is also confirmed by the Lanzarote Committee's recent concerns regarding emerging technologies. In its 9th Activity Report, the Committee notes the increase in AI-generated CSAM, the use of "nudifying" applications to manipulate images of children, and the use of such materials for grooming, blackmail and coercing victims into new forms of abuse[33]. Similarly, the 8th Activity Report records the difficulties of distinguishing real materials from artificially generated ones and the need to clarify the legal regime of AI-generated images, including in relation to manuals or exchanges of instructions concerning the creation of such materials[34].

It follows, therefore, that the European standards relevant to Article 374 of the Criminal Code may be summarised in several concrete requirements: the criminalisation of the entire circuit of materials; the differentiation of conduct according to seriousness; the distinction between intentional and accidental access; the inclusion of coercion, force and threat in the field of performances; the nuanced regulation of self-generated material produced by children; the use of CSAM terminology; and the adaptation of the norm to simulated, manipulated or technologically generated materials. These benchmarks

[29] Ibid., Recommendation II-1

[30] Lanzarote Committee, *Factsheet – Romania. The Protection of Children against Sexual Exploitation and Sexual Abuse Facilitated by Information and Communication Technologies (ICTs): Addressing the Challenges Raised by Child Self-Generated Sexual Images and/or Videos*, updated March 2025, section II, *Legal Frameworks*

[31] *Explanatory Report to the Lanzarote Convention*, paras. 142–144

[32] Lanzarote Committee, *Declaration on Protecting Children against Sexual Exploitation and Sexual Abuse Facilitated by Emerging Technologies*, adopted at the 43rd meeting of the Lanzarote Committee, 6–8 November 2024

[33] Lanzarote Committee, *9th Activity Report of the Lanzarote Committee*, covering the period 16 February 2024 – 6 March 2025, adopted on 6 March 2025, pp. 7–8, 17–20

[34] Lanzarote Committee, *8th Activity Report of the Lanzarote Committee*, covering the period 3 February 2023 – 15 February 2024, adopted on 6 March 2024, para. 72.

constitute the criteria against which the current Romanian regulation and the need for its amendment must be assessed.

## 5. Comparative-law aspects concerning the regulation of CSAM

Comparative-law analysis may be used as a tool for identifying normative solutions that are useful in assessing Article 374 of the Criminal Code. From this perspective, particular relevance attaches to the terminology used, the manner in which the materials are defined, the regime applicable to the criminalised conduct, the treatment of simulated or virtual representations, and the existence of exceptions or grounds for non-punishment.

From the standpoint of terminology, European legal systems do not offer a uniform solution. Some systems still retain formulas close to "child pornography", while others use notions closer to the idea of sexual representation of minors or child sexual abuse material. Austrian law is relevant in this respect, since the regulation contained in § 207a StGB concerns representations involving minors and includes both situations relating to production, transmission, acquisition and making available, and situations concerning knowing access. This structure shows a concern to cover the entire circuit of materials, without reducing the analysis to mere possession or distribution[35].

In terms of the structure of criminalisation, several systems differentiate forms of conduct according to their seriousness. Production, distribution, making available, possession and accessing are therefore not treated as perfectly equivalent modalities. In German law[36], for example, the provisions of §§ 184b–184e StGB distinguish between pornographic content involving children and pornographic content involving young persons, as well as between dissemination, production, acquisition, possession and access by means of internet communication. This differentiation allows for a more nuanced criminal-law response, depending on the age of the person represented, the real or realistic nature of the content and the specific conduct of the perpetrator. From this perspective, the German model confirms that criminal-law protection can cover a broad range of acts without subjecting all modalities to the same sanctioning regime.

A differentiated structure is also found in Croatian law. Article 163 of the Croatian Criminal Code[37] sanctions both attracting, recruiting or encouraging a child to participate in the production of child pornography, and knowingly producing, offering, making available, distributing, acquiring, possessing or accessing child pornography. At the same time, where the act is committed by coercion, threat, deception, abuse of power or by exploiting a relationship of dependency, the sanctioning regime becomes more severe. This solution is relevant for Romanian law, as it shows that the legislature may distinguish between conduct relating to the circulation of materials and conduct involving direct intervention upon the minor.

French law[38] offers another relevant example. Article 227-23 of the French

[35] Austria, *Strafgesetzbuch*, § 207a, § 208a and § 215a, available in the official RIS system: https://www.ris.bka.gv.at

[36] Germany, *Strafgesetzbuch*, §§ 184b–184e, available on the official *Gesetze im Internet portal*: https://www.gesetze-im-internet.de/stgb

[37] Croatia, *Kazneni zakon*, Art. 163 and Art. 164, available on the Croatian legislative portal *Zakon.hr*: https://www.zakon.hr/z/98/kazneni-zakon

[38] France, *Penal Code*, arts. 227-23, 227-24, available on the official Légifrance portal: https://www.legifrance.gouv.fr/codes/

Criminal Code sanctions the making, recording or transmission of the image or representation of a minor where it is pornographic in nature, as well as the offering, dissemination, import or export of such an image or representation. The provision deals separately with habitual consultation, or consultation in return for payment, of an online service that makes such images available, as well as with their possession or acquisition. In addition, the use of an electronic communications network for dissemination to an indeterminate public constitutes a circumstance of increased seriousness. The French solution is useful for Romanian law because it shows that accessing and repeated consumption of materials may be treated separately from production and dissemination, without being confused with them.

An area of particular comparative interest is the regulation of virtual, simulated or apparently juvenile materials. In Italian law[39], Article 600-ter of the Criminal Code criminalises the production or making of pornographic performances or materials through the use of minors, the recruitment or inducement of minors to participate in such performances, as well as the distribution, dissemination, offering or transfer of materials. At the same time, Article 600-quater sanctions the possession of pornographic materials produced through the use of minors, while Article 600-quater.1 extends the regulation to virtual pornography. This latter provision is of particular relevance to the topic under analysis, since it refers to images created through graphic processing techniques, not wholly or partly associated with real situations, but which appear to represent real situations. The Italian model confirms that criminal law may treat virtual materials distinctly, without excluding them from the scope of criminal-law protection.

The United Kingdom, in turn, offers an interesting solution through the use of the notion of "pseudo-photographs" in the Protection of Children Act 1978. This notion allows for the inclusion of images generated or manipulated so as to appear to be photographs, even if they are not real photographs. In addition, the Criminal Justice Act 1988 sanctions the possession of indecent photographs or pseudo-photographs of children, while the Coroners and Justice Act 2009 extends the regime to prohibited pornographic images of minors, including situations in which the representation may be unrealistic but the predominant impression is that of a minor[40]. This model is particularly useful for the discussion concerning technologically generated or manipulated materials, as it avoids limiting criminalisation to authentic photographs or recordings.

In the same direction, Polish law[41] is of interest because it criminalises created or processed images depicting a minor involved in sexual activity, even without the participation of a real minor. This solution is important for the discussion concerning artificially generated materials, since it shifts the focus from the physical existence of the victim in the act of production to the nature of the representation and to the risk it creates for the protection of minors.

[39] Italy, *Codice penale*, arts. 600-ter, 600-quarter and 600-quarter.1, available on the official Normattiva portal: https://www.normattiva.it

[40] United Kingdom, *Protection of Children Act 1978*, section 1; *Criminal Justice Act 1988*, Section 160; *Coroners and Justice Act 2009*, sections 62, 65 and 66, available on the official website legislation.gov.uk: https://www.legislation.gov.uk

[41] Poland, *Kodeks karny*, Art. 202, available in the official ISAP/Sejm database: https://isap.sejm.gov.pl/isap.nsf/

In the matter of access, the legal systems analysed confirm the importance of the conscious nature of the conduct. Both German and Austrian law regulate forms of accessing or attempting to access through computer or communication means, placing emphasis on the conscious conduct of the perpetrator. In the same vein, French law sanctions habitual or paid consultation of an online service that makes pornographic materials involving minors available. These solutions confirm that accessing must be treated as a distinct form of conduct, but only where it expresses a conscious choice to access unlawful content. For Romanian law, the comparative conclusion is that the criminalisation of access should be maintained, but formulated or interpreted in such a way as to exclude accidental contact with the material.

Another comparative element concerns pornographic performances involving minors. In several legal systems, this matter is regulated separately from materials that have already been produced. Croatian law sanctions the exploitation of children for pornographic performances and treats more severely situations in which the child's participation is obtained through coercion, threat, deception, abuse of power or exploitation of a relationship of dependency. Similarly, Bulgarian law criminalises both recruiting, assisting or using a minor for pornographic performances and forcing a minor to participate in such a performance[42]. These solutions are relevant for Romanian law, as they confirm the need for the hypothesis of coercing the minor to be expressly provided for, rather than indirectly inferred from broader notions such as recruitment or exploitation.

With regard to private, consensual and non-abusive situations, comparative law offers relevant examples of grounds for non-punishment or exclusion of liability. Austrian law provides that the production or possession of a pornographic representation involving a minor who has reached the age of 14 is not punishable where it was made with the minor's consent and is intended for the personal use of the minor or of the person who possesses it. Liability is also excluded for the production, possession or transmission of a pornographic representation of oneself, where the minor has reached the age of 14 and the material is intended for personal use. Croatian law moves in a similar direction, providing that a child may not be punished for producing and possessing pornographic material depicting himself or herself, or himself or herself together with another child, if the material was produced and possessed with the consent of each person and exclusively for personal use[43]. In German law, in the field of material involving young persons, liability does not apply to the production and possession of materials made with the consent of the persons represented and intended exclusively for their own use[44].

These solutions do not relativise the protection of minors and do not permit the public circulation of materials. On the contrary, they draw a line between exploitative situations — imposed production, non-consensual distribution, use for blackmail, making available to other persons — and situations in which the material remains within the private sphere of the minors involved, without elements of coercion, abuse or dissemination. For Romanian law, such models are relevant because the current Article 374 of the

[42] Bulgaria, *Criminal Code*, art. 158a, official text/English translation available through the Ministry of Labour and Social Policy: https://www.mlsp.government.bg/uploads/1/blgarsko-zakonodatelstvo/en/criminal-code.pdf

[43] Croatia, *Kazneni zakon*, art. 163 para. (5)

[44] Austria, *Strafgesetzbuch*, § 207a para. (5); Germany, *Strafgesetzbuch*, § 184c para. (4)

Criminal Code does not contain sufficient criteria for situations involving self-generated materials and private interactions between minors who are close in age and maturity. A coherent regulation should avoid both the impunity of abusive conduct and the transformation of the minor into the perpetrator of an offence in situations that rather call for protection, education and prevention.

Finally, several systems complement criminalisation with confiscation measures designed to neutralise the material and computer-related means used to commit or facilitate the acts. Croatian law provides for the confiscation of special equipment, means, computer programs or data intended, adapted or used for committing or facilitating offences concerning child pornography or pornographic performances involving minors. Bulgarian law provides for the confiscation of the object of the offence, while German law regulates the confiscation of property to which the criminal act relates.

Similar solutions are also found in Czech law[45], where objects, valuables or property connected with the act may be confiscated, in Estonian law[46], which allows the extended confiscation of assets or property obtained through crime, and in Luxembourg law[47], which provides for the mandatory confiscation of objects in the event of conviction. These solutions are particularly relevant in the digital environment, where criminal conduct is supported not only by the material itself, but also by devices, programs, data, storage media, access tools, anonymisation mechanisms or means of avoiding detection. Confiscation therefore has not only a repressive function, but also a preventive one, by eliminating the technical infrastructure that may allow the resumption or continuation of criminal conduct.

These comparative benchmarks are useful for reassessing Article 374 of the Criminal Code. They confirm that a coherent regulation must differentiate forms of conduct according to their seriousness, without placing production, possession, distribution, promotion and accessing under the same sanctioning regime. Accessing must also be built around conscious conduct, not accidental contact with the material. The definition of the materials must be sufficiently flexible to cover real, simulated, virtual or technologically manipulated representations, while the regime applicable to self-generated materials must avoid the disproportionate criminalisation of minors. Finally, comparative law shows the usefulness of complementary instruments, in particular the confiscation of the means used to commit or facilitate the act.

## 6. De lege ferenda proposals for the reconfiguration of Article 374 of the Criminal Code

The analysis of the current form of Article 374 of the Criminal Code, carried out by reference to European standards and comparative-law benchmarks, highlights the need for a legislative intervention broader than a mere terminological adjustment. The provision currently in force has the merit of covering a wide range of forms of conduct, but it remains built on a normative architecture that no longer fully corresponds to the reality of the phenomenon. The reform

[45] Czech Republic, *Criminal Code*, Act No. 40/2009 Coll., §§ 192–193, available on the official e-Sbírka portal: https://www.e-sbirka.cz/sb/

[46] Estonia, *Penal Code*, §§ 175¹, 178, available in official version in English on Riigi Teataja: https://www.riigiteataja.ee/en/eli/

[47] Luxembourg, *Code pénal*, arts. 383, 383bis, 383ter and 384, available on the official Legilux portal: https://legilux.public.lu/eli/etat/leg/code/penal

should therefore concern not only the legal language and definitions used, but also the manner in which the criminalised conduct is structured, the regime applicable to minors, adaptation to new technologies and the complementary instruments for combating the phenomenon.

The amendment should start from the marginal heading of the offence. This solution may also be justified by the requirement of accurate legal labelling of the criminalised conduct. Legal scholarship has shown that, in the field of child sexual abuse and exploitation, legal labels must reflect both the nature of the conduct and the seriousness of the harm, since imprecise terms may lead to inappropriate social perceptions and legal responses[48]. Replacing the expression "child pornography" with a formula such as "operations involving child sexual abuse material" would more accurately express the nature of the criminalised conduct. The term "pornography" refers to an inappropriate logic, associated with content intended for adults and with the sphere of obscenity. By contrast, the notion of child sexual abuse material places the emphasis on the abuse, exploitation and continuing victimisation of the child. Such an amendment would not have merely symbolic value, but would guide the interpretation of the norm towards the social value actually protected: the minor against being used for sexual purposes.

The same logic also requires a redefinition of the criminalised materials. The current text defines "pornographic materials involving minors", but does not provide sufficiently clear regulation for the situations generated by new technologies. A definition adapted to the CSAM paradigm should include materials depicting a real minor, an adult presented as a minor, a credibly simulated minor, as well as representations of the minor's genital organs for sexual purposes. In addition, the definition should expressly cover materials manipulated or generated by artificial intelligence, in order to avoid difficulties of legal classification in cases where the content does not directly reproduce real abuse, but credibly simulates the use of a minor in a sexual context.

Another necessary amendment concerns the structuring of the forms of criminalised conduct. The current form of Article 374 paragraph (1) of the Criminal Code places production, possession, acquisition, storage, display, promotion, distribution and making available under the same regime. Such a solution is no longer satisfactory. The production of the material should be treated as one of the most serious forms, since it lies at the origin of the criminal circuit and is, as a rule, the closest to the initial moment of the abuse or of the use of the minor for sexual purposes. Promotion and display, in turn, entail an additional degree of danger, as they increase the visibility of the material and facilitate its dissemination. Possession, storage and acquisition remain criminally relevant forms of conduct, but their contribution is different, being linked mainly to the preservation of the material and the maintenance of demand.

This differentiation is also supported in legal scholarship, where it has been shown that an undifferentiated focus on possession of materials may lead to a questionable allocation of criminal-law resources and to a distortion of the relationship of seriousness between the various forms of the phenomenon. The production of the material, its distribution and direct sexual abuse involve a higher level of danger than mere possession, which is why the criminal-law

[48] Leary, Mary Graw. "The Language of Child Sexual Abuse and Exploitation." In *Refining Child Pornography Law: Crime, Language, and Social Consequences*, edited by Carissa Byrne Hessick. University of Michigan Press, 2016. http://www.jstor.org/stable/j.ctt1gk08jr.8

response must be calibrated according to the concrete role of the conduct in producing, circulating and maintaining the material within the criminal circuit[49].

In the matter of access, the issue is not whether criminalisation is appropriate, but how it should be delimited. Accessing should remain punishable, since it sustains demand and contributes to maintaining the circuit of materials. However, criminal law should not sanction accidental contact with CSAM, the involuntary appearance of an image in a digital stream, or automatic technical storage over which the person has no real control. Criminal liability must be based on conscious conduct: searching for, opening, viewing, maintaining access to, returning to the material, or using means that indicate an intention to access such content. Clarifying this requirement would ensure the compatibility of the provision with the principle of culpability and with the European standard of knowing access.

Particular attention should be paid to performances involving minors. The current Article 374 paragraph ($1^1$) of the Criminal Code criminalises inducing or recruiting a minor, obtaining benefits and exploiting the minor for the purpose of producing pornographic performances, but does not expressly mention coercion. Yet coercing, forcing or threatening the minor are distinct and more serious situations, which European standards treat separately. A comprehensive regulation should therefore expressly include the coercion of a minor for the purpose of participating in a performance involving child sexual abuse.

In the same context, the relationship between this criminalisation and trafficking in minors must be clarified. Terms such as "recruitment", "obtaining benefits" or "exploitation" may, in certain circumstances, also fall within the scope of trafficking in minors, especially where the conduct goes beyond the strict framework of participation in a performance and involves a broader activity of exploitation. In order to avoid overlaps and non-uniform solutions of legal classification, the formula "where the act does not constitute a more serious offence" would allow the special criminalisation in Article 374 of the Criminal Code to be maintained, while also permitting the application of the more severe norm where the act fulfils the constituent elements of trafficking in minors. Such a legislative technique is already known to the Criminal Code and would preserve the obligations to transpose European standards on performances involving minors, without weakening the delimitation from more serious offences.

The definition of performance should, in turn, be detached from the idea of public display. In the digital environment, transmission to a single person or to a restricted group may have the same seriousness as a display addressed to a broad audience, where the minor is involved in live conduct of a sexual nature. A formulation referring to display addressed to one or more persons would be better suited to current technological realities and would avoid restrictive interpretations.

As regards the request addressed to a minor, the current text concerns a request made by an adult for the production or transmission of materials concerning that minor. A more coherent regulation should also cover the situation in which the request concerns materials relating to another minor. In addition, the liability of a minor who requests such materials from another minor should be analysed, but only under strictly delimited conditions, where the conduct is

[49] Hessick, Carissa Byrne. "Questioning the Modern Criminal Justice Focus on Child Pornography Possession." In *Refining Child Pornography Law: Crime, Language, and Social Consequences*, edited by Carissa Byrne Hessick. University of Michigan Press, 2016. http://www.jstor.org/stable/j.ctt1gk08jr.9.

abusive, exploitative, coercive or manipulative. Not every interaction between minors can be turned into an offence, but criminal liability cannot be excluded in serious cases either.

The regime of self-generated materials involving minors also calls for separate regulation. The production, possession or storage by a minor of his or her own materials should not be punishable where such materials are not intended for distribution or making available to other persons. Voluntary, consensual and private transmission between minors who are close in age and maturity must be treated differently from non-consensual distribution, sexual blackmail, threat, coercion or the introduction of the material into the public circuit. In this matter, criminal law must remain ultima ratio, in order to avoid turning the child into the perpetrator of an offence in situations in which he or she rather needs protection and education.

New forms of content generation and manipulation require special attention. The text must be sufficiently clear to cover situations in which the image of a real minor is altered, integrated or combined into content of a sexual nature, as well as situations in which an apparently real minor is generated without the existence of an individualisable victim. At the same time, the wording must be foreseeable and must allow the criminalised materials to be distinguished from other representations that do not fall within the scope of criminal-law protection. The issue is not the sanctioning of any artificial image, but of those materials that credibly simulate the use of a minor in sexually explicit conduct or focus on the minor's genital organs for sexual purposes.

The reform should also address instruments facilitating the commission of such acts. The digital environment involves not only the existence of the materials themselves, but also computer programs, guides, manuals, instructions, anonymisation methods or technical tools designed for producing, accessing, distributing or concealing CSAM. The criminalisation of such instruments must be formulated precisely, so as to target materials designed or adapted for criminal purposes, without affecting neutral tools or legitimate uses of technology.

Last but not least, an express confiscation regime is necessary. In the field of CSAM, confiscation does not merely serve to deprive the offender of the objects used to commit the act, but also to eliminate the means that may allow the continuation, resumption or facilitation of the conduct. Equipment, programs, storage media, tools adapted for the production or distribution of materials and proceeds obtained from the exploitation of the minor should be subject to confiscation, including confiscation by equivalent where they can no longer be found. Such a solution is all the more important in the digital environment, where technical tools may play an essential role in the production, multiplication and dissemination of materials.

Overall, the amendment of Article 374 of the Criminal Code should pursue a coherent reconstruction of the norm, not merely a punctual intervention concerning the marginal heading. The reform should ensure coherence between the terminology used, the definition of the criminalised materials, the structure of the criminalised forms of conduct and their concrete seriousness. At the same time, the text must be adapted to the realities of the digital environment by clarifying intentional access, regulating self-generated materials, including materials generated or manipulated by artificial intelligence, delimiting performances involving minors and establishing the relationship with more serious offences, such as trafficking in minors. In addition, the criminalisation of

facilitating instruments and the confiscation regime must ensure the neutralisation of the means through which the phenomenon is produced, maintained or resumed. Only such an intervention can lead to a clear, proportionate regulation adapted to the current reality of the sexual exploitation of minors.

## 7. Conclusions

The analysis of Article 374 of the Criminal Code reveals a tension between the traditional terminology of "child pornography" and the current legal reality of the phenomenon, which concerns child sexual abuse material. This difference is not purely linguistic. The name of the offence influences the way in which the protected social value, the seriousness of the conduct and the function of the criminalisation norm are understood.

The current text has the merit of covering a broad spectrum of conduct: production, possession, acquisition, storage, distribution, making available, accessing, exploitation in the context of performances and solicitation addressed to a minor. However, this coverage is not matched by a sufficiently coherent normative architecture. Article 374 of the Criminal Code treats in a similar manner forms of conduct with different degrees of harmfulness, maintains questionable terminological formulas and does not fully respond to the challenges generated by the digital environment, self-generated materials, performances transmitted to limited recipients and content generated or manipulated by artificial intelligence.

The protected legal interest of the criminalisation confirms the need to reassess the provision. Although the norm is placed in Title VIII of the Criminal Code, criminal-law protection cannot be satisfactorily explained solely by reference to public order or public morals. In substance, the criminalisation seeks to protect minors against being used for sexual purposes, against interferences with their dignity and integrity, and against the continuing victimisation produced by the circulation of the materials. This reality justifies the shift from the terminology of "child pornography" to the CSAM paradigm.

European standards and comparative-law benchmarks support the same conclusion: the regulation must cover the entire circuit of materials, but in a differentiated and proportionate manner. Accessing must be distinguished from accidental contact, coercion must be dealt with expressly in the field of performances, minors must not be disproportionately sanctioned in cases involving self-generated materials, and the norm must be capable of including simulated, manipulated or technologically generated representations.

Consequently, the amendment of Article 374 of the Criminal Code should pursue a normative reconstruction, not merely a change of name. The reform must correlate the legal language used, the definition of the criminalised materials, the gradation of conduct, the regime applicable to minors, the delimitation from more serious offences and the complementary instruments for combating the phenomenon, including confiscation.

Therefore, Article 374 of the Criminal Code should be retained as a central instrument of criminal-law protection of children against sexual exploitation, but reconfigured so as to reflect more clearly the nature of the phenomenon it sanctions. A modern criminalisation in this field must be precise, proportionate, technologically neutral and oriented towards the effective protection of minors, without losing sight of the requirements of legality, foreseeability and the ultima ratio character of criminal law.

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