

ECIJA



REPORT REGULATORY SEARCH

RAYUELA Project

Index



01

Introduction

02

Questions relating to OG, CB, HT and with minors as victims

03

Questions regarding cybercrime or cyber-facilitate crime committed by minors

04

General questions regarding cross border cybercrime, international instruments applicable to fighting cybercrime and regarding the international cooperation



01 INTRODUCTION

1.1. Purpose of the report

This report is issued by ECIJA at the request of TIMELEX, with the main purpose of carrying out a comprehensive search of the Spanish regulation, case law and national and international legal cooperation relevant for cybercrime and juvenile delinquency.

The request is made under the framework of the Project “Empowering and education young people for the Internet by playing” (RAYUELA). RAYUELA’s main goal is to better understand the drivers and human factors affecting cyber criminality, as well as to empower and educate young people about the benefits, risks and threats intrinsically linked to the use of the Internet, thus preventing and mitigating cybercriminal behavior.

Specifically, through this report TIMELEX seeks to study in detail:

- o How the main crimes of online grooming, cyberbullying, misinformation and deception online and human trafficking are dealt with by the legal system e.g., which behaviors are punishable and under which conditions.
- o How cybercrime and cyber-facilitated crime perpetrated by minors is dealt with in the legal system, in general and specifically in relation to the crimes in focus.
- o What international instruments and cooperation mechanisms are available in dealing with cybercrime perpetrated by minors.

Initially, we shall point out that the Spanish legal system currently considers minors as victims of cybercrime. For this reason, it articulates mechanisms aimed to protect minors and not to punish them if they commit a crime via the internet, which is an unusual situation. Therefore, these mechanisms will not be repressive, but preventive-special oriented towards re-education, reintegration, and the best interests of the minor.

1.2. Applicable legislation

- Organic Law 10/1995, of November 23, 1995, of the Spanish Criminal Code (hereinafter, the “**Spanish Criminal Code**”).
- Organic Law 5/2000, of January 12, 2000, regulating the criminal liability of minors (hereinafter, “**Act on Minors Criminal Liability**”).
- Organic Law 6/1985, of July 1, on the Judiciary (hereinafter, the “**Act on the Judiciary**”).
- Organic Law 8/2021, of 4 June, on the comprehensive protection of children and teenagers against violence (hereinafter, the “**Act on protection of children and teenagers against violence**”).
- Law 23/2014, of November 20, on the mutual recognition of criminal decisions in the European Union (hereinafter, the “**Act on mutual recognition**”).
- Instrument of Ratification of the Convention on Cybercrime, done at Budapest on 23 November 2001 (hereinafter, the “**Convention on Cybercrime**”).



- Instruction No. 10/2005, of October 6, 2005 on the treatment of bullying in the Juvenile Justice System (hereinafter, the “**Treatment of bullying in the Juvenile Justice System**”).
- Instruction No. 2/2011, of October 11, on the Prosecutor of the Cybercrime Chamber and the cybercrime sections of the Prosecutor's Offices (hereinafter, the Instruction 2/2011).

1.3. Definitions

Online grooming (further: OG) is the crime where the perpetrator (usually an adult) uses electronic communication services, including social media, to contact a minor and build rapport with the aim of eventually meeting in person for the purposes of sexual activity. The perpetrator may employ various strategies (deception, romantic/emotional attachment, promise of material or other benefits, blackmail, coercion, etc.) to lower a child's inhibitions, heighten their curiosity about sexual experiences, or otherwise convince them to meet up.

Cyber bullying (further: CB) is a broad term that includes all types of bullying behaviour online. This includes cyber stalking and cyber harassment, and any other type of behaviour online aimed at hurting the victim. Cyber bullying may also have a sexual component.

Misinformation and deception (further: MD) is a behaviour that may or may not be punishable by law depending on the context. It involves all kinds of information sharing that is fake, or deceptive. For a criminal qualification to apply, typically the behaviour will need to be intentional and there will need to be material consequences to this intention.

Human trafficking with a cyber component (further: HT) is the online facilitation of human trafficking by grooming and attracting potential victims for human trafficking.



02 QUESTIONS RELATING TO OG, CB, HT AND WITH MINORS AS VICTIMS

1.1 QUESTION 1: Is online grooming punishable by law in your country?

Under the light of the Spanish legislation the crime of online grooming is foreseen in **Article 183 ter of the Spanish Criminal Code**¹:

"1. Whoever through the Internet, telephone or any other information and communication technology contacts a minor under sixteen years of age and proposes to arrange a meeting with the same in order to commit any of the offenses described in Articles 183 and 189, provided that such proposal is accompanied by material acts aimed at the approach, shall be punished with the penalty of one to three years in prison or a fine of twelve to twenty-four months, without prejudice to the penalties corresponding to the offenses in their case committed. The penalties shall be imposed in their upper half when the approach is obtained by means of coercion, intimidation or deception.

2. Whoever, through the Internet, telephone or any other information and communication technology, contacts a minor under sixteen years of age and performs acts aimed at duping him to provide him with pornographic material or shows him pornographic images in which a minor is represented or appears, shall be punished with a prison sentence of six months to two years."

In relation to the crime of online grooming, in recent sentences, the Supreme Court considered that it is a conduct constituting the crime of sexual assault, because "The physical distance "does not denaturalize sexual aggression, since intimidation is an attack on sexual freedom in a scenario, that of social networks, with a greater harmful and lasting impact"²

When the offence of child grooming is committed with the intention of committing other offences, especially crimes of sexual assault or abuse, child pornography and prostitution, the main opinion of the Supreme Court is that the penalties for both offences will be applied jointly and separately, which in Spanish legal system is known as real concurrence of offences.

The Attorney General's Office (FGE) recorded in 2020 an increase in cases of sexual harassment of minors through the Internet. Specifically, an increase of 55% compared to 2019 and 175% compared to 2018, as stated in the Report of the Prosecutor's Office of 2020 that was presented this Monday during the opening ceremony of the judicial year.

The FGE also alerted about the increase in crimes committed by minors, especially sexual offences and in offences committed through the internet.

¹ The description of Articles 183, 183 bis, 189 and 264 is incorporated as Annex I to be read in conjunction with Article 183 ter.

² This criterion has been repeatedly followed, among others in SSTS 864/2015, of 10 December and 450/2018, of 10 October; being the subject of the Agreement of the non-jurisdictional Plenary of the Supreme Court of 8 November 2017.



However, the Spanish Supreme Court has decided to make a distinction between the offences that can concur with child grooming. When the offences of sexual abuse or sexual assault are involved, there will be actual concurrence – that is, the penalties for both offences will be applied independently. On the other hand, when it comes to the crime of prostitution, the Supreme Court considers that this crime protects the same legal right as the crime of child grooming: sexual indemnity. That is the reason why when there is a concurrence between a prostitution offence and a child grooming offence, the penalty applied would be the one corresponding to the more serious offence.

1.2 QUESTION 2: Is cyberbullying punishable by law in your country? Please consider a broad understanding of cyberbullying (cyber/online stalking, harassment, sexual harassment)?

Currently, the Spanish Criminal Code does not provide for a criminal offence of "ciberbullying". Nevertheless, when it comes to handing down convictions for behaviours constituting bullying or cyberbullying, our Courts and Tribunals apply different criminal offences already existing in the Spanish Criminal Code, depending on the situation and intensity of the bullying.

These criminal offences are as follows:

- Articles 138 to 142. Murder or homicide.
- Article 143. Inducement to suicide.
- Articles 147 to 156. Injury.
- Articles 169 to 172. Threats or coercion.
- Article 172 ter. Stalking or harassment.
- Article 173.1. Offence against moral integrity.
- Article 178 to 183. Sexual assault and sexual abuse.
- Article 197. Offences against the privacy of minors.
- Article 189.5. Knowingly possessing or accessing material or child pornography.
- Article 205 to 210. Slander and libel.

The offence of **stalking** is punishable under **Article 172 ter of the Spanish Criminal Code**, under the category of crimes against liberty:

"1. Anyone who harasses a person by insistently and repeatedly carrying out, without being legitimately authorised to do so, any of the following conducts and, in this way, seriously disrupts their daily life, shall be punished with a prison sentence of between three months and two years or a fine of between six and twenty-four months:

1.ª Watches over her, pursues her or seeks her physical proximity.

2. establishes or attempts to establish contact with her through any means of communication, or through third parties.

3. through the improper use of her personal data, purchases products or goods, or contracts services, or has third parties contact her.

4.ª Attacks against their freedom or assets, or against the freedom or assets of another person close to them.



In the case of a person who is particularly vulnerable due to age, illness or situation, a prison sentence of six months to two years shall be imposed.

2. Where the offended party is one of the persons referred to in Article 173(2), the penalty shall be imprisonment for a term of one to two years, or community service for a period of sixty to one hundred and twenty days. In this case, the complaint referred to in paragraph 4 of this Article shall not be required.

3. The penalties provided for in this Article shall be imposed without prejudice to those which may correspond to the offences in which the acts of harassment have been committed.

4. The acts described in this Article may only be prosecuted by means of a complaint by the aggrieved person or his or her legal representative.”

The Spanish legal system also punishes the crime of **sexual harassment** in **Article 184 of the Spanish Criminal Code**:

“1. Anyone who requests favours of a sexual nature, for themselves or for a third party, in the context of an employment, teaching or service provision relationship, whether continuous or habitual, and by such behaviour causes the victim to be placed in an objective and seriously intimidating, hostile or humiliating situation, shall be punished, as a perpetrator of sexual harassment, with a prison sentence of three to five months or a fine of six to ten months.

2. If the perpetrator of sexual harassment has committed the act by taking advantage of a situation of superiority in the workplace, teaching or hierarchical position, or with the express or tacit announcement of causing the victim a harm related to the legitimate expectations that the victim may have within the scope of the aforementioned relationship, the penalty shall be a prison sentence of five to seven months or a fine of 10 to 14 months.

3. When the victim is particularly vulnerable, due to age, illness or situation, the penalty shall be imprisonment of five to seven months or a fine of 10 to 14 months in the cases provided for in paragraph 1, and imprisonment of six months to one year in the cases provided for in paragraph 2 of this Article.”

1.3 QUESTION 3: When would misinformation and deception online constitute a criminal offence in your country? In other words, what potential qualifications could apply to wilful misinformation and deception on the internet?

According to **Article 248 of the Spanish Criminal Code**:

“1. Fraud is committed by those who, for profit, use deception sufficient to produce error in another, inducing him to carry out an act of disposition to his own or another's detriment.

2. The following shall also be considered to be guilty of swindling

a) Those who, with intent to profit and using some computer manipulation or similar artifice, achieve an unauthorised transfer of any patrimonial asset to the detriment of another.



b) Those who manufacture, introduce, possess or provide computer programs specifically intended for the commission of the frauds envisaged in this article.

c) Those who, using credit or debit cards or traveller's cheques, or the data contained in any of them, carry out transactions of any kind to the detriment of the cardholder or a third party."

The Supreme Court has considered that there is misinformation and deception online when the fraudster uses a "similar artifice" with a computer or IT resources to produce deception (Supreme Court Judgement of 17 December 2008); it also considers that the use of stolen passwords constitutes a crime of misinformation and deception online (Supreme Court Judgement of 10 February 2020).

2.1. QUESTION 4: What constitutes human trafficking and how is human trafficking facilitated by electronic means punished in your country? Are online grooming activities to find victims (e.g. lover boys) before the actual human trafficking punishable in itself? In addition, are these activities punishable as a separate crime if human trafficking does take place afterward?

According to **Article 177 bis of the Spanish Criminal Code**:

"1. Anyone who, either in Spanish territory, or from Spain, in transit or bound for Spain, using violence, intimidation or deception, or abusing a situation of superiority or need or the vulnerability of the national or foreign victim, shall be punished with five to eight years' imprisonment for trafficking in human beings, or by giving or receiving payments or benefits to achieve the consent of the person who has control over the victim, captures, transports, transfers, harbours, or receives, including the exchange or receipt of goods or services, including the exchange or receipt of goods or services, or by giving or receiving payments or benefits to achieve the consent of the person having control over the victim, to recruit, transport, transfer, harbour or receive them, including the exchange or transfer of control over such persons, for any of the following purposes:

(a) the imposition of forced labour or services, slavery or practices similar to slavery, servitude or begging.

(b) sexual exploitation, including pornography.

c) Exploitation for criminal activities.

(d) removal of their bodily organs

(e) the conclusion of forced marriages.

A situation of need or vulnerability exists when the person concerned has no real or acceptable alternative but to submit to the abuse.

When the victim of trafficking in human beings is a minor, the penalty of special disqualification from any profession, trade or activity, whether paid or unpaid, which involves regular and direct contact with minors, shall be imposed for a



period of between six and twenty years in excess of the duration of the custodial sentence imposed.

(...)

4. The penalty shall be higher in degree than that provided for in the first paragraph of this Article when:

a) the life or physical or mental integrity of the persons who are the object of the offence has been endangered.

b) **the victim** is particularly vulnerable due to illness, gestational condition, disability or personal situation, or **is a minor.**"

There is currently no case law on the punishment of the offences of human trafficking and child grooming when committed together. However, and according to the case law on the crime of child grooming, each of the crimes would be punished separately.



03 Questions regarding cybercrime or cyber-facilitated crime committed by minors

3.1. QUESTION 5: How is crime committed by minors dealt with in your country, in general? Is there a specific juvenile justice system? If yes, please explain in detail how this works.

In Spain, the age of the minor determines the criminal liability and the corresponding legal regimen. Therefore, minors under eighteen years of age are not criminally responsible. Consequently, when a minor commits a crime, it is applicable the Organic Law on the Criminal Responsibility of Minors. According to this law:

- **Minors under fourteen years of age** are not criminally responsible. However, their parents or guardians must pay a financial penalty.
- **Minors between fourteen and eighteen years of age** are liable, i.e. they are responsible in a special procedure for minors according to the type and seriousness of the offence.

The penalties or sanctions for criminal liability of minors in Spain have a preventive and educational objective. For this reason, and depending on the seriousness of the conduct, the measures can be custodial or non-custodial. Some of these measures are the following:

- a) Cautions.
- b) Disqualification of licences.
- c) Charity work in the community.
- d) Socio-educational tasks.
- e) Probation.
- f) Absolute disqualification.
- g) Attendance at outpatient treatment centres.
- h) Placement in institutes of different regimes according to the sentence.
- i) Living with a guardian family or centre.

The age of the minor, his or her personal circumstances and the seriousness of the offence determine the maximum duration of the sentence.

- Under 16 years of age, maximum 2 years or 100 hours in the case of social benefits; 8 weekends in the case of stay or stay penalties.
- Those minors over 16 years of age will be penalised in the same way, except in cases involving violence or intimidation or serious risk to persons. In the latter cases, the judge may assign closed detention with complementary measures for a further 2 years.

The criteria guiding the regulation of the criminal liability of minors is contained in the doctrine of the Constitutional Court³, on the guarantees and respect for fundamental

³ Particularly in the legal grounds of the judgments TC 36/1991, of February 14, Rec. 1001/1988, and STC 60/1995, of March 17 Rec. 2536/1994.



rights that must necessarily prevail in the procedure followed before the Juvenile Courts aimed at the adoption of measures that, fundamentally, cannot be repressive, but rather preventive-special, oriented towards the effective reintegration and the best interests of the minor, evaluated with criteria that must be sought primarily in the field of non-legal sciences.

3.2. QUESTION 6: Are there specific rules or is there a specific policy that deals with cybercrime by minors as a special topic, acknowledging the special characteristics of crime by minors in the cyber environment, and the fact that minors may not knowingly or intentionally break rules (issues with criminal intent)? Even absent a written policy, are minors prosecuted for cybercrime in practice?

The Spanish legal system does not have specific regulations on cybercrime in the juvenile sphere.

However, recent studies show that crimes related to new technologies are frequently committed by minors. Specifically, crimes committed through the computer by young people over 15 years of age with outstanding computer skills, committing fraud, hacking, threats, insults and even child pornography.

Additionally, the Organic Law 8/2021, of 4 June, on the comprehensive protection of children and teenagers against violence establishes in its Article 45 the promotion of a safe and responsible use of the Internet through education, awareness-raising and dissemination campaigns aimed at children and teenagers, families, educators and other professionals who work regularly with minors. This regulation is specifically focused on the fight against cyber-violence or sexting, and the access and consumption of pornography among minors.

3.3. QUESTION 7: Can minors be punished for online grooming in your country? I.e. the situation of a minor capable of providing sexual consent (e.g. 17 year-old) grooming a minor who has not reached the age of sexual consent (e.g. 13 years old) to meet up with the intent to perform sexual activities? Please focus not only on the specific crime of online grooming (which, if present as a separate crime in your jurisdiction, often requires an adult perpetrator), but also on other crimes that would punish the activities that constitute online grooming (i.e. the use of different strategies to force a meeting with the minor victim with the intent to perform sexual activities). If criminal sanctions could apply, are minors prosecuted in practice?

Under the light of the Spanish legislation, a minor can be punished for the offence of child grooming or online grooming, although it is unusual that minors commit this offence

One of the first resolutions confirming the sentence imposed by a Juvenile Court for a grooming offence was issued by the Provincial Court of Ourense on 2013, October 13th:

"Tomás, born on NUM000 /1994 with ID NUM001, and Casilda, born on NUM002 /2000, connected via "Twenty" in the month of September 2012. After a few conversations via "Twenty" Tomás and Casilda exchanged their cell phone numbers in which they had whatsapp service. From that moment onwards, Tomás, knowing that Casilda was twelve years old, since she had told him so on her cell phone, began to send repeated whatsapps to Casilda proposing her to meet for sexual acts."

The sentence declared:



"To impose on the minor "Tomás", as the author of a continuous crime of sexual abuse of art. 183 bis in relation to art. 74 of the Penal Code, the measure of ten months of probation with attendance to a forty-hour course of effective sexual development. The minor is warned that in case he does not comply with the measure imposed, in addition to incurring in a crime of violation, it may be substituted by internment in a semi-open regime for the remaining time of compliance".

It has to be considered that until a recent sentence The Supreme Court, had not been able to pronounce its criteria on Article 197.7 of the Spanish Criminal Code, which was introduced by the also recent amendment of the Spanish Criminal Code on 2015, and is the applicable section that applies to the offences committed after the amendment entered in to force.

Pursuant the mentioned section of the Spanish Criminal Code, anyone who, without the authorization of the person concerned, disseminates, discloses or transfers to third parties' images or audio-visual recordings of that person obtained with his or her consent in a home or any other place out of the reach of the gaze of third parties, when the disclosure seriously undermines the personal privacy of that person.

In order to appreciate the existence of the offence of child grooming, the Spanish case law⁴ considers the following circumstances to be necessary:

- a) The first element required is contact via the internet, telephone or any other information or communication technology with a minor under the age of sixteen. This requires not only the sending of the message by the adult but also the response of the minor. The aim is to punish these conducts due to the ease with which these technological means can be used to attract minors.
- b) Secondly, proposing a meeting with a minor under the age of sixteen, for the purpose of carrying out any of the actions typified in arts. 183 and 189 of the Spanish Criminal Code.
- c) And thirdly, to carry out material acts aimed at bringing them together. That is, acts that require the conduct to transcend the virtual world to the physical world. In this sense, the STS of 24 February 2015, understands that acts aimed at rapprochement are acts that tend to strengthen the relationship of seduction, i.e., to bring the offender closer to the minor, strengthening affection and trust in the victim through such material acts, considering as material acts those that must necessarily have repercussions and be reflected beyond the digital world.

Unlike the international conventions ratified by Spain, that require the defined offence to be carried out by an adult⁵—, under the light of the Spanish legislation the offence can be committed by minors. Wording of Article 183 ter, which includes the offence of grooming, does not introduce any particularity in this regard, stating that the defined offence can be committed by "Whoever through the Internet (...)".

⁴ In the same sense, SSTS 97/2015, of 24 February; 527/2015, of 22 September and 864/2015, of 10 December, pronounce on the typical conduct and the requirements of the crime of grooming or approaching a minor by telematic means.

⁵ Eg: Instrument of Ratification of the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, done at Lanzarote on October 25, 2007.



At this point, the doctrine⁶ has criticised the position chosen by the Spanish legislator, which goes far beyond its international commitments without limiting the criminal relevance of the same to those undertaken by active subjects of legal age, although it introduced in Article 183 *quater* of the Spanish Criminal Code a personal clause of exclusion of the penalty which allows it not to be applied when the active and passive subjects are close in age.

3.4. QUESTION: Can minors be punished for purely online behaviour with a sexual intent when other minors are the victim? E.g. the situation where a minor perpetrator obtains sexually explicit material from the minor victim in order to sell this or to force the victim to do something. If criminal sanctions could apply, are minors prosecuted in practice?

A minor can be punished for the offence of sexual intent when the acts are under the provisions of the defined offences included in section 1.2. of this report. Although it is unusual that minors commit this offence the proceedings initiated against minors are increasing.

3.5. QUESTION 9: Can minors be punished for cyberbullying behaviour, without there being a physical component to the crime? This includes behaviours such as cyberstalking and cyberharassment. If criminal sanctions could apply, are minors prosecuted in practice?

Cyberbullying lacks a specific regulation in the Spanish legal system, but it is punished through Article 173.1 or through the cyberstalking behaviour in Article 172 *ter* of Criminal Code.

The main characteristics of this type would be:

- a) it would be necessary to prove that, because of the acts, a serious impairment of the victim's moral integrity had occurred (which can take the form of a worsening of schooling, psychological assistance, unjustified absences from class, etc.).
- b) It is a reiterated action through different forms of bullying or harassment. There is no minimum number of actions but there is a requirement that the acts must be spread over time. This excludes isolated behaviour.
- c) The bullying behaviour is usually carried out by a classmate or group of classmates against another student in the educational context (similar ages)
- d) This behaviour causes a serious disruption of the victim's daily life
- e) Cyberbullying is characterised because the behaviour is carried out through social networks and other forms of communication based on new technologies. So, cyberbullying can be punished without physical component

There is still no case law illustrating the position of Spanish Court in relation to cyberbullying.

In order to the types of punishment that can be imposed, the criminal liability of the minor remains along the lines of that set out in question 5 above. However, the most common will be the payment of compensation to the victim which, given that the perpetrator is a minor, will be the responsibility of the parents and, in addition, there is the possibility of

⁶ VILLACAMPA ESTIARTE, Carolina y GÓMEZ ADILLÓN, María Jesús, «Nuevas tecnologías y victimización sexual de menores por Online Grooming», *Electronic Journal of Criminal Science and Criminology*, 18-02, 2016, page 24.



suing the owners of educational establishments as civilly liable before the juvenile court for damages and harm derived from offences committed by minors during the periods of time in which they are under the control or supervision of the teaching staff should be addressed.

3.6. QUESTION 10: Can minors be punished for wilful misinformation or deception online (sharing false news, false information, pretending to be someone else, pretending to be an expert, etc.)? Which crimes/qualifications could possibly apply? If criminal sanctions could apply, are minors prosecuted in practice?

The question of the criminal implications of fake news is one of the issues that has attracted increasing attention both nationally and internationally.

In this context, the FGE has pointed out that there is no crime of fake news, what we have is fake news that can have criminal significance, because through fake news, crimes such as hate crime, crimes against moral integrity or crimes of slander and libel can be committed.

For criminal purposes, the content of disinformation or fake news must have a clear impact on the legal assets that have been considered legally worthy of protection by the legislator; and its attack, due to its level of intensity, must be worthy of criminal repression, for which it will be necessary to consider both the lack of value of the action and that of the result, as well as the evidence of the intention pursued.

We can conclude by considering that disinformation or false news can be reflected in the criminal justice system through hate crimes, slander, and libel. In any case, criminal intervention should always be the last resort of a legal system, always meeting the requirements analysed and in the face of the most serious attacks. Therefore, the line for criminal punishment of these conducts, especially when the perpetrator is a minor, is very thin, although it will have to be assessed on a case-by-case basis.

3.7. QUESTION 11: Can minors be punished for online actions facilitating human trafficking? Typically this includes the selection and grooming of victims (e.g. lover boy phenomenon). If criminal sanctions could apply, are minors prosecuted in practice?

Supreme Court ruling 396/2019 of 24 July defines recruitment as the first phase of the crime of trafficking in human beings. This phase consists of the recruitment of a person (in this case, a minor) with the aim of controlling his or her will for the purpose of exploitation, which is equivalent to the recruitment of the victim. Deception is often used in this recruitment phase, whereby the trafficker, his collaborators or his organisation articulates a mechanism of direct or indirect approach to the victim in order to accept the proposal. Deception is often combined with coercion.

Experts warn against this trend. Human trafficking networks use minors who recruit others in high schools, nightclubs or through social networks. One of the most used methods is Lover boy, young men who "fall in love" with their victims by taking advantage of a situation of vulnerability to attract them.

In most cases, when human trafficking networks use a minor as a "hook" for the recruitment of another minor, he or she has usually been recruited before. The Law on the Legal Protection of Minors has tried to reinforce the protection of these minors, considering the commission of a crime as a situation of helplessness, but it is necessary to



identify them as victims of trafficking and to put in place all the mechanisms foreseen for this purpose.

The Organisation for Security and Cooperation in Europe reminds us that victims of human trafficking should not be detained, charged or prosecuted as perpetrators of crimes as long as they are a direct consequence of their trafficking situation.

Therefore, minors who facilitate trafficking in human beings cannot be punished when they have previously been victims and carry out such action because of human trafficking.

3.8. QUESTION 12: Can minors be punished for acts of online piracy in your jurisdiction, i.e. the illegal use and/or distribution of content protected by intellectual property rights? Please focus on the elements of criminal nature. If criminal sanctions could apply, are minors prosecuted in practice?

Under the Spanish legislation minors can be punished for acts of online piracy. Specifically, offences relating to intellectual property rights are regulated in Articles 270 to 272 of the Spanish Criminal Code in relation to the provisions of Royal Legislative Decree 1/1996, of 12 April, approving the revised text of the Intellectual Property Law.

3.9. QUESTION 13: Can minors be punished for acts of hacking (i.e., unauthorized access to a computer system)? In particular, would this also apply to various scenarios exploiting vulnerabilities in IoT and connected devices? If criminal sanctions could apply, are minors prosecuted in practice?

A minor can be punished for an offence of hacking. In fact, the technological environment in which the behaviour takes place means that those who commit it are usually young and, on many occasions, minors.

The crime of hacking is included in a series of relatively new conducts, introduced into the Spanish Criminal Code by Organic Law 1/2015 of 30 March. They are included in the crimes against privacy, the right to one's own image and the inviolability of the home, specifically in **Article 197 bis of the Spanish Criminal Code**. However, before continuing with the development of the issue, it should be clarified that not all "secrets" of individuals are criminally protected, but only those relating to privacy.

In this sense, the rights of Article 18 of the Spanish Constitution, which include the right to personal privacy and one's own image, the inviolability of communications and data protection, are part of the legally protected rights that belong to the sphere of private life.

Article 197 bis punishes the hacker who, by means of software or any other device, infiltrates a computer system and accesses data without the owner's authorisation and in violation of the right to "computer privacy". The wording of the offence foresees a subjective element that requires the will to violate the victim's privacy in order to know his secrets, and furthermore emphasises that **the real danger lies in the integrity of the computer system in which the data is stored**. In other words, the offence requires the interruption of the functioning of non-public computer data transmission systems.

The courts have set out the terms in which the wording of the offence is to be interpreted and what is to be understood by privacy. To this end, they refer to the constitutional rights



referred to in the sense that they safeguard a space of personal and family privacy that is kept away from external intrusions, highlighting the necessary protection against the growing development of means and procedures for capturing, disseminating, and publicising it and the data and circumstances inherent to privacy. Thus, **a common criterion has been reached whereby it is understood that there is a sphere of privacy that can be considered secret in the sense that it is a person's right to exclude it from the knowledge of third parties.**

3.10. QUESTION 14: Can minors be punished for acts of using Cybercrime as a Service? If yes, under what qualification? In particular, how would this apply to using such services for exploiting vulnerabilities in IoT and connected devices e.g., the device of a friend or acquaintance? Does it matter if the intent is somewhat innocent (i.e., the minor thinks it's a joke or a prank)? If criminal sanctions could apply, are minors prosecuted in practice?

Minors can be punished for acts of using Cybercrime as a service. However, it is common that when the offender is a minor, the facts are downplayed because of the lack of knowledge that is often involved in the commission of the offence.

Pursuant Article 16.1 of the Spanish Criminal Code:

There is an attempt when the subject begins the execution of the crime directly through external acts, performing all or part of the acts that objectively should produce the result, and nevertheless the result is not produced due to causes independent of the will of the perpetrator.

If the subject voluntarily desists from the execution, this circumstance must be assessed, as provided for in Art. 16.2 and 3 of the Criminal Code:

"2. A person shall be exempt from criminal liability for the crime attempted who voluntarily avoids the consummation of the crime, either by desisting from the execution already begun or by preventing the production of the result, without prejudice to the liability he may have incurred for the acts executed, if they were already constitutive of another crime.

3. When several parties are involved in an act, those who desist from the execution already initiated and seriously, firmly and decisively prevent or attempt to prevent its consummation shall be exempt from criminal liability, without prejudice to the liability they may have incurred for the acts executed, if these were already constitutive of another offense."

To analyse the nature of the acts and assess the attempt it is necessary to establish the concurrence of (i) an objective element, inasmuch as the subject must have initiated the execution of the act, and (ii) a subjective element, the will to consummate the offence.

The STC 36/91 of February 14, 1991, whose doctrine is included in Article 8 of the Act on Minors Criminal Liability, accepts the principle by virtue of Therefore, in the analysis of conducts carried out by minors, it is necessary to determine whether we are dealing with a preparatory act or an executive act and, if so, whether the crime has been attempted or consummated.

In practice, the minors are prosecuted and the proceeding shall be initiated in order to assess if the will to commit the offence concurred.



Children have grown up in a virtual environment, which makes them perceive the internet as a harmless context, where it is more difficult for them to categorise conduct as dangerous or illegal. In addition, we can identify a specific phenomenon that links adolescent criminality and the internet, the online disinhibition effect, which is based on 3 elements:

- a. Neutralisation. Greater permissiveness that exists on the internet to carry out certain behaviours.
- b. Anonymity. A very defining characteristic of the virtual context, where we can interact without showing our identity, which makes adolescents feel more comfortable to engage in criminal conduct.
- c. Security. This element is related to the two previous ones since the internet minimises the risk of being punished for criminal behaviour.

Also, the skills required to commit cybercrime are lower today than ever before, as it is no longer necessary to be an expert in computer science or programming to perform hacking. Various hacker tools are available online at a low cost to the user. There are hundreds of tutorials and digital manuals that explain step by step how to access computers or steal passwords.

All of this can be found in environments, social networks or websites linked to teenage content. One example is video game-related environments where, along with tutorials that offer tips and tricks on some video games, they also show how to crack them or get hold of game licences.



04 General questions regarding cross border cybercrime, international legal instruments applicable to fighting cybercrime and regarding international cooperation

4.1. QUESTION 15: How does your country deal with the cross-border nature of many cybercrimes? When is jurisdiction established? Can judgements have extra-territorial effect?

Considering that cybercrime is one of the most prolific transnational crime areas, law enforcement agencies must combat highly complex cyber threats and face new challenges, including the handling of large volumes of data, cross-border investigations, and new areas of expertise.

Regarding the jurisdiction established, is the Article 23 of the Act on the Judiciary regulates Spanish criminal jurisdiction. It establishes the principle of territoriality, according to which crimes committed in Spanish territory will be investigated and tried by the Spanish courts.

In addition, Article 1 of the Act on mutual recognition establishes the principle of mutual recognition of criminal judgments within the countries on the European Union. This means that the Spanish judicial authorities can transmit a judgment to another Member State for recognition and enforcement.

All these regulations are equally applicable to the field of criminal liability of minors.

4.2. QUESTION 16: What international legal instruments (bi-lateral, multi-lateral) apply in your country to the fight against (cross-border) cybercrime and how have they been implemented in national law (if implementation is necessary)?

On October 1 2010, Spain ratified the Convention on Cybercrime, better known as the Budapest Convention. It is the first international treaty in the fight against cybercrime and Internet Crime.

In addition, the Secretary of State for Security and the Secretary of State for Telecommunications and the Information Society have signed a collaboration agreement on cybersecurity⁷.

Similarly, the Ministry of the Interior of the Spanish Government has launched the National Centre of Excellence in Cybersecurity, dedicated to training, entertainment, research and technological development of excellence in cybersecurity to increase efficiency in the fight against crime.

4.3. QUESTION 17: What forms of international cooperation exist in your country to the fight against cross-border cybercrime? Please describe different routes/options/procedures and the measures that can be requested (e.g., asking for investigative actions, exchange of information/evidence, etc.)?

⁷ Framework collaboration agreement on cybersecurity between the Secretary of State for Security of the Ministry of the Interior and the Secretary of State for Telecommunications and the Information Society of the Ministry of Industry, Energy and Tourism, signed in 2015.



One of the most important mechanisms to combating cybercrime, are the following services developed by INTERPOL:

- The Cybercrime Knowledge Exchange workspace, where general non-police information is discussed and made available to all relevant users.
- The Collaborative Platform on Cybercrime-Operations, a support system for law enforcement operations that is accessible only to stakeholders involved at the operational level.

With the proliferation of cybercrime threats, governments around the world have become increasingly aware of the need to share goals, ideas and information on internet security.

For this reason, on 14 May 2021, Spain and other NATO countries (Germany and Italy, among others) signed the formal creation of the Centre of Excellence for Cyber Defence Cooperation (COE) based in Estonia, Tallinn. The centre is tasked with developing research and training programmes on “digital warfare”.

This is evidence of the countries concern about internet security and the fight against cybercrime. Therefore, the instruments of international cooperation in this area will become increasingly important over the years.

4.4. QUESTION 18: Do the rules (national, international) and policies mentioned in your answers in this section have any particular effect or impact on cybercrime committed by minors?

There is no specific legislation on juvenile cybercrime, so we cannot claim that the above-mentioned legislation has a direct impact on cybercrime committed by minors. However, it corresponds to regulation that are applicable to offences committed by minors, applying the regime of criminal liability of minors.



ANNEX I

RELEVANT SECTIONS OF THE SPANISH CRIMINAL CODE

Article 183 of the Spanish Criminal Code:

"1. Whoever performs acts of a sexual nature with a minor under sixteen years of age, shall be punished as a perpetrator of sexual abuse of a minor with imprisonment for a term of two to six years.

2. When the acts are committed using violence or intimidation, the perpetrator shall be punished for the crime of sexual assault of a minor with a prison sentence of five to ten years. The same penalties shall be imposed when, by means of violence or intimidation, he compels a minor under sixteen years of age to engage in acts of a sexual nature with a third party or to perform them on himself.

3. When the attack consists of carnal access by vaginal, anal or oral means, or the introduction of bodily members or objects by either of the first two means, the offender shall be punished with a prison sentence of eight to twelve years in the case of paragraph 1, and with a sentence of twelve to fifteen years in the case of paragraph 2.

4. The conducts foreseen in the three previous sections shall be punished with the corresponding prison sentence in the upper half of the sentence when any of the following circumstances apply:

a) When the victim is in a situation of special vulnerability due to age, illness, disability or any other circumstance, and, in any case, when the victim is under four years of age.

b) When the acts are committed by the joint action of two or more persons.

c) When the violence or intimidation exercised is of a particularly degrading or humiliating nature.

d) When, in order to commit the offence, the perpetrator has taken advantage of a situation of cohabitation or a relationship of superiority or kinship, by virtue of being an ascendant or sibling, by nature or adoption, or related to the victim.

e) When the offender has endangered, intentionally or through gross negligence, the life or health of the victim.

f) When the offence has been committed within an organisation or criminal group engaged in such activities.

5. In all the cases provided for in this article, when the offender has taken advantage of his or her status as an authority, agent thereof or public official, the penalty of absolute disqualification of six to twelve years shall also be imposed.



Article 183 bis of the Spanish Criminal Code:

"Whoever, for sexual purposes, determines a minor under the age of sixteen to engage in conduct of a sexual nature, or causes him to witness acts of a sexual nature, although the perpetrator did not participate in them, shall be punished by imprisonment for a term of six months to two years.

If he or she has caused him or her to witness sexual abuse, even if the perpetrator did not participate in it, shall be punished by imprisonment for a term of one to three years."

Article 189 of the Spanish Criminal Code:

"1. Shall be punished with imprisonment from one to five years:

(a) Anyone who recruits or uses minors or disabled persons in need of special protection for the purposes of or in exhibitionist or pornographic performances, whether public or private, or to produce any kind of pornographic material, whatever its medium, or finances any of these activities or profits from them.

b) Whoever produces, sells, distributes, exhibits, offers or facilitates the production, sale, dissemination or exhibition by any means of child pornography or the production of which has been used by disabled persons in need of special protection, or possesses it for these purposes, even if the material originates abroad or is unknown.

For the purposes of this Title, child pornography or the production of which has been used by persons with disabilities in need of special protection shall be considered as follows

(a) any material which visually depicts a minor or a person with a disability in need of special protection engaging in real or simulated sexually explicit conduct; and

(b) Any depiction of the sexual organs of a child or a person with a disability in need of special protection for primarily sexual purposes.

(c) Any material that visually depicts a person appearing to be a minor engaged in real or simulated sexually explicit conduct, or any depiction of the sexual organs of a person appearing to be a minor, for primarily sexual purposes, unless the person appearing to be a minor is found to be in fact eighteen years of age or older at the time the images were obtained.

(d) Realistic images of a minor engaged in sexually explicit conduct or realistic images of the sexual organs of a minor for primarily sexual purposes.

2. Those who carry out the acts provided for in paragraph 1 of this article shall be punished with a prison sentence of five to nine years when any of the following circumstances apply:

a) When minors under sixteen years of age are used.



b) When the acts are of a particularly degrading or humiliating nature, when physical or sexual violence is used to obtain the pornographic material, or when scenes of physical or sexual violence are depicted.

c) When minors who are in a situation of special vulnerability due to illness, disability or any other circumstance are used.

d) When the offender has endangered, intentionally or through gross negligence, the life or health of the victim.

e) When the pornographic material was of notorious importance.

(f) where the offender belongs to an organisation or association, even of a temporary nature, which engages in such activities.

g) When the perpetrator is an ascendant, guardian, tutor, curator, tutor, teacher or any other person in charge, de facto, even temporarily, or de jure, of the minor or disabled person in need of special protection or is any person who lives with him or her or any other person who has acted in abuse of his or her recognised position of trust or authority.

h) When there is an aggravating circumstance of recidivism.

3. If the acts referred to in point (a) of the first subparagraph of paragraph 1 have been committed with violence or intimidation, the penalty shall be imposed that is higher in degree than those provided for in the preceding paragraphs.

4. Anyone who knowingly attends exhibitionist or pornographic performances involving minors or disabled persons in need of special protection shall be sentenced to six months to two years' imprisonment.

5. Anyone who acquires or possesses child pornography for their own use or in the production of which disabled persons in need of special protection have been used, shall be punished with a prison sentence of three months to one year or a fine of six months to two years.

The same penalty shall be imposed on anyone who knowingly accesses child pornography or the production of which has used persons with disabilities in need of special protection, by means of information and communication technologies.

6. Anyone who has under their authority, guardianship, custody or foster care a minor or a person with disabilities in need of special protection and who, with knowledge of their state of prostitution or corruption, does not do what is possible to prevent their continuation in such a state, or does not go to the competent authority for the same purpose if they lack the means for the custody of the minor or person with disabilities in need of special protection, shall be punished with a prison sentence of three to six months or a fine of six to twelve months.

7. The Public Prosecutor's Office shall promote the relevant actions with the aim of depriving the person who commits any of the conducts described in the



previous section of parental authority, guardianship, custody or foster care, as the case may be.

8. The judges and courts shall order the adoption of the necessary measures for the removal of websites or Internet applications that contain or disseminate child pornography or in the creation of which persons with disabilities in need of special protection have been used or, where appropriate, to block access to them for Internet users who are in Spanish territory.

These measures may be ordered as a precautionary measure at the request of the Public Prosecutor's Office.”

Article 264 of the Spanish Criminal Code:

“1. Anyone who, by any means, without authorisation and in a serious manner, deletes, damages, deteriorates, alters, suppresses or makes inaccessible computer data, computer programs or electronic documents of others, when the result produced is serious, shall be punished with a prison sentence of six months to three years.

2. A prison sentence of two to five years and a fine of one to ten times the damage caused shall be imposed when any of the following circumstances apply to the conduct described:

1.º It has been committed within the framework of a criminal organisation.

2.º It has caused particularly serious damage or has affected a large number of computer systems.

3.º The act has seriously damaged the functioning of essential public services or the provision of essential goods.

4.º The facts have affected the computer system of a critical infrastructure or a situation of serious danger to the security of the State, the European Union or a Member State of the European Union has been created. For these purposes, critical infrastructure shall be considered to be an element, system or part thereof which is essential for the maintenance of vital functions of society, health, safety, security, protection and the economic and social well-being of the population, the disruption or destruction of which would have a significant impact as it would not be able to maintain its functions.

5.º The offence has been committed using any of the means referred to in article 264 ter.

If the offence is extremely serious, the higher degree of punishment may be imposed.

3. The penalties provided for in the previous sections shall be imposed, in their respective cases, in their upper half, when the offences have been committed through the unlawful use of the personal data of another person in order to gain access to the computer system or to gain the trust of a third party.”



ANNEX II

CIVIL LIABILITY

Article 61.3 of the Law on the Criminal Responsibility of Minors establishes that *"When the person responsible for the acts committed is a minor under eighteen years of age, his parents, guardians, foster carers and legal or de facto guardians, in that order, shall be jointly and severally liable with him for the damages caused. When these have not favoured the conduct of the minor with wilful intent or gross negligence, their liability may be moderated by the judge according to the following cases.*

Therefore, the parents or legal guardians of minors between fourteen and eighteen years of age are directly responsible for the offences committed by the minors, which implies that civil action can be addressed directly to them.

In those cases in which the perpetrator of the crime is a minor under the age of fourteen, although they cannot be held criminally liable under the Law on Criminal Liability of Minors, nor, obviously, under the Criminal Code; with regard to the civil liability derived from the crime,

Article 1903 of the Spanish Civil Code provides that: *"The obligation imposed by the preceding Article is enforceable not only for one's own acts or omissions, but also for those of the persons for whom one is liable.*

Parents are liable for the damage caused by their children under their care.

Guardians are liable for damages caused by minors under their authority and living in their company.

The curators with full powers of representation are liable for damages caused by the person they support, provided that they live with them.

[...]

The liability referred to in this article shall cease when the persons mentioned therein prove that they have used all the diligence of a good parent to prevent the damage."

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