THE CRIMINAL SCIENCES JOURNAL
TCSJ
"AL.I. CUZA" POLICE ACADEMY

# ABOUT RECENT LEGISLATIVE CHANGES IN THE AREA OF TRAFFICKING IN HUMAN BEINGS, CHILD TRAFFICKING AND PIMPING

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***Abstract:*** *The phenomenon of trafficking in human beings has transnational dimensions, as evidenced by the existence of joint efforts at the international level in the fight against it, based on the relevant legislation, namely the conventions and additional protocols at the level of the United Nations, but also the directives at the level of the European Union, international documents focused on preventing and combating the phenomenon in question, as well as on protecting victims. The dynamics of the phenomenon lead to legislative changes to ensure adequate means of protecting the social values affected. This is the case with the most recent amendments to the rules criminalizing trafficking in human beings, trafficking in minors and procuring. It should also be discussed whether these amendments also cover the transposition into Romanian criminal law of the legislative changes made to Directive 2011/36 by Directive 2024/1712.*

***Keywords****: traffic; person; minor; legislative change*

## 1. Introductory Aspects

The Criminal Code was most recently amended and supplemented by the provisions of Law[2] No. 269/2024, the latter law entering into force on November 3, 2024. The rationale for these amendments and additions is set out in the Explanatory Memorandum[3] to Law no. 269/2024, but essentially focuses on the idea that "there is no justification for different treatment of the offences of trafficking in human beings and the offences classified (...) as aggravated pimping (...)"[4]. Although we support the need to constantly amend and complete the legal provisions so that they correspond to the need to protect social values, we would like to make some clarifications regarding the aspects used as arguments in the explanatory memorandum, on

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[2] Law no. 269/2024 on amending and supplementing Law no. 286/2009 on the Criminal Code, published in the Official Gazette of Romania no. 1089 of October 31, 2024.

[3] Available at: https://www.cdep.ro/proiecte/2024/400/50/0/em510.pdf (last accessed: November 12, 2024).

[4] Ibid.

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the one hand, and, on the other hand, the content of the new incriminating variants in the rule criminalizing the offences of trafficking in human beings, respectively trafficking in minors, on the other hand, together with the reference to an omission by the legislator regarding the need to corroborate these legislative novelties with the content of another article of the Criminal Code, and the application of the constitutional principle of the more favourable criminal law, from the perspective of the application of criminal law over time.

## 2. Considerations on the Amendment of the Rules Criminalizing Trafficking in Human Beings, Trafficking in Minors and Pimping

First of all, we disagree with the reference in the above-mentioned explanatory memorandum to the termination of the applicability of Decision No. XVI/2007, handed down in appeal in the interest of the law by the High Court of Cassation and Justice, on the grounds of the "new place of criminalization"[1] of the offenses of trafficking in persons and trafficking in minors, the consequence being that of a return to the non-unitary judicial practice prior to the publication of the above-mentioned decision in the Official Gazette of Romania. The argument is represented by the provisions contained in Art. 474[1] of the Code of Criminal Procedure[2], relating to the termination or modification of the effects of the decision handed down on appeal in the interest of the law. In their view, the incorporation of the provisions criminalizing trafficking in persons and trafficking in minors into the Criminal Code, although it entailed the repeal of the provisions of Articles 12 and 13 of Law[3] No. 678/2001, it did not mean that the decision which had resolved the legal issue ceased to have effect, since the new rules still applied.

Secondly, by the amendments and additions to the Criminal Code through the provisions of Law No. 269/2024, assimilated variants were introduced for both the crime of trafficking in persons and the crime of trafficking in minors, which are found in para. (1[1]) of Art. 210 and 211 of the Criminal Code. These are, in essence, the former aggravated variants of the offense of pimping, provided in Art. 213 of the Criminal Code. Different from the situation in the crime of trafficking in persons, in the case of the crime of trafficking in minors, the assimilated variant has also been taken up in the aggravated variant of para. (2) of Art. 211 of the Criminal Code. We consider that the reference to para. (1[1]) in para. (2) of Art. 211 of the Criminal Code is welcome, however, when, para. (4) of Art. 211 of the Criminal Code refers to the offense under para. (2) that it is followed by the actual exploitation of the minor, applying the rules of concurrence of offenses, it cannot refer to the hypothesis in para. (1[1]) because it is already a form of exploitation, by referring to the obtaining of financial gain from the practice of

[1] Ibid.
[2] Law no. 135/2010 on the Criminal Procedure Code, published in the Official Gazette of Romania no. 486 of July 15, 2010, with subsequent amendments and additions.
[3] Law no. 678/2001 on preventing and combating trafficking in human beings, published in the Official Gazette of Romania no. 783 of December 11, 2001, with subsequent amendments and additions.

prostitution by one or more minors. Moreover, we consider that this aggravated variant, which refers to the assimilated variant of the offense of trafficking in minors, when the offense is committed by vitiation of consent, according to the conditions of Art. 210 para. (1) of the Criminal Code, renders inoperative the provision of Art. 211 para. (4) of the Criminal Code, relating to the concurrence of offenses when the act of para. (2) is followed by actual exploitation of the minor. We state this because forcing a minor to engage in prostitution, a form of exploitation of a person, according to Art. 182 let. c) of the Criminal Code, is currently nothing other than the aggravated version of the crime of trafficking in minors, compared to the assimilated version. In these circumstances, therefore, it is not possible to find a concurrence of offenses because a person cannot be punished twice for the same conduct.

The same reasoning also applies to the crime of trafficking in persons, in the sense of not applying the provisions on the concurrence of offenses when the crime of trafficking in persons consists in inducing to start or continue the practice of prostitution, by vitiating consent, because this assimilated variant is, in essence, a compulsion to prostitution, within the meaning of Art. 182 let. c) of the Criminal Code.

Thirdly, we consider that the legislator should have referred to "minors" and not to "underage persons" in the assimilated version of the offense of trafficking in minors, thus ensuring a unity in the regulation in terms of the terminology used in the norm.

Fourth, we consider incorrect the reference to "modalities" in para. ($1^1$) of Art. 210 of the Criminal Code because by modalities we mean the actions that constitute the material element of the offense. In accordance with the provisions of Art. 211 para. (2) let. a) of the Criminal Code, the reference should have been made to the conditions of para. (1) of Art. 210 of the Criminal Code, this proposal being in line with the explanatory memorandum to Law No. 269/2024[1].

Fifthly, the rule in para. ($1^1$) of Art. 210 of the Criminal Code does not include the hypothesis of obtaining profit from the practice of prostitution by one or more persons. This conduct is therefore not criminalized under the crime of trafficking in human beings, but under the crime of pimping. If one person willingly engages in prostitution and another person profits from this activity, the first person is not committing an offense and the second person is committing the offense of pimping. If, however, a person induces another person to begin or continue practicing prostitution, under the conditions of Art. 210 para. (1) of the Criminal Code, i.e. by vitiating consent, and subsequently obtains benefits from the practice of prostitution by that person, there shall be a real concurrence of offenses between the crime of trafficking in persons, under Art. 210 para. ($1^1$) of the Criminal Code and the crime of pimping (Art. 213 of the Criminal Code). We state this because the crime of procuring has three alternative normative ways of realization of the material element, including obtaining profit from prostitution. This obtaining of financial gain goes beyond the content of the criminalization of

[1] For details, see paragraph 10 of the Explanatory Memorandum, available at: https://www.cdep.ro/proiecte/2024/400/50/0/em510.pdf (last accessed: November 13, 2024).

trafficking in human beings and is an activity subsequent to, but distinct from, the activity of inducing the person to engage in or continue prostitution by vitiating consent. It is thus possible to establish a real concurrence of offenses between the crime of trafficking in persons and the crime of pimping, as mentioned above.

Sixthly, we consider that the reference in Art. 211 para. ($1^1$) of the Criminal Code, to "the practice of prostitution by one or more minors" validates the validity and applicability of Decision[1] No. 49/2007 rendered by the High Court of Cassation and Justice in appeal in the interest of the law, in the sense that it is possible to hold an offense of trafficking in minors, in the continuous form, when there is a plurality of passive subjects. Although the legislator does not add an identical provision in the case of the assimilated version of the crime of trafficking in human beings, given that the same ruling given by the High Court of Cassation and Justice in the above-mentioned decision also referred to the crime of trafficking in human beings, we consequently consider that the validity and applicability of this decision is maintained in the case of the crime of trafficking in human beings.

Seventhly, with regard to the jurisdiction to conduct criminal prosecution, respectively the trial, although we consider it appropriate to clarify the situation of cases involving the offense of pimping, in the aggravated variants, in the form before the amendments made by Law no. 269/2024, we do not find a legal justification for the situation described by the legislator, in the sense that, although a conduct prohibited by the criminal law could have been classified under any of the incriminating variants of trafficking in persons or minors, this should not happen, but the act should be classified as a pimping offense, in any of the aggravated variants, corresponding to the currently repealed paragraphs. Prosecution, irrespective of the status of the person, of the offences of trafficking in persons and trafficking in minors, and of the offence of pimping, when the latter is committed for the purposes of an organized criminal group[2], shall be carried out by the Directorate for the Investigation of Organized Crime and Terrorism[3]. The court of first instance shall have jurisdiction[4]. If it does not fall within the scope of an organized criminal group, the prosecution of the crime of pimping is carried out by the public prosecutor's office and the trial in first instance by the judges[5].

[1] For details, see Decision No. 49/2007 of the Court of Cassation, available at: https://www.iccj.ro/biblioteca-digitala/decizii-pronuntate-in-recurs-in-interesul-legii/comunicate-privind-deciziile-pronuntate-in-recurs-in-interesul-legii-in-cadrul-sectiilor-unite-pana-la-data-de-17-ianuarie-2011/?Anul=2007&_page=4 (last accessed: November 14, 2024).

[2] According to Art. 367 para. (6) of the Criminal Code, by "organized criminal group" we mean "structured group of three or more persons, formed for a specific period of time and acting in a coordinated manner to commit one or more crimes".

[3] According to Art. (1) item 2 of the Government Emergency Ordinance no. 78/2016 on the organization and functioning of the Directorate for the Investigation of Organized Crime and Terrorism, as well as amending and supplementing certain normative acts, published in the Official Gazette of Romania no. 938 of November 22, 2016, with subsequent amendments and additions.

[4] According to Art. 36 para. (1) let. a) and c) of the Criminal Procedure Code.

[5] According to Art. 35 para. (1) of the Criminal Procedure Code.

Eighthly, we note that although the legislator amended and supplemented the rules criminalizing trafficking in persons, trafficking in minors and pimping, he failed to amend Art. 217 of the Criminal Code, concerning the punishment of attempt in the case of certain offences under Chapter VII of Title I of the Special Part of the Criminal Code, this article still containing the reference to the punishment of attempt in the case of the crime of pimping, provided in Art. 213 para. (2) of the Criminal Code, which is now repealed.

Ninthly, if in the aggravated version of the crime of trafficking in minors, provided in Art. 211 para. (2) let. f) Criminal Code, the legislator refers to the offense of pimping as one of the listed offenses that can be included in the offender's antecedence, we find a new omission by the legislator, in that he did not replace the phrase "pimping of a minor" with the term ,,pimping", in the case of the aggravated versions of the offenses of rape of a minor[1], sexual assault of a minor[2], sexual corruption of minors[3], solicitation of minors for sexual purposes[4] and child pornography[5], as the phrase has no normative equivalent.

Tenthly, we consider that, in the case of the crime of pimping, a minor may also be a secondary passive subject in the hypothesis that the perpetrator was not aware of and could not have realized the age of the person whom he induces or facilitates to engage in prostitution or from whose activity he derives financial gain.

Eleventhly, the constitutional principle of the application of more favourable criminal law is also applicable to the crimes of trafficking in persons, trafficking in minors and pimping. In the context of the recent legislative amendments, for an offense committed under the Criminal Code in force but in the form prior to the amendments that entered into force on November 3, 2024, the question of the application of the more favourable criminal law arises. We consider that the more favourable criminal law in this situation is the old law, taking into account the lower special limits of punishment for the crime of aggravated forms of pimping, compared to the punishments for the crimes of trafficking in persons and trafficking in minors.

Twelfthly, we consider it insufficient to supplement Art. 182 of the Criminal Code, relating to the exploitation of a person, by adding a new form of exploitation, namely "compelling to commit acts provided by criminal law"[6], in relation to the amendments to Directive[7] 2011/36

[1] According to Art. 218[1] para. (5[2]) let. b) of the Criminal Code.
[2] According to Art. 219[1] para. (3) let. f) and (3[2]) let. b) of the Criminal Code.
[3] According to Art. 222[1] of the Criminal Code.
[4] Ibid.
[5] According to Art. 374 para. (3[1]) let. d) of the Criminal Code.
[6] For details, see Art. 182 of the Criminal Code.
[7] Directive 2011/36/EU of the European Parliament and of the Council of April 5, 2011 on preventing and combating trafficking in human beings and protecting victims of such trafficking, and replacing Council Framework Decision 2022/629/JHA, available at: https://eur-lex.europa.eu/legal-content/RO/TXT/PDF/?uri=CELEX:02011L0036-20240714 (last accessed: November 15, 2024).

by Directive[1] (EU) 2024/1712. We believe that the other forms of exploitation, namely surrogate motherhood, forced marriage and illegal adoption, should also be considered.

## 3. Conclusions

We consider that the amendments and additions to the Criminal Code are opportune in order to respond to the need to protect social values through the means of criminal law, in line with the evolution of society, but we believe that greater attention should be paid to legislative correlations, thus ensuring that the rules can be applied to concrete cases.

## References

Directive (EU) 2024/1712 of the European Parliament and of the Council of June 13, 2024 amending Directive 2011/36/EU

Directive 2011/36/EU of the European Parliament and of the Council of April 5, 2011 on preventing and combating trafficking in human beings and protecting victims of such trafficking, and replacing Council Framework Decision 2022/629/JHA

G.E.O. no. 78/2016 for the organization and functioning of the Directorate for the Investigation of Organized Crime and Terrorism, as well as for amending and supplementing some normative acts

Law No. 135/2010 on the Criminal Procedure Code

Law No. 269/2024 on the amendment and completion of Law no. 286/2009 on the Criminal Code

Law No. 286/2009 on the Criminal Code

Law No. 678/2001 on preventing and combating trafficking in human beings

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[1] Directive (EU) 2024/1712 of the European Parliament and of the Council of June 13, 2024 amending Directive 2011/36/EU, available at: https://eur-lex.europa.eu/legal-content/RO/TXT/PDF/?uri=OJ:L_202401712 (last accessed; November 15, 2024).