Legal Protection of Minors

Implementation of EU Directives in Spain

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Article

ABSTRACT

The indiscriminate use of social networking for interpersonal relationships has increased the possibilities to engage in behaviour that affects the private and personal lives of citizens in general and minors in particular. Offences such as child grooming have been incorporated into the Spanish Criminal Code, in compliance with international and community commitments. This paper aims to analyze the changes made by the Spanish legislator to the Spanish criminal law system as a result of the transposition of EU directives on sexual crimes against minors.

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I. Introduction

The development of new information and communication technologies (ICT) and, above all, the increase in data transmission networks – basically the internet – offer numerous advantages and improve people's quality of life by reinforcing personal and work relationships. They considerably influence the private sphere, however, and, in turn, their indiscriminate use entails risks that must be minimized by adequate responses to the new demands. Indeed, the use of social networks has multiplied the possibilities for types of behaviour to develop that affect the private and personal lives of citizens and, in particular, of minors.

The use of ICT by minors, as a form of social interaction, involves certain risks for various reasons. They include the ease with which minors can access the internet, inappropriate use of these new forms of communication between minors, and simple lack of knowledge of the dangers involved in the use and dissemination of private images of other minors on the internet, all of which is linked to the vulnerable situation in which minors find themselves. These risks are associated with certain forms of crime committed by sex offenders, such as child grooming, cyber-bullying of minors under the age of sixteen and sexting –a term used to describe behaviour involving the sending of images with sexual content to minors. They victimize minors by damaging their legal rights, e.g., image and privacy rights and the right to sexual indemnity, understood as a process of formation and development of the minor's personality and sexuality.

Today's society is concerned about these types of behaviour and strongly rejects them. Hence, effective measures to combat this phenomenon in order to prevent such behaviour from going unpunished must be established. These responses are not only established by the Member States but also by European or international institutions. On the one hand, the aim is to prevent minors from the new dangers associated with the virtual world and, on the other, to dissuade sex offenders from attempting the sexual indemnity of minors through ICT. Among the multiple criminological manifestations of the use of ICT that can cause harm to minors, the so-called crime of child grooming – the crime of sexual harassment of minors through the internet – stands out. This form of crime consists of the use of new technologies to contact a minor for the purpose of performing sexual acts as well as the act of tricking a minor into providing the offender with pornographic material.

The Spanish legislator reacted to this form of sexual harassment of minors performed through social networks by reforming the criminal law with an act in 2010, namely Organic Law 5/2010 of 22 June 2010. The new law integrated provisions, which specifically typifies the criminal conduct of cyber grooming into the Spanish Criminal Code. In so doing, the Spanish legislator complies with the European and international commitments

This article analyses the regulations that were drawn up, both at the international and European levels, with the aim of establishing a legal framework for the effective protection of minors against sexually abusive and exploitative behaviour (II.). It outlines the way in which the Spanish criminal legislator has addressed this protection in the Spanish Criminal Code (III.) before a summary assessment of the reforms is made in the final remarks (IV.).

II. Normative Instruments to Combat Child Sexual Abuse

The response, both at European and international levels, to certain behaviours that affect both the development and the sexual formation of minors, is reflected in various normative instruments. At the international

level, the most prominent response is the United Nations Convention on the Rights of the Child of 20 November 1989,[1] in which Art. 19 urges States Parties to take all appropriate measures to protect the child from all forms of physical or mental violence, including sexual abuse.[2]

At the European level, several instruments have been developed to combat the phenomenon of sexual exploitation of children, e.g., the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse of 25 October 2007 (the "Lanzarote Convention").[3] In its preamble, the Convention stresses the need for protection of children not only by their families but also by society and the State, in view of the fact that the welfare and best interests of children are fundamental values shared by all Member States. Art. 1 sets out the purposes of the Convention:

- To prevent and combat sexual exploitation and sexual abuse of children;
- To protect the rights of child victims of sexual exploitation and abuse;
- To promote national and international cooperation against sexual exploitation and the abuse of children.

The criminal law aspects of the Convention that are relevant for the crime of child grooming are contained in Chapter VI under the heading "Substantive criminal law." Art. 23 requires States Parties to criminalise the conduct of those who, by means of IT technologies, propose to meet a child under the minimum age of sexual consent[4] for the purpose of committing an act against him or her constituting sexual assault or abuse or the production of child pornography, provided that the proposal was followed by material acts leading to the meeting.[5]

As far as substantive criminal law at the EU level is concerned, Art. 83(1) TFEU includes the possibility of laying down minimum standards for definitions of criminal offences and sanctions of particular gravity and cross-border dimension. They arise from the nature or impact of such offences or from the "special need" to combat them, according to common criteria. This provision is of particular relevance when the Treaty itself describes those "areas of particularly serious crime," in which Member States must approximate their domestic criminal law in order to comply with their obligations under Union law, including conduct relating to the sexual exploitation of minors.

On the basis of Art. 83(1) TFEU, the European Parliament and the Council established Directive (EU) 2011/93 of 13 December 2011 on combating sexual abuse and exploitation of children and child pornography, replacing Council Framework Decision 2004/68/JHA of 22 December 2003.[6] This Directive provides, *inter alia*, for a general legal framework to combat serious criminal offences with regard to the sexual exploitation of children; the Directive states that these offences require the adoption of a "comprehensive approach covering the prosecution of offenders, the protection of child victims and prevention of the phenomenon."[7] In addition, the child's best interests must be a primary consideration when carrying out any measures to combat these offences in accordance with the Charter of Fundamental Rights of the European Union and the United Nations Convention on the Rights of the Child. The Directive calls on the Member States to declare both child grooming (using information and communication technologies) and the solicitation of children (without using the internet) criminal offences, by ensuring that the perpetrators of such offences are prosecuted in such a way that the conduct does not go unpunished.[8]

The first articles of the Directive contain definitions relating to "minor," "age of sexual consent," and "online solicitation of children for sexual purposes." With reference to the latter concept, Art. 6 of the Directive calls on Member States to take the necessary measures to ensure that the following intentional conduct, carried out by means of information and communication technologies, is punishable: a) a proposal by an adult to meet a minor who has not reached the age of sexual consent;[9] b) this proposal for contact must be for the

purpose of performing a sexual act with a minor who has not reached the age of sexual consent (Art. 3(4)) or producing child pornography (Art. 5(6)), and c) the proposal must be accompanied by material acts aimed at meeting the minor. Similarly, Art. 6(2) of the Directive punishes any attempt by an adult to commit, by means of information and communication technologies: (a) the acquisition or possession of child pornography (Art. 5(2)); (b) knowing accession to child pornography by any technological means (Art. 5(3)) or tricking of a minor below the age of sexual consent into providing child pornography depicting himself/herself. For all the above-mentioned behaviours, inducement and complicity are punished, too (Art. 7(1)). Art. 9 of the Directive refers to a number of aggravating circumstances for the offence of solicitation of children for sexual purposes by technological means, which the States themselves must provide for in their domestic criminal laws, in so far as they do not form part of the constituent elements of the offences. Aggravating circumstances could be: the offence was committed against a child in a particularly vulnerable situation; the offender deliberately or recklessly endangered the life of the child; the offence was committed using serious violence or caused serious harm to the child; the offence was committed within the framework of a criminal organisation.

III. Child Grooming in the Spanish Criminal Law

As mentioned in the introductory remarks, the Spanish legislator has complied with the above-mentioned texts (both European and international) by including Art. 183 *bis* into the Spanish Criminal Code in the 2010 reform.[10] Art. 183 *bis* refers to the crime of child grooming by taking up Art. 23 of the Council of Europe Lanzarote Convention and transposing Council Framework Decision 2004/68 of 22 December 2003 on combating the sexual exploitation of children and child pornography,[11] which was later replaced by the above-mentioned Directive 2011/93/EU. The Directive itself was transposed by a subsequent reform in 2015 that introduced a series of novelties, among them, it reflected the content of the child grooming offence from Art 183 *bis* in Art 183 *ter*. The amending act (Organic Law 1/2015) specifies that abuse of minors committed via the internet or by other means of telecommunication is easy, due to the ease of access and anonymity they provide, and counteracts it with a new paragraph in Art. 183 *ter* of the Criminal Code. This provision foresees punishment to anyone who, through technological means, contacts a minor under the age of fifteen and carries out acts intended to trick him or her into providing pornographic material or showing pornographic images to him or her.

With the 2015 reform of the Spanish Criminal Code, the Spanish legislator reproduced the content of Art. 183 *bis* in the first number of Art. 183 *ter*,[12] keeping the same typical structure as well as the penalty of Art. 183 *bis*. However, Art. 183 *ter* (1) extends the concept of victim by including minors under sixteen years of age, in response to the Spanish legislation that raised the age of sexual consent. Consequently, the Spanish Criminal Code presumes that consent given by a minor for the performance of acts of a sexual nature is irrelevant if the minor is under the age of sixteen. Raising the age of sexual consent by the Spanish legislator came in response to the suggestion made by the United Nations Committee on the Rights of the Child, which urged it to reform the Spanish Criminal Code in order to bring the age of sexual consent in line with the UN Convention on the Rights of the Child. The aim was to intensify the framework for protection of minors against conduct of a sexual nature. The most relevant novelty introduced by LO 1/2015 is the introduction of a new criminal type in section 2 of Art. 183 *ter*. It stipulates the offence of swindling the minor through new information technologies with the purpose of providing the offender with pornographic material or showing him/her pornographic images in which a minor is represented or appears.

The offence of child grooming in Art. 183 *ter* (1)

As far as the offence of child grooming in Art. 183 *ter* (1) is concerned, the Spanish legislator established the following elements of crime:

- Contact with a minor under the age of 16;
- Contact must be made through the internet, by telephone, or by means of any other information and communication technology;
- A proposal to meet the minor with the purpose of committing one of the offences of Arts. 183 (sexual abuse of a minor under sixteen) or 189 (child pornography offence);
- The proposal must be accompanied by material acts aimed at bringing the minor closer, i.e., acts tending to the physical encounter between the two.[13]

Thus, the objective elements of crime first require contact with a minor. In the opinion of most criminal law scholars, this contact must be responded to by the minor.[14] The requirement of contact with the minor specifically described in the criminal type under the expression “contact with a minor” is actually neither determined in Art. 23 of the Lanzarote Convention nor in Art. 6 of Directive 2011/93. Both texts only refer to the meeting proposal, provided that such proposal has been accompanied by material acts leading to such an encounter. This means that the Spanish legislator goes beyond the terms of the Directive and the Convention.

Second, the wording of Art. 183 *ter* (1) implies that the proposal should lead to arranging a meeting and must be arranged by one of the means indicated in this regard, namely through the internet, telephone, or any other means of information and communication technology. The specific allusion to these technological means has led legal doctrine to question whether Art. 183 *ter* only covers virtual contacts and not direct, personal contacts.[15] A criminal law response, however, cannot be understood as covering only cases in which the perpetrator establishes personal contact with the minor through the aforementioned means, leaving out traditional types of approaches to the minor for sexual purposes carried out in the physical environment.[16] The reasons that may have led the legislator to create this loophole are difficult to discern; omitting contact in the real world is problematic, as it is just as dangerous for the sexual indemnity of the minor as the virtual world.

Third (and along with the act of contacting a minor for sexual purposes), the criminal offence of child grooming requires the making of a proposal to meet the minor in order to commit material acts aimed at becoming physically closer. It is not fully clear what these types of acts really are, since the Spanish legislator does not provide any explanation on this matter. The legislator just specifies its nature, which has to be material, and its purpose aimed at bringing the minor closer. As a result, a reasonable limitation of the types of acts is not possible. In my opinion, the introduction of this element of "material acts" does not provide information on which acts are to be performed by the subject in order to approach or maintain contact with the child. If the acts involve approaching the child, one interpretation is to strengthen trust with the victim. Even if the physical encounter is intended, determining the place where the encounter will take place or the way in which it should be carried out could be accepted as a material act. The problem arises in determining what kinds of acts are covered by the criminal law. Therefore, failure to specify the material acts intended for the encounter with the child may lead to confusion in legal practice by obliging law enforcement to specify and determine what these "material acts" should be.[17] This inaccuracy runs counter to the principle of legal certainty and has been criticized by criminal law experts for its lack of precision and its ambiguity.[18]

Ultimately, the crime of child grooming includes the subjective requirement of a transcendent internal tendency, namely the ultimate purpose of arranging a meeting with the minor in order to commit any of the crimes contained in Arts. 183 and 189. This requirement poses problems of interpretation. The reference to Art. 189, which describes conduct relating to child pornography, leaves open what must be determined: (1) must the contact and proposal of contact with the child by technological means be carried out with the aim of performing the conduct described in Art. 189 or (2) must the criminal forms of conduct described in Art. 189 constitute the aim of approaching children by technological means? Art. 189 (1) lit. a) refers to the conduct of recruiting a minor for exhibitionist or pornographic purposes or performances, whether public or private, or for the production of any pornographic material. The difficulty therefore lies in distinguishing the conduct of abducting a minor in Art. 189 (1) lit. a) from that of contacting a minor in Art. 183 *ter* (1). If the subject engages in the conduct of contacting a minor for the purposes set out in Art. 189 (1) lit. a), the conduct in Art. 183 *ter* would be a preparatory act with respect to the conduct in Art. 189.

The preparation of child grooming in Art. 183 *ter* (2)

In accordance with the Directive, Art. 183 *ter* punishes the conduct of contacting a minor under the age of 16 by performing acts intended to deceive him or her in order to obtain pornographic material and or show him or her pornographic material depicting or showing images of a minor. Unlike Art. 6(2) of the Directive, Art. 183 *ter* (2) does not punish the attempt of an adult to engage in the conduct of acquiring, possessing or accessing child pornography, which requires conning a minor in order to obtain the pornographic material. Art. 183 *ter* (2) instead defines a preparatory act for the commission of a crime of child pornography. Preparing for the performance of one of the types of conduct constituting the crime of pornography, the offender must contact the minor to be provided with the pornographic material. If the offender contacts the minor and the minor does not provide the material, the conduct will not be considered an attempt at a pornographic crime, but rather a preparatory act to the crime of child pornography.[19]

The dictionary of the Royal Academy of the Spanish Language specifies that the act of deceiving consists of an act taking advantage of the inexperience or lack of inhibitions of the deceived. Therefore, the act of deception entails the need for deception which manifests itself in the use of certain tricks by the offender to attract the minor. The structure of the offence of deception is similar to that of Art. 183 *te*r (1) –child grooming–, as both offences coincide in the conduct of contacting a minor under the age of sixteen through the internet, by telephone, or by any other technological or communication means. However, there is a difference in relation to the acts to be performed by the subject, as Art. 183 *ter* (2) specifies that they must be aimed not at meeting, but at tricking the minor into providing him or her with pornographic material.

As regards its compatibility with the Directive, however, there are some differences in the wording of Art. 183 *ter* (2) when comparing it with Art. 6(2) of Directive 2011/93. Firstly, with reference to the active subject, the Directive applies the term “adult,” a fact that is obviated by the Spanish legislator when using the wording “the person who.” Moreover, Art. 6(2) of the Directive mentions the act of tricking a minor with the aim of obtaining pornographic material from the minor with whom the adult is in contact, a precision not covered by Art. 183 *ter* (2), which merely refers to “a minor.” By using this expression “a minor”, it seems that the offence of solicitation of children for sexual purposes will apply in cases in which the pornographic material or pornographic images provided by the minor with whom the offender is in contact do not belong to him but to another minor. The Spanish Criminal doctrine has criticised the configuration of the conduct in Article 183 *ter* (2) because it establishes criminal liability not only for the provision of images of the minor who is the subject of the request, but also for images representing any minor. Thus, *Tamarit Sumalla* points out that the extension of criminal liability is too excessive, as it goes beyond the mere request for pornographic images of the victim. Therefore, *Tamarit Sumalla* opts for a restrictive interpretation by arguing that any reference to the elements of "pornographic material" and "pornographic images" should be understood as pornographic

in the strict sense, without considering such images with a provocative or exotic character.[20] Considering the problems of interpretation and delimitation of Art. 183 *ter* (2) with the crime of Art. 189 (child pornography), we can indeed question whether the creation of this criminal offence in the Spanish Criminal Code is justified.

IV. Final Remarks

The reform carried out by the Spanish legislator with regard to the crimes of sexual harassment of minors must generally be viewed positively. It responds to the need to criminalise behaviours that affect the process of formation and development of the personality and sexuality of the minor, that is to say his or her sexual indemnity. So far, the Spanish legislator is following the approach marked by the European legislator who established the protection of the sexual integrity of minors in different instruments.

This article especially examined the offence of solicitation of children for sexual purposes by means of information and communication technology, as defined in Art. 6 of Directive 2011/93/EU. We can observe here that there were some flaws in the transposition of Union law into Spanish legislation. The Spanish legislator was not very accurate when establishing the criminal elements of child grooming in Art. 183 *ter* (1) of the Spanish Criminal Code. The Spanish legislator, for instance, opted for a *numerus apertus* when making reference to "the material acts" that must accompany the proposal to meet a minor. If the intention is that these material acts aim at an encounter with the minor, the legislator should have delimited these acts, specifying them exhaustively or at least introducing a definition of what is to be understood by "material acts." This technical deficiency in the concept of criminal liability is sure to create legal uncertainty, as it will need to be interpreted by the Spanish courts. The new Art. 183 *ter* (2) which is to transpose Art. 6(2) of the Directive, entails problems of interpretation and delimitation, since the references to the criminal offence of child pornography as defined in Art. 189 of the Spanish Criminal Code are unclear. A restrictive interpretation is advocated here by limiting the terms "pornographic material" and "pornographic images".

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1. Ratified by Spain on 30 November 1990, *BOE* n. 313 of 31.12.1990. See also the "Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography", signed in New York on 25 May 2000.↩
2. Following its Preamble: "Bearing in mind that the need to extend particular care to the child has been stated in the Geneva Declaration of the Rights of the Child of 1924 and in the Declaration of the Rights of the Child adopted by the General Assembly on 20 November 1959 and recognized in the Universal Declaration of Human Rights, in the International Covenant on Civil and Political Rights (in particular in Arts. 23 and 24), in the International Covenant on Economic, Social and Cultural Rights (in particular in Art. 10) and in the statutes and relevant instruments of specialized agencies and international organizations concerned with the welfare of children".↩
3. CETS No. 201, ratified by Spain on 5 August 2010, entered into force for Spain on 1 December 2010.↩
4. With reference to the age of consent of the child, Art. 18 specifies that it is up to each States to determine the age below which sexual activity with a child is not permitted.↩
5. Likewise, the European Charter of the Rights of the Child (*O.J.* C 241, 21.9.1992), which provides for the protection of children from all forms of sexual exploitation, and the 1997 European Parliament resolution on the protection and rights of the child also deserve mention (*O.J.* C 371, 8.12.1997, 210).↩
6. *O.J.* L 335, 17.12.2011, 1.↩
7. Recital 6 of Directive 2011/93.↩
8. Cf. Recital 19 of Directive 2011/93.↩
9. Under the heading "Definitions", Art. 2(b) of the Directive defines the age of sexual consent, specifying that it is the age below which, in accordance with national law, it is prohibited in all cases to perform acts of a sexual nature.↩
10. More precisely, Organic Law 5/2010 of 22 June 2010 included Art. 183 bis under Title VIII of Book II (Criminal Law, Crimes against sexual freedom and sexual indemnity), Chapter II bis (entitled: "On the abuse and sexual aggressions to minors under thirteen years of age").↩
11. *O.J.* L 13, 20.2.2004, 44.↩
12. Article 183, ter provides that: 1. Anyone who, through the Internet, telephone or any other information and communication technology, contacts a minor under the age of 16 and proposes to arrange a meeting with him for the purpose of committing any of the offences described in articles 183 and 189, provided that such a proposal is accompanied by material acts aimed at bringing him or her closer, shall be punished by one to three years' imprisonment or a fine of twelve to twenty-four months, without prejudice to the penalties corresponding to the offences, if any, committed. The penalties shall be imposed in their upper half when the approach is obtained by means of coercion, intimidation or deception. 2. Anyone who, through the Internet, telephone or any other information and communication technology, contacts a person under the age of 16 and engages in

acts intended to deceive him or her into providing pornographic material or showing pornographic images depicting or featuring a minor, shall be punished by imprisonment for a term of six months to two years.↩

13. See. C. Díaz Morgado, "Delitos contra la libertad e indemnidad sexual", in M. Corcoy Bidasolo, (Dir.), *Manual de Derecho Penal, Parte Especial,* vol 1, 2019, pp. 294–295.↩
14. See J.M. Tamarit Sumalla, "Los delitos sexuales. Abusos sexuales. Delitos contra menores (Arts. 178, 180, 181, 183 and 183 bis)", in: G. Quintero Olivares, (ed.), *La reforma penal de 2010: análisis y comentarios,* 2010, p. 165, pp. 165–171; it is understood that the child is not contacted simply by sending messages (for example, via e-mail) without receiving a response.↩
15. Vid, M.J. Dolz Lago, "Un acercamiento al Nuevo delito child grooming. Entre los delitos de pederastia", (2011), *Diario La Ley*, n. 7575, 23 February 2011, 1, 13, for whom this contact would be ruled out if it were not followed by technological contact.↩
16. In this regard, reference is made to L. Nuñez Fernández, "Presente y futuro del mal llamado delito de ciberacoso a menores: análisis del Art. 183 bis CP y de las versiones del Anteproyecto de Reforma del Código Penal de 2012 y 2013", (2012), *Anuario Derecho Penal y Ciencias Penales*, 65(1), 179, 193.↩
17. J.M. Tamarit Sumalla, "Los delitos sexuales...", *op. cit.* (n. 14), p. 172, who specifies that such an act would, for example, be an act that transcends simple virtual contact.↩
18. L.M. Díaz Cortés, "Aproximación criminológica y político criminal del contacto TICS preordenado a la actividad sexual con menores en el Código penal español –Art. 183 bis CP", (2012) 8 *Revista de Derecho Penal y Criminología*, 289, 290.↩
19. This is the view held by the criminal doctrine. On this matter, see E. Orts Berenguer, *Derecho Penal. Parte Especial.* Gonzalez Cussac, J.L. (Coord.), 2016, p. 228.↩
20. J.M. Tamarit Sumalla, "Los delitos sexuales...", *op. cit.* (n. 14), p. 351↩

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