QUESTIONNAIRE

PORTUGAL

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1. Introduction

Please read carefully before answering the questionnaire

The RAYUELA project is aimed at protecting children in their online interactions. For this purpose, the project will develop a "game", which will present the children with realistic scenarios relating to the following cybercrimes/cyber-facilitated crimes:

- ***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.

The purpose of the game is to teach children how to remain safe online, while the obtained insights will be used to provide policy recommendations and educational tools.

The game does not focus solely on the threats of potentially falling victim to one of these four crimes. It also aims to raise awareness about the general threats of using IT, such as the Internet and connected devices, and minors' capacity to make responsible choices in this regard.

A particular point of interest is understanding whether minors are aware of when they, or someone else, is crossing the line in becoming offenders themselves, as this an important aspect of protecting children online. Due to the nature of online communication, inhibitions may be lowered, and certain actions may feel more innocent or less "real" than in real life. In addition, a perception may exist that what happens on the Internet has little or no impact beyond the digital world. This creates situations where minors engage in what they perceive to be relatively innocent behaviour ("everyone does this on the internet"), that may however have serious legal consequences.

One of the goals in RAYUELA is to ensure that minors realize when their behaviour may turn into actions that are punishable by law.

The present study and questionnaire are set up in the context of the RAYUELA project in order to provide an overview of the **legislative framework and relevant policies** in a number of countries, both in the EU and beyond, in relation to:

- How the main crimes of OG, CB, MD and HT are dealt with by the legal system i.e., which behaviours are punishable and under which conditions?
- How cybercrime and cyber-facilitated crime perpetrated by minors is dealt with in the legal system (both in general and specifically in relation to the crimes in focus)?
- What international instruments and cooperation mechanisms are available in dealing with cybercrime perpetrated by minors?

Importantly, we want to know both the legal rules and policies which are implemented in practice, and their effect on the **real enforcement situation**. If you have knowledge about the effects of current policies on crime rates by minors and on the crime rates for OG, CB, MD and HT, this would be of interest.

We are specifically interested in **case law** that illustrates the "why and how" of certain legal rules, principles and policies in practice. Case law will help us illustrate the similarities and differences between jurisdictions and is therefore *essential***.** Please ensure to have a good amount of case law processed in your answers.

In addition, we want input on **international legal instruments and international cooperation** relevant for cybercrime, and in particular for cybercrime perpetrated by minors. What happens when cybercrimes is perpetrated in a cross-border context? What are the legal rules in place for cooperation with authorities from other countries, and how does this work out in practice (issues, problems, etc.)?

Lastly, we are interested in some **statistical information on cybercrime** in your country and cybercrime by minors specifically.

The purpose of this questionnaire is to help you provide this information for your jurisdiction.

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

In this section, we will ask questions to understand how to main 4 crimes in focus in RAYUELA are regulated in your jurisdiction. In this section, the focus is on adult perpetrators with victims that are minors. We are interested in both the general rules, and whether the fact that the victim is a minor has an influence on the application of the law. We are also in particular interested in your thoughts on whether the scope of the law affects the number of cases that are brought before the courts, in other words, are the current provisions sufficient to prosecute the diverse forms of crime present in reality? And are cases effectively prosecuted in practice or are there obstacles (e.g., lack of resources)?

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

Answer:

Yes, online grooming is punishable by law in Portugal. The Portuguese Penal Code (CP), in its Article 176-A - Grooming minors for sexual purposes (TITLE I - Crimes against persons, CHAPTER V - Crimes against sexual freedom and self-determination, SECTION II - Crimes against sexual self-determination) determines:

"n.º1, an individual [*adult perpetrator*], who by means of information and communication technologies, entice minors [*the victim may be any child or young person up to 18 years of age*] to meet with a view to the practice of any of the acts included in paragraphs 1 and 2 of article 171 (*Child sexual abuse*) and in subparagraphs a), b) and c) of paragraph 1 of the previous article (176 - *Child pornography*), is punished with imprisonment for up to 1 year."

According to Article 176A, n.º 2 "if this solicitation is followed by material acts leading to the meeting, the agent is punished with imprisonment for up to 2 years."

The type of act(s) included in this crime are the ones enticing a minor to meet, with the aim of: (i) engage in sexual intercourse; (ii) engaging in a qualified sexual act, (iii) using a minor in a pornographic show, (iv) enticing a minor for a pornographic show; (v) using a minor in pornographic photography, film or recording, regardless of medium; (vi) enticing a minor for pornographic photography, film or recording, regardless of medium; (vii) produce, distribute, import, export, disseminate, display or assign, in any capacity or by any means, photographs, films or pornographic recordings.[1]

In this process, we observed that by enticement is understood the use of information and communication technologies and/or any material acts leading to the meeting (e.g., arranging for the victim's transport, arranging a space for this purpose) that harms the free development of the child personality and thus does not protect her/his sexual self-determination.

This is a crime of public nature, which means that it is sufficient that the Public Prosecution Service (MP) becomes aware of the crime in any way for the criminal proceeding to start. Thus, the process is initiated regardless of the victim's will and the crime can be reported by anyone.

[1] https://apav.pt/care/index.php/informacao-para-adult-s/crimes-sexuais-contra-criancas-e-jovens-explicacao-da-lei

Article 176-A of the Portuguese Penal Code came into force in 23rd of September 2015 (Law nº 103/2015, 24-08-2015, Article 3.º - Amendment to the Penal Code) in compliance with Article 5 of the Council of Europe Convention against Sexual Exploitation and Sexual Abuse of Children.

Even though this article (176-A, CP) fully covers grooming for the purpose of using children in "pornographic shows" or in the production of child sexual abuse materials, it was acknowledged in the report "Sexual Exploitation of Children in Portugal", submitted by CIAF Portugal and ECPAT International for the Universal Periodic Review of the human rights situation in Portugal to the Human Rights Council 33rd session (May 2019) UPR third cycle 2017 – 2021, that it does not give an equal protection to all children against grooming for the purpose of sexual relations, as articles 171-1 and 171-2 only apply to sexual abuse of children under 14.[2]

The Portuguese Penal Code distinguishes crimes of a sexual nature into two groups:

1. Crimes against sexual freedom (Articles 163 to 170 of the Penal Code), which penalize all sexual activities committed without the victim's consent, regardless of age;
2. Crimes against sexual self-determination (Articles 171 to 176 of the Penal Code) that penalize sexual activities with minors under the age of 18, and whose existence is directly linked to the need to protect the free development of the personality of the child or young person in the sexual domain.

In Portugal, consent to sexual activity by a child under the age of 14, whatever it may be, is irrelevant, because sexual acts and behaviour up to this age are considered to harm, without exception, the child's development and self-determination. If the minor is under 14 years of age, then the act is always a crime (CP).

The legal age for a minor to have sex with an adult without any criminal relevance in the country is 16 years old: if the child is 16 years of age or older, provided that this relationship has not occurred for profit or the adult is not the person who has been entrusted with the education or assistance of the child, there is no criminal relevance.

Although the law allows the relationship between minors and adults from the age of 16, adolescents over 14 years of age can also have consensual sex, albeit with some nuances. According to Portuguese legislation, if the relationship between the minor and the adult develops between the ages of 14 and 16, it is a crime only if the adult abuses the child's inexperience to make him or her commit the act.

Up to the age of 14, crimes against self-determination and sexual freedom are of a public nature, which means that anyone can present a complaint to the authorities. Sexual crimes against adolescents over 14 years old are semi-public in nature, which means that they depend on a complaint to proceed and the consent of the adolescent becomes legally relevant.

Currently, the law provides that the victim [minor] of sexual crimes can make a complaint up to five years after turning 18. In 2021, the Portuguese Parliament has approved a new law concerning the extension of this period to make possible the victim to make complaints up to the age of 50 or up to 40 if they were not yet 14 at the time of the crime. However, with the dissolution of the Parliament in October 2021, this new law did not come into force since it was not possible to complete all legal procedures [*at the date of this report*].

Know issues of application: In 2019, the United Nations Committee on the Rights of the Child, in the *Concluding observations on the combined fifth and sixth periodic report of Portugal*,[3] in its n.º 25 - Sexual exploitation and abuse, expressed "concern at: (a) The low level of awareness on and the absence

[2] Available at: https://gddc.ministeriopublico.pt/sites/default/files/documentos/pdf/3ciclo-cc1.pdf
[3] Available at: https://tbinternet.ohchr.org/Treaties/CRC/Shared%20Documents/PRT/CRC_C_PRT_CO_5-6_37295_E.pdf

of defined procedures for the professional response to child sexual abuse; (b) Reporting rates on online grooming remaining low; (c) Insufficient resources allocated to the timely and effective identification and investigation of sexual abuse of children, including in religious institutions and online; (d) Insufficient data on sexual abuse of children and on the exploitation of children in prostitution."

As a result, the UNCRC recommend the State Party to "(…) (b) Raise the awareness of parents, children, teachers and other professionals working with and for children on referral procedures and ways of minimizing the risks to children in their online conduct; (c) Increase the human, technical and financial resources allocated to the effective prevention, identification, investigation and prosecution of sexual abuse of children, including in religious institutions and online."

In the n.º 22 of the same document, the UNCR referring to the civil rights and freedoms (arts. 7, 8, and 13-17), and in its n.º 22 also stated "In the light of the conclusions of the day of general discussion on digital media and children's rights in 2014, and line with the right of the child to access appropriate information, the Committee recommends that the State party: (a) Develop regulations to protect the privacy of children in digital environment and the media; (b) Build the capacities of children, parents, legal guardians and teachers on the safe use of ICTs, in particular on how children can protect themselves from being exposed to information and material harmful to their well-being; (c) Develop mechanisms to monitor and prosecute violations of the rights of the child in the digital environment."

Case Law: two innovative decisions on the crime of enticing minors for sexual purposes (or online grooming) reached the Higher Courts, after being introduced to the legislative amendment to the Penal Code of 2015.

1) *Acórdão do Tribunal da Relação de Coimbra* 97/17.9JACBR.C1 (Decision of the Court of Appeal of Coimbra)[4]

Judge Rapporteur: Isabel Valongo. Date: 12-11-2019. Vote: Unanimity

Procedural Means: Criminal Appeal.

National Legislation: ART. 176-A of CP

Summary: I – The grooming of minors for sexual purposes, a conduct typified in article 176-A of the CP, presupposes an approach to the child, through any technological means of information and communication, such as the internet and mobile phone. II – Grooming constitutes an aggravated form of the crime when it already configures the performance of material acts leading to a meeting between the agent and the minor – e.g., travel to the place of the meeting, providing assistance in transporting the victim, marking a physical space for the purpose. III – The type of article 176-A of the CP contains an intention ("aiming") to achieve a result that is not part of it (practice of acts provided for in paragraphs 1 and 2 of article 171, and in subparagraphs a), b) and c) of no. 1 of article 176), but which is caused by a subsequent action to be carried out by the agent, thus providing for a crime of short-term act. IV – The *subjective* type only admits the intentional form of intent, as it is clear from the Lanzarote Convention and the word "targeting". V – The mentioned crime is a common crime and a necessary co-payment in the form of a crime of encounter, and the minor (necessary co-payer) is not punishable. VI – The agent who, through several messages sent to a minor insinuating sexual acts to be performed with her, tries to meet with the child, offering to pay for the trip and suggesting a ride to a place where they could meet, commits the offense provided for in article 176-A, n.º 1."

[4] Available at: http://www.dgsi.pt/jtrc.nsf/8fe0e606d8f56b22802576c0005637dc/b434fabd21331094802584ef0041eb7d?OpenDocument

2) *Acórdão do Tribunal da Relação de Lisboa* 117/17.2PHLRS-3 (Decision of the Court of Appeal of Lisboa)[5]

Judge: João Lee Ferreira. Date: 12-11-2019. Vote: Unanimity

Procedural Means: Criminal Appeal.

National Legislation: ART. 176-A of CP

Summary: The legal provision in the crime of enticing minors for sexual purposes covers the typical cases in which the agent uses means linked to information and communication technologies to arrange meetings with minors in order to perform a pornographic act or relevant sexual act. It is a formal crime or a mere activity, which is therefore consummated with the mere attempt to arrange a meeting with a minor with these illicit *desideratums* (it is not required that the meeting actually take place), being also a crime of abstract danger. The doctrine and jurisprudence agree in the understanding that a relevant sexual act will be the act with an objective sexual connotation identifiable by an external observer, which is abstractly suitable for the satisfaction of sexual instincts that constitute a serious and serious offense to the intimacy and sexual freedom of the passive subject. The typical prediction regarding enticement does not require the use of any explicit formula in the invitation and in order to understand the purpose sought by the defendant when writing and sending the messages, a joint interpretation of the common meaning of the expressions used must be made. Taking into account the references expressed to various acts of copulation, followed by the requests for a relationship in an intimate and affectionate environment ("just the two of you alone, `at ease' to see you well and happy to relax and unwind with me and to feel loved and cherished; "seriously I love you sooo much and I really like you"), in a reserved place and the availability of the defendant ("bring you to my house), it is clear to us that when sending the messages through social networks, the defendant had, not only the purpose of arranging a mere meeting with the minor but also intended that in that meeting he would practice with her a relevant sexual act provided for in article 171 nº 1 and nº 2 of the Penal Code.

Jurisdictional aspects in online grooming cross-border cases: see answers to Questions 4.15, 4.16, 4.17 and 4.18.

An example of successful practice: *CARE - Specialised support to children and youngsters victims of sexual violence*, coordinated by the Portuguese Association for Victim Support (APAV) and co-financed by the Calouste Gulbenkian Foundation and Portugal Inovação Social *Webpage*: https://apav.pt/care/

Core objective: to develop a model of implementation, operation and supervision of a support network and referral of cases of children and young people victims of sexual violence.

Key national partners: National Institute of Forensic Medicine and Forensic Sciences (INMLCF, I.P.); Judiciary Police (PJ); Department of Forensic Medicine of the Faculty of Law of the University of Porto.

Question 2: Is cyberbullying punishable by law in your country? Please take into account a broad understanding of cyberbullying (cyber/online stalking, harassment, sexual harassment)?

Answer:

Currently, the Portuguese Penal Code does not include a classification of the crime of cyberbullying, which means that cyberbullying does not exist as an autonomous type of crime. But this does not mean

[5] Available at: http://www.dgsi.pt/jtrl.nsf/33182fc732316039802565fa00497eec/934421e22b80e9a8802584ff0059f266?OpenDocument

that behaviours corresponding to cyberbullying are not punished since there is a set of crimes that fill in the type of crime in question.

The question is to know, in case cyberbullying happens, what type(s) of crime(s) established in the CP could be considered for this purpose. Among others, it could be configured as crime of/combination of crimes of:

- Article 153 – Threat: a person who threatens another person to kill, attack, offend his personal freedom or sexual self-determination or to take away considerable goods from him is punished with imprisonment up to one year or a fine of up to 120 days. (…)

- Article 154- Article 154 – Coercion:1. Whoever, by means of violence or threat of serious harm, constrains another person to an action or omission, or to support an activity, is punished with imprisonment for up to three years or with a fine. 2 - The attempt is punishable. (…)

- Article 154-A – Persecution (Stalking) (since 1st August of 2014, as result of the ratification of the Council of Europe Istanbul Convention - Action against violence against women and domestic violence): 1. Whoever, in a repeated way, persecutes or harasses another person, by any means, directly or indirectly, in an adequate way to provoke fear or uneasiness or to harm his freedom of determination, is punished with imprisonment up to 3 years or fine, if a more serious penalty is not applicable by virtue of another legal provision. 2. The attempt is punishable. (…) 5. The criminal procedure depends on a complaint.

- Article 154 – Coercion: a person who constrains another person to an action or omission, or to support an activity, through violence or threat is punished with imprisonment for up to three years or a fine.

- Article 180 – Defamation: is punished with imprisonment for up to six months or with a fine of up to 240 days, whoever imputes an act to another person, or express an offensive opinion about her your honour or consideration.

- Article 181 – Injury: is punished with imprisonment for up to three months or with a fine penalty for up to 120 days, whoever insults another person, imputing facts to him or addressing him with offensive words of his honour or consideration.

The distinction between the crimes of defamation and injury lies in the fact that the attack is directly to the offended person, without intermediation, in the case of injury, or is done in a biased, indirect, through third parties, in the case of defamation. For both crimes, it is not to require any specific intent or special element of the subjective type that would translate into the special purpose of reaching the target in his honour and consideration (Mantinha, 2020).[6]

Article 192 – 'Devassa' of private life: a person who records or transmits conversations, captures images, or discloses facts relating to the private life of other people is punished with imprisonment for up to one year or a fine.

Article 193.º - 'Devassa' by means of information technology: 1. Whoever creates, maintains or uses an automated file of individually identifiable data referring to political, religious or philosophical beliefs, party or trade union affiliation, private life, or ethnic origin, is punished with imprisonment for up to two years or with penalty of fine up to 240 days. 2 - The attempt is punishable.

[6] Mantinha, Cíntia (2020). *O Ciberbullying: A Autonomização do Tipo de Crime*, Dissertação de Mestrado em Direito e Prática Jurídica, Especialidade em Direito Penal, Lisboa, Faculdade de Direito da Universidade de Lisboa.

Article 199.º – Illegal recordings and photographs: whoever records or use another person's words not addressed to the public, without consent and anyone who photographs or films another person, or uses photographs or film, against that person's will.

At the basis of the consideration of crimes related to cyberbullying cases are constitutional rights, namely Article 26: everyone has the right to personal identity, to the development of personality, to citizenship, to the good name and reputation, image, and legal protection against any forms of discrimination (Constitution of the Portuguese Republic).

Jurisdictional aspects in cyberbullying cross-border cases: see answers to Questions 4.15, 4.16, 4.17 and 4.18.

Known issues of application.

- Some authors defend that cases of cyberbullying are insufficiently protected by the current Portuguese penal legal framework, thus lacking a new legislation since currently the victims could be left without the suitable legal protection (Mantinha, 2020; Serrão, 2019[7]). These authors defend that whether for cases that do not fit into a specific type of illicit, or for those who due to their seriousness, scope, and their connection with various types of illicit, there is a lack of specific and adequate legislation, so that the legal interests of victims of cyberbullying are sufficiently protected by the criminal law in force, by the criminal norms in force and the victims find thus greater protection (Mantinha, 2020). Cyberbullying acts end up being related consider within a type of crime in which they may have some correlation, being punished unduly, or just not being punished. Moreover, are also pointed out the constraints on identifying the offensive meaning/purpose of the conducts since cyberbullying is often practiced by teenagers or young people (Mantinha, 2020).
- In a recent national study on judicial responses to cyberbullying victims (Serrão, 2019), it was concluded (i) the importance of ensuring greater application and compliance with legal rules for the preservation of victims and guaranteeing their rights; (ii) the need for the development of a proactive behaviour by ISP in the fight against cyberbullying; (iii) the need to guarantee a greater societal awareness of this phenomenon, (iv) associated with greater cooperation between the different actors; and (v) the need to have a cyber-police capacity to immediately stop cyber-aggressions, guaranteeing support for victims and the collection of data inherent to the aggressions.

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?

Answer:

In Portugal, there is no crime that even comes close to online "disinformation and deception" that adults or children can be offended by.

There are "classic" crimes, such as "fraud (art. 217 of the Penal Code, *Burla*), which can be committed online, and whose typical element is deception. Commits this crime "whoever, with the intent to obtain for himself/herself or a third-party illegitimate enriching, by means of mistake or deceit about facts which he/she has caused with astuteness, determines another person to the commission of acts which

[7] Serrão, Gonçalo (2019). *Cyberbullying: A Primeira Resposta às Vítimas*. Dissertação de Mestrado em Direito e Segurança, Lisboa, Faculdade de Direito, Universidade NOVA de Lisboa.

causes to such person, or causes to another person, a property loss is punished with sentence of imprisonment for not more than three years or with fine penalty". If the agent takes advantage of the victim's situation of special vulnerability, due to age, disability or illness, the penalty is much more serious (art. 218, no. 2, al. c, CP).

Of course, this "disinformation and deception" online can be instrumental in other crimes, that is, for example, to take the child to a certain place where he will be kidnapped or even killed. In such cases, it may be difficult to determine whether we are still dealing with preparatory acts (which are not punishable – article 21 of the CP) or already attempted (already punishable – articles 22 and 23 of the CP).

If the purpose is sexual, the crime of enticing minors for sexual purposes will be at stake (art. 176-A of the CP). Commits such a crime who, being of legal age, by means of information and communication technologies, entice a minor to meet with a view to the practice of any of the acts included in paragraphs 1 and 2 of article 171. , anal intercourse, oral intercourse or vaginal or anal introduction of body parts or objects) and in subparagraphs a), b) and c) of paragraph 1 of the previous article (pornography of minors). If this enticement is followed by material acts leading to the encounter, the agent is punished with a more severe penalty. If the meeting takes place and these sexual crimes are committed, the agent will be punished for them.

The deception could also have the goal of getting the child to show the "intimate" body online or even to perform sexual acts, recording these images. If this result happens, the crime of child pornography will be at stake [art. 176, no. 1, al. a) of the CP]; otherwise, there will be an attempt.

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?

Answer:

In 2013, Portugal modified Article 160 (Trafficking in Persons) of the Penal Code following the transposition of Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims.

Currently, the crime of trafficking of persons is provided for in Article 160 of the CP in the following terms: "1 – Whoever offers, delivers, allures, accepts, carries, accommodates or receives a person for sexual exploitation purposes, work exploitation or organs removal: a) By means of violence, kidnapping or serious threat; b) Through artifice or fraudulent manipulation; c) With abuse of authority resulting from a hierarchical, economic, working or familiar dependence relationship; d) Taking advantage of mental incapacity or of a situation of special vulnerability of the victim; or e) By means of the attainment of the consent of the person who has control over the victim; is punished with sentence of imprisonment from three to ten years.
2. The same term is applied to someone who, through any means, incites, transports, proceeds to the lodging or shelter of a minor, or delivers, offers or accepts him/her for the purpose of exploitation, including sexual exploitation, labour exploitation, forced begging, slavery, removal of organs or the exploitation of other criminal activities."

There are different types of punishable conduct, with different penalties, including provisions for cases of underage victims (n.º 3: "In the case set forth in the previous number, if the agent uses any of the

means set forth in the subsections of paragraph 1 or acts professionally or with the intention of monetary gain, he/she will be punished with a prison term of from three to twelve years").

If the conduct mentioned has involved specific conditions, such as "a) endangered the victim's life; b) been committed with special violence or has caused particularly serious harm to the victim; c) been committed by public officials in the exercise of their duties; d) been committed within the framework of a criminal organisation or e) as a result the suicide victim", n.4 established that "the above penalties are increased for one third (in their minimum and maximum).

There is provision for trafficking through a ruse or fraudulent maneuver [n.º 1, al. b)], but there is no specific forecast for the online medium.

Concerning minors, n.º 5. defines that "Whoever, through payment or other compensation, offers, delivers, solicits or accepts a minor, or obtains or gives consent for his/her adoption, will be punished with a prison term of from one to five years."

The aforementioned crime of enticing minors for sexual purposes does not seem to cover cases of subsequent trafficking. These previous conducts may only be preparatory acts (not punishable) or already tentative (punishable). It will depend on the circumstances of the case, on the stage of execution of those acts.

Case Law:

1) *Acórdão do Tribunal da Relação de Porto* 6/08.1ZRPRT.P1 (Decision of the Court of Appeal of Porto)[8]

Judge: Elsa Paixão. Date: 14-05-2014. Vote: Unanimity

Procedural Means: Criminal Appeal.

Summary: I - The crime of trafficking of persons, p. and p. by article 160 of the Penal Code, it protects, in addition to personal freedom, the dignity of the human person. II - This is a crime of damage (in terms of damage to the legal interest) and of result (in terms of the object of the action). III - The typical action of trafficking in adults consists of offering, delivering, enticing, accepting, transporting (through the agent's own means or by a third party, but at the expense of the agent), accommodation or reception of a person with a view to sexual exploitation, exploitation of their labour or the extraction of their organs. IV - It is a crime of binding execution, with the means of execution of the crime being typified, and a crime of intention ("for the purposes of) since it aims to achieve a result that is not part of the type (sexual exploitation, exploitation of labour and the extraction of an organ), which is caused by a subsequent action to be carried out by the agent himself or by a third party, and it is not necessary to verify the effective exploitation of the victim or the effective extraction of an organ of his own. V - It is a crime of an eminently personal nature. VI - The "deceit or fraudulent maneuver is the action by which the agent deceives others about the meaning, purpose and consequences of his action, and the mere passive use of someone else's deception is not sufficient. VII - The "special vulnerability of the victim includes vulnerability due to age, disability, illness or pregnancy, and reflects the exploitation of such a situation of weakness that the victim has nothing left but the possibility of conforming. VIII - The subjective type requires deceit. IX The crime of pimping a minor, p. and p. by article 175 of the Penal Code, it protects the sexual self-determination of minors under 18 years of age, the free development of their personality in the sexual sphere, creating the conditions for this development to take place in an adequate and undisturbed way. X - Criminal agent can be any man or woman, as long as he is over 16 years old and plays the role of intermediary or mediator for the exercise of prostitution activity by the

[8] Available at:
http://www.dgsi.pt/jtrp.nsf/56a6e7121657f91e80257cda00381fdf/9c14d0f919c5c8ce80257cec00309e79

minor. XI - Victim of this crime is necessarily a minor under 18 years of age. XI - It is a crime of result; therefore it is necessary that the referred to relevant sexual acts are consummated and that their consummation is accompanied by a payment. XII - The subjective type requires intent in relation to all the constitutive elements of the objective type of illicit act. XIV - It is a crime of an eminently personal nature. XV - The crime of trafficking in persons and pimping a minor are in an effective competition relationship.

Jurisdictional aspects human trafficking facilitated by electronic means cross-border cases see answers to Questions 15, 16, 17 and 18.

More information: [9] The Portuguese Government issued the Order 138-E/2021, which approved a new model/document regarding victim status of especially vulnerable victims, including Victims of Trafficking. These new instruments are the result of multisectoral work, coordinated by the governmental department of citizenship and equality, which is also in charge of coordinating 4th National Action Plan to Prevent and Combat Trafficking in Human Beings (2018-2021). In 2021, Portugal launched the "Protocol for the definition of action procedures for the Prevention, Detection and Protection of (presumed) children victims of trafficking in human beings - National Referral System". This Guideline is a measure of the 4th Action Plan to Prevent and Combat Trafficking in Human Beings (2018-2021), and of the National Implementation Plan of the Global Compact for Migration. It is also the commitment of Portugal to comply with international and European standards and recommendations (Committee of the Parties to the Council of Europe Convention on Action against Trafficking in Human Beings).

3. Questions regarding cybercrime or cyber-facilitated crime committed by minors

This section is aimed at understanding how cybercrime or cyber-facilitated crime committed by minors is dealt with in your jurisdiction. In particular, we are trying to assess to what extent the rules and policies in place create leeway for minors who may not always be aware of when their behaviour is crossing a line. We are also interested to know the real enforcement situation. In addition to the general rules on the juvenile justice system and the punishment of minors, the 4 crimes of focus of RAYUELA are addressed, as well as two particularly relevant crimes committed by minors online: online piracy and hacking.

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.

Answer:

Portugal was one the first countries in the world to establish a specific legal framework separating children from adults within justice system. The first Portuguese legislation concerning children in conflict with the law was published in 1911−one year after abolishing the monarchy and establishment of the republican regime–, and it is commonly known as *Lei de Protecção à Infância* (*The Childhood Protection Act*). Children under the age of 16 years who have committed offences were removed from the scope of criminal law and become subject to a new specialized jurisdiction. Since then, Portugal has a special law and jurisdiction regarding minors.

[9] Available at: https://ec.europa.eu/home-affairs/policies/internal-security/organised-crime-and-human-trafficking/together-against-trafficking-human-beings/eu-countries/portugal_en#general-information-situation-on-trafficking-in-human-beings

- **Minimum age of criminal responsibility (MACR)**

Since 1911, the MACR in Portugal is 16 years, which is also the minimum age for criminal majority, even though the age of civil majority is set at 18 years (Article 122 of the Civil Code).

Currently, the Portuguese justice system combines three different kinds of intervention regarding child and youth offending considering three age ranges:

1) children below the age of 12 years (child protection system),

2) young people between 12 and 16 years (youth justice), and

3) young adults between 16 and 21 years of age (criminal law).

Portugal has a strict model, which does not allow for exceptions in the enforcement of criminal laws and does not foresee the prosecution of minors for certain offences only. The country and has never had criminal laws applicable to children under 16 and does not take the age downwards for serious offences. Below the age of 16, it is not possible to sentence children in criminal terms: they can be subject only to the enforcement of protective measures (child protection system) or educational guardianship measures (youth justice).

After turning 16, the criminal law is applied and young people are tried in criminal courts (Article 19 of the Criminal Code). To mitigate this situation, an individual aged 16 to 21 can be subjected to the *Regime Penal Especial para Jovens Delinquentes* (*Special Criminal Law Regime for Young Adults*), Decree-Law no. 401/82, of 23 September. As a result of the Criminal Code Reform of 1982, this special criminal law regime was established within the adult justice system setting up distinct procedures and lower sentencing guidelines that could be applied to young adults, depending on the judge's assessment.

This criminal law regime is based on the need to establish a criminal law approach better suited to deal with crimes at these ages. Thus, young adulthood is defined in this legal diploma as a generational category of its own, involving a stage of the life course corresponding to a phase of social latency that makes crime an ephemeral and transient phenomenon. The law is clear in recognising that young adults are distinct from adults, as they are more vulnerable to peer pressure and to being involved in risk-taking behaviour, seeking social recognition, and are less likely to consider the immediate and future consequences of their actions.

Based on the recognition of the potentially high criminogenic effect of prison sentences and on the social and personal vulnerabilities affecting the transition stage from youth to adulthood, the focus is to enforce alternatives to prison sentences that could promote, in a more efficient way, the young adult's social rehabilitation and prevent recidivism. The goal is to avoid the enforcement of a prison sentence at these ages and ensure, when necessary, that it is enforced in specialised prison facilities in line with international guidelines.

Despite this humanistic perspective, a major constraint remains since the specialised detention centres for young adults, foreseen in this special regime, have never been built. As a result, even with lower figures of young adult incarceration, there is still a significant contradiction between law and practice, as most of these young adults serve their prison sentences in adult prisons and the system can hardly separate them from adults. This acquires relevance considering that the 16- and 17-year-olds sentenced to a measure involving deprivation of liberty are placed in adult prisons in clear violation of international guidelines and standards, as regularly expressed by the Portuguese Ombudsman and by various United Nations Committees in their concluding observations on the national periodic reports

This special criminal law regime for young adults is not mandatory. Therefore, judges are required to decide whether to apply the mitigation rules to each young adult and have to justify the decision they make, including when they choose not to apply it. This assessment is not dependent on a request from

the public prosecutor or from the accused. It constitutes an inherent part of the proceedings, even in cases where there is insufficient evidence.

It is possible for young adults to be under youth justice supervision if, under the age of 18, they have had judicial proceedings for having committed acts qualified by the penal law as crimes between the age of 12 to 16. Moreover, a series of rules and specific legal procedures resulting from the joint application of educational and penal orders for the same young person must be considered. The youth justice law foresees the possibility for a Youth Court to intervene and enforce an educational measure for a young person under the age of 18 for an offence committed before he/she reached 16, as long as he/she is serving a pre-trial detention (Article 27). The enforcement of this proceeding depends on the Judge from the Criminal Court's assessment of each individual case.

- **Brief historical perspective**

Whilst major social changes in the country have occurred, the Portuguese child justice system has remained decades deeply rooted in a welfare model, which can be traced back to the country's first specific laws on the protection of children.

Since 1911, the Portuguese child justice has been characterized by three periods of evolution. The first one, extending from 1911 until the 1962 Reform, constituted a period of paternalist-repressive logic based on a degeneration-dangerousness model for minors under the age of 16 years, and it emphasized individual protection. At the core of the judicial intervention was the need for the rehabilitation and treatment of children, both victims and offenders in the same terms, initially based on bioanthropologic theories as was common at the time. Specific proceedings regarding offenders were established considering the need for a protective measure/intervention.

The second period, which began in 1962 with the establishment of a new legal framework, the *Organização Tutelar de Menores* - OTM (Organizational Guardianship of Minors), Decree-Law n.º 44.288/62, of 20th of April, was grounded on a maximalist guideline of child protection deepening the the welfare model established in 1911; thus, it was not a complete break from the previous legal framework. The law provided the Family and Minors Courts with a set of protection, assistance and educational measures to be imposed either separately or cumulatively to each minor, in similar terms both to victims and offenders, which covered from admonition to the deprivation of liberty. The social and political changes brought by the Revolution in 25th April 1974 led to the introduction of some amendments of the law in 1978 (Decree-Law n.º 314/78, of 27th of October), but the child justice system remained firmly rooted in a welfare model. The reason for this lies on the fact the country did not reach political and governmental stability at the time and the State priority was on consolidating democracy and the rights of citizens after a period of 48 years of dictatorship.

The system did not undergo significant changes until the end of the 20th century and of the beginning of the 21st century. Since 1999, the system has been subject to reforms that sought to incorporate international standards into the legal basis. The process of ratifying the United Nations Convention on the Rights of the Child by the Portuguese State in 1990 supported the need for its implementation,[10] which has led to a broader evaluation and deep critical reflection on the efficacy and limits of the welfare model, which was in force since 1911.

As a result the system has made significant changes, and international standards have been integrated into the legal framework.[11] Two new laws were approved in 1999: *Lei de Promoção e Protecção de*

[10] The Convention on the Rights of the Child was signed by Portugal on the 26th of January of 1990, approved for ratification by the Resolution Nº 20/90 of the Assembly of the Portuguese Republic and published in the Official Gazette of Portugal (*Diário da República*), Series I, n.º 211, 12th of September of 1990.

[11] According to the Constitution of the Portuguese Republic (Article 8) 'the rules and principles of general or customary international law are an integral part of Portuguese law' (§1) and the 'rules provided for in international

Crianças e Jovens em Perigo (Law on the Promotion and Protection of Children and Juveniles in Danger), Law n.º 149/99, hereinafter LPJCP,[12] and *Lei Tutelar Educativa* ("Educational Guardianship Law), Law n.º 166/99, hereinafter LTE[13]. Both came into force on the 1st of January 2001.

The essential idea was to distinguish the situation of children in danger,[14] that legitimizes a State intervention of protection (LPCJP), from the needs and situation of the children, between 12 and 16 years old, who commit an offence qualified by the penal law as crime and, as a result, justify another kind of intervention, an educational one (LTE). A transfer of these juveniles (12-16) to adult courts is illegal, whatever the nature of the offence committed.

- **Minors committing facts qualified by the penal law as crime: current framework**

a) Children under the age of 12 – child protection system

Under the legal framework system in Portugal, **for a child under 12 years of age who has committed an offence qualified by the penal law as crime, the LPCJP is applied and can only be implemented in terms of protection measures within the child protection system.** This means they receive the same treatment as any other children who are at danger since the Portuguese legislators considered that below this age children's psycho-biological development requires a specific intervention that is not compatible with the principles and goals defined in the LTE. As Rodrigues and Fonseca (2010, p. 1034) noted, "the commission of an offence qualified by the penal law as crime by a minor aged below 12 years, to the extent that is related to situations of social need, may indicate that the State should intervene. The intervention in this case should be solely of a protective nature, carried out within the framework of LPCJP".

The intervention for the promotion and protection of the child's rights expressed in the LPCJP is applied to all the children at danger, between 0 and 18 years old, and in some cases, it currently can be extended until the age of 25. The protection measures applied by the local Commissions for the Protection of Children and Young People[15] or by the Family and Minors Courts aim to remove the child away from the danger they are facing, giving them conditions that protect and promote their safety, health, education, well-being, and full development, and trying to assure the physical and psychological

conventions that have been duly ratified or approved, shall apply in national law, following their official publication' (§2).

[12] Currently, Law n.º 26/2018, of 05th of July, fith amendment to the Law n.º 149/99, of 1st of September.

[13] Currently, Law n.º 4/2015, of 15th of January, first amendment to the Law n.º 166/99, of 14th of September.

[14] The LPCJP (Article 3) considers that a child is placed at danger when: "a) is abandoned or living on their own means; b) is suffering physical or psychological harm or is a victim of sexual abuse; (c) does not receive adequate care or affection their age and personal situation; d) is in the care of third parties, during a period of time in which the establishment of a strong bonding relationship with them was observed and simultaneously with the non-exercise by the parents of their parental functions; e) is obliged to carry out activities or work that are excessive or inappropriate to their age, dignity and personal situation or that are harmful to their training or development; f) is subject, directly or indirectly, to behaviors that seriously affect their safety or emotional balance; g) assumes behaviours or engages in activities or consumption that seriously affect their health, safety, training, education or development without their parents, the legal representative or appropriately remove them from this situation; h) has foreign nationality and is placed in a public, cooperative, social or private institution with a cooperation agreement with the State, without a residence permit in national territory."

[15] The Children and Young People Protection Commissions are non-judicial official institutions with autonomy, located in every municipality, and are composed by representatives of local entities, such as the administration State services, social services, education and health services, police authorities, youth associations, and others. The Commission intervention depends on the consent of the parents, legal guardian or *de facto* guardian, and is also required the non-opposition of the child aged 12 years or older. These Commissions can apply measures for the protection of children and youth (except placement for future adoption), but only when having an agreement in the terms mentioned above. If there is no agreement regarding the implementation of the protection measures proposed by the Commission, or if the required consents are withdrawn, this entity has to report the case to the Public Prosecution services. The Public Prosecutor monitors and assesses the activity of the Children and Youth's Protection Commissions, and has the legal duty to represent children, by bringing to court the cases for the protection of their rights. In care and protection cases, the court can take protective measures by a care and protection agreement or by a judicial order, after a trial (judicial debate, as it is called by the law).

recovery of those who were victims of any form of exploitation or abuse. The protection measures are divided into two categories (Article 35). In the first category are the family-based measures enforced in the children's living environment: parental support; family support (involving other child's relative); entrust to a third person (non-relative); entrust to a person selected for adoption; and the support towards autonomy (applied to young person aged 15 or more). The second category refers to the placements' measures, which imply the removal of the child or of the young person from his/her life context: foster care, residential care and entrust to an residential institution aiming a future adoption.

The protection measures can also be applied to young people older than 12 years-old who have committed offences qualified by the penal law as crime and whose needs for protection in face of the situation of danger affecting them overlap the goal of 'education in the law' (*educação para o direito*) foreseen in the LTE (Rodrigues & Fonseca (2010).[16] Rules and procedures of interconnection between the protective and educational interventions (Article 81 of the LPCJP and Article 43 of the LTE) support the enforcement of promotion and protection measure instead or in association with an educational measure.

b) Youth Justice

The current Portuguese youth justice system differs from most other EU countries, giving less importance to the offence than to the need for the offender to be educated on the fundamental community values that have been violated by the illicit act. It can be regarded as a third perspective falling in between a welfare model and a punitive or penal one.

A young person between 12 and 16 years old who commits an offence qualified by the penal law as crime can be subject to educational measures, as defined by the LTE. **In this age range a transfer of the juvenile to adult's courts is totally inadmissible, whatever the nature of the offences committed, and the Family and Minors court can only impose the so-called educational measures.**

The Portuguese youth justice system does not have a retributive or punitive purpose; it is focused on addressing the offending behaviour in a manner appropriate to the young person's development. At the core of the LTE is the respect for the young person's personality, ideological, cultural and religious freedom, within all the rights conferred upon him/her by the Constitution of the Portuguese Republic. The State can only intervene in indispensable cases: since 2001 status offences are no longer sufficient to initiate a youth justice proceeding involving a young person, only alleged criminal offences are eligible to start a judicial process within this framework.

The set of educational measures provided by the LTE and applied by the courts aims at socializing and educating offenders on the values protected by the penal law, in a process called 'education in the law'. The concept of 'education in the law' has been understood as the process that takes the young person to learn, adhere and respect the fundamental values of society, which are expressed in the legal-criminal values protected by the penal code. The young offenders' rehabilitation is based on their needs to be educated on the fundamental values for living in society aiming they would assume a constructive role in society.

The meaning of socialization is fully explicit in the LTE and the 'education in the law' principle "does not represent moral correction but it is rather – in respect for the freedom of conscience that pertains to all citizens – to educate the minor to pursue a social life that complies with essential legal norms" (Rodrigues & Fonseca, 2010, p.1035).

The proof of the facts of a criminal offence is indispensable to the lawsuit/proceeding, but merely by itself it is insufficient being also required the evaluation of the young offender's need for 'education in the law'. Only by the corroboration of the above assumptions could the youth court decide

[16] 'Education in the law' corresponds to the Portuguese term 'educação para o direito' accordingly to the translation defined by the national legislators in Rodrigues and Fonseca (2010).

to apply an educational measure (Articles 2 and 3, LTE). The criteria on which an educational measure is determined by the youth court rely not only on young offenders' needs, which are evaluated before the sentence by social and psychological or psychiatric assessments, but also on the seriousness of the committed offences in comparison to what is defined in the penal code.

The LTE provides a diversified set of educational measures (Article 4, LTE) that can be executed until the age of 21 (Article 5, LTE). Electronic tagging is not applied to young people; this measure can only be imposed in the penal system for those who are at the age of 16 and fall under the general criminal law. From the least to the most impactful to the young person's life, they are as follows (Table 1): admonition, restriction of the right to drive or obtain a driver's permit for motorcycles, reparation to the victim, economic compensation or work for the benefit of the community, imposition of rules of conduct, imposition of obligations, attendance of training programs, educational supervision, and placement in custody in Educational Centres.[17]

Table 1 Educational measures provided by the Educational Guardianship Law (Article 4 LTE)

MEASURE		DURATION
Admonition (Article 9, LTE)	A lenient warning that, alone or cumulatively with other measures, may be imposed by a court to a young person juvenile subject to youth justice. It consists of a formal reproach or warning given by the court at a public hearing to a young person found guilty of minor facts qualified by the penal law as crime.	---
Restriction of the right to drive or obtain a driver's permit for mopeds (Article 10, LTE)	The young person's right to drive or to obtain a driver's permit for mopeds is subject to restriction.[18]	Applicable for a period ranging between one moth and one year.
Reparation to the victim (Article 11, LTE)	Presenting apologies or undertaking any activities related to the inflicted damage which may benefit the victim.	---
Economic compensation or work for the benefit of the community (Article 12, LTE)	The young person must (i) make a payment of a specified amount or (ii) perform a specific activity that benefits a public or private non-profit organization. Activities could be carried out on weekends and bank holidays. Financial compensation could also be paid in instalments, as long this option does not distort the meaning and content of the educational measure. Before establishing the amount of the payment, the judge must take into consideration the young person's ability to pay.	Maximum duration of 60 hours and cannot exceed a total period of three months.
Imposition of rules of conduct (Article 13, LTE)	The imposed rules cannot put abusive or unreasonable constraints to the young person's liberty to make decisions or lead his/her life. The rules should be of preventive nature and are meant to adjust the young person's behaviour to the rules and values essential to life as a member of society.	Maximum duration of two years.
Imposition of obligations	This measure seeks to address young people whose educational needs for the law could be satisfied by attending programmes and activities of educational, formative or therapeutic nature and that are	Maximum duration of two years.

[17] In this report, the term 'custody' is used in a broad sense to refer the Portuguese measures of deprivation of liberty applied to young people as provided by the LTE.

[18] In Portugal, a moped is a two or three-wheel motor vehicle with an engine of 50 cc (3.1 cu in) or less, or having an engine with more than 50 cc but with a maximum speed of no more than 45 km/h (28 mph). Class M (moped) license is required to drive such vehicles. This license can be obtained with a minimum age of 14.

(Article 14)	organized and accessible for the population in general. This measure means the young person is obliged to attend controlled activities and programmes, which can include training, school, counselling sessions in psycho-pedagogical institution, activities in clubs or youth associations or undergo medical, psychiatric, psychological treatment or equivalent at a public or private institution, as an outpatient or as hospitalised patient, to treat alcoholism, drug addiction, contagious or sexually transmitted diseases or mental illness. The judge should always seek the young person's agreement for the treatment programmes and over the age of 16 the consent is compulsory.	
Attendance of training programs (Article 15, LTE)	The legislator intended the intense participation of the young person in certain formative and training programmes specifically adapted for young offenders. The imposition of the obligation of attendance would, therefore, restrict the young person's liberty. In exceptionally situations, this measure can include an obligation to the young person to live with a competent person or institution that provides accommodation, in all cases, in open facilities.	Maximum duration of one year
Educational supervision (Article 16, LTE)	This measure consists of the adjudication to an individualised educational plan (PEP) that covers the areas of intervention defined by the court and involves a combination of measures and educational intervention. The content of the measure is wide-ranging and it can be imposed rules of conduct or obligations as well as attending formative, training or school programmes. The PEP is executed by the services of the Ministry of Justice (currently, the Directorate General of Reintegration and Prison's Services), which has the task to supervise, guide, follow and support the young person throughout its implementation. In case of repeated non-compliance of the PEP, the measure can be extinguished and the young person may be sentenced up to four weeks ends in custody in an educational centre.	From the minimum of three months to the maximum of two years.
Placement in custody (Articles 17 and 145, LTE)	Liberty depriving educational measures could be enforced in four ways: pre-trial detention (Article 146, LTE, upt to 3 months, eventually plus 3 months maximum), custodial measure to perform psychological assessment in forensic context (Article 147, LTE, up to 2 months, eventually plus 1 month maximum), for compliance of detention following the young person have been caught in 'flagrant offense' (Articles 51 and 146, LTE), detention measure (Article 148, LTE).	From three months to two years, exceptionally three years in the closed regime.

Source: LTE (1999, 2015), author's elaboration

Educational measures can be executed until the age of 21 (Article 5, LTE). Electronic tagging is not applied to young people; this measure can only be imposed in the penal system for those who are at the age of 16 and fall under the general criminal law.

The Portuguese custodial facilities for young offenders are called Centros Educativos (Educational Centres) and are managed by the DGRSP - , which constitutes an auxiliary body of the judiciary administration for youth justice.[19] The Educational Centres are distinguished according to the type of

[19] Decree-Law no. 215/2012, of 28th September. From 1925 to 2012 there was an independent State youth justice service, something that no longer exists due to the recent merge of the former DGRS and the Prison's Service into the new DGRSP, which has the task of managing the implementation of public policies of crime prevention and the social reintegration of young and adult offenders as well as managing the prison's services. The DGRSP ensures the enforcement of the non-institutional educational measures for young offenders in the community, and it is responsible for enforcing the liberty-depriving educational measures through the management of the educational centres. The DGRSP staff, in local teams or in custodial institutions, is responsible for assisting the youth courts and the public prosecution services concerning the juvenile proceedings. This state justice department provides technical and specialized counselling to the youth courts, psychosocial support to young people and adults

regime carried out and are organized into residential units (Article 4, LTE) with secure accommodations provided for 10, 12 or 14 young people. A custodial measure can be executed in one of the three regimes defined by the LTE, which are based on their extent of deprivation to young person's liberty.

Table 2 Educational centre's regimes (Article 17 LTE)

REGIME	CONDITIONS	DURATION
Open	The young person lives and is educated in the education centre but may be allowed to spend weekends and holidays with the family or going out unaccompanied. He/she may also attend school, education or training, employment, sports and leisure activities outside the centre, as defined in the Personal Educational Project approved by the youth court. An open residential unit accommodates the maximum of 14 minors.	From six months up to two years
Semi-open	Applicable to those who s have committed an offence against people that corresponds to a prison sentence in excess of three years or two or more offences punished by a prison sentence in excess of three years. An young person is educated and attend educational, training, employment, sports and leisure activities inside the centre, but may be allowed to attend them outside, and may be allowed to enjoy holidays with family as defined the Personal Educational Project approved by the youth court. A semi-open residential unit accommodates the maximum of 12 minors.	
Closed	Applicable to a young person at the age of 14 or older, who has committed an offence corresponding to a prison sentence of more than eight years or when the committed offences correspond to crimes against people, punished with prison sentences of more than five years. A psychological assessment in forensic context is required before the judicial decision is taken. Young people live, are educated and attend all the activities inside the centre and going outside is strictly limited to attend judicial duties or due to health needs or other equally ponderous and exceptional reasons, and always under surveillance. A closed residential unit accommodates the maximum of 10 minors.	From six months to two years (and exceptionally three years in the most serious cases)

Source: LTE (1999, 2015); General and Disciplinary Regulation of the Educational Centres (2000), auhtor's elaboration.

In accordance with international standards, detention, in any of its modalities, must be only used as last resort. Thus, fulfilling the principles of legality and proportionality, the requirements and assumptions underlying the application of this measure are restricted, and in the case of the closed regime "are extremely restricted, which is perfectly understandable" (Rodrigues & Fonseca, 2010, p. 1060).

In Portugal, the pre-trial detention measure consists of detention in an Educational Centre in the closed or the semi-open regime and must be used as a last resort, only applicable to youth if other precautionary measures provided by the LTE are insufficient or inadequate. This judicial order is regulated by child-specific provisions according to international standards and can only be imposed by a judge as a precautionary measure on youth who have committed an offence qualified by the penal law as crime between 12 and 16 years old, as long as they have not yet reached 18 years old. In addition, not all offences are eligible to the enforcement of this measure: it can only be applied when the offence committed corresponds to a maximum prison sentence of more than five years, or when two or more committed offences are classified as crimes against people punishable by a maximum prison sentence in excess of three years.

involved in lawsuits, in conjunction with the competent public entities and individuals, and promotes the connection between justice administration and community agencies.

If the young person is over 14 years-old, he/she can be placed in the closed regime; if is below 14 years-old the pre-trial detention order must be carried out in the semi-open regime. The Portuguese legislation stipulates a maximum duration of this measure: it can take up to three months and can be extended for another three months, in any of the above mentioned regimes, in specially complex cases and where the reasons on which it is based are duly stated.

In the decision-making process, the pre-trial detention may only be imposed to a young person when there is strong evidence of the offence or offences and there is the probability of the application of a LTE measure corresponding to the need of 'education in the law', and when there is the probability the young person will abscond or commit further offences. To impose a pre-trial detention measure, these three pre-conditions must be cumulatively fulfilled and when they are no longer applicable the measure has to be extinguished.

The pre-trial detention of juveniles in Portugal has at its core the principle of the 'vagueness doctrine' (only those orders stipulated by law may be applied) and the principles of need, suitability, proportionality and subsidiary. Proceedings involving pre-trial detention in an Educational Centre, when carried out during judicial vacation, are given priority status. Only the public prosecution magistrate, who is in charge of the investigation stage, can request the enforcement of the pre-trial detention measure and the young person has the right of defence. Whenever possible, a prior hearing with the defence lawyer and parents, legal representatives or guardians should occur.

The minimum length for a custodial/detention measure is six months (since 2015, before were 3 months) in the open and semi-open regimes, and six months in the closed regime; the maximum length is up to two years in all the three regimes, exceptionally three years in the closed regime for the most serious cases. Below the age of 14 years old a young person cannot be placed in the closed regime, just in the open or semi-open regime. Depending on the juvenile offenders' progress in detention, a change to a less restrictive regime can be proposed to the court and the custodial measure applied can be reviewed accordingly to the law and changed, but never to a more restrictive regime.

The current law does not envisage a specific therapeutically custodial measure. According to the LTE, it is supposed the young person is able to understand the meaning of the measures and of the educational intervention. In these terms, it is supposed the law is not applied to those who suffer serious mental health problems (Article 49), which prevent them of understanding the judicial process. A minor who faces a custodial measure and have mental health issues that have to be therapeutically addressed, will receive psychiatric and/or psychological treatment during detention. **Although the current legal framework foresees the creation of specialized centres or residential units that should provide therapeutic programmes specifically designed for those having personality disorders or serious addictive behaviours, such units and programmes have not been fully implemented**. It is important to note that the placement of a young person in specialized centres or units and their enrolment in such therapeutic programs depends on the court's approval.

The intervention in the educational centres should be structured on activities and programs concerning different areas (e.g. education, training, social and cultural activities, sports, health and other activities depending on individuals' specific needs) besides focusing on daily routines to increase personal and social skills. To fulfil the objectives of the judicial intervention, each educational centre establish partnerships with various institutions and agencies in the community (schools, health centres and hospitals, recreational, sports, and cultural associations, NGO, religious and local authorities, and others services). Rules and procedures are defined within a legal regulation framework that provides a foundation for the system's organization, the General and Disciplinary Regulation of the Educational Centres ("*Regulamento Geral e Disciplinar dos Centros Educativos*", approved by Decree Law n.º 323-D/2000, of 20th December). **For each young offender, there is a range of mandatory activities**

according to the individualised Personal Educational Project (*Projeto Educativo Pessoal,* PEP) that has to be presented for Court-approval up to 30 days after the entrance of the minor into custody.

An important issue concerning the young offenders' path to personal and social well-being is their preparation prior to release from an educational centre and the following monitoring process. In 2015, it occurred the first amendment to the LTE sustained in a political consensus among the major political parties represented in Parliament. This revision established two new conditions related to the enforcement of custodial measures:

- Intensive supervision (article 158º-A): it is established the possibility of havind a period of intensive supervision (from 3 months up to 1 year) to be enforced on the community (if the young person does not have family support he/she could be placed, alternatively, in a 'Home of Autonomy') before the end of the detention measure. The aim is to assess the impact of the custodial measure on the young person behaviour back to the community. The Court may impose rules of conduct.

Post-custodial monitoring (article 158.º-B): if it not possible to enforce the intensive supervision, when the custodial measure ceased the DGRSP services have to attend the return of the young person to freedom and, when necessary, the case may be reported to the local Commissions for the Protection of Children and Young People.

The youth justice procedure

The fundamental principles foreseen by the CRC (Article 37) are the basis of the LTE core principles.

The LTE intervention is based on the principle of maintaining all the civil, political, social, economic and cultural rights and guarantees legally granted to youth in the country that are compatible with the deprivation of liberty. Within the guarantees and rights legally conferred upon the young person placed in custody, are the right to be informed in a personal and adequate manner, the right that the centre will act in the best interests of the young person's life, physical integrity and health; the right to preserve one's dignity; the right to preserve one's privacy; the right to contact, in private, the judge, the public prosecutor and the defence lawyer; the right to attend school; the right to maintain authorized contact with the outside world, by different means (letter, phone, visits); the right to be heard prior to the imposition of any disciplinary measure and the freedom of religion.

The Children and Youth Justice Reform (1999) introduced the **principle of the juvenile offenders' responsibility**, but it has remained focused on the application of educational measures and has not signified a rising punitive trend. The Portuguese juvenile justice explicitly follows the ideal of education while at the same time emphasising prevention of re-offending. **The young offender is considered responsible for his actions, but not in a penal way.** The system could be described in what Bailleau and Fraene (2009: 6) considered a "tendency towards bifurcation – a soft approach in most cases and tougher actions against a limited number of adolescent undergoing a custodianship order".

The **key juvenile justice system principles established by the LTE are:** preference for non institutional measures over institutional measures; specific duration of educational measures; proportionality (according to the offence gravity and the identified educational needs); jurisdictional control over the execution of the order; legality (in terms of the 'vagueness doctrine' - the legislator provided a closed catalogue of educational measures and other modalities, types or measures distinct from those stipulated in the law cannot be applied); need; suitability; and subsidiary.

The Court may — after a specific procedure that is different from a penal one but follows some similar rules to a criminal procedure for adults — apply compulsory educational measures, but no penal sanctions.

A youth justice proceeding is organized in two stages: the investigation/enquiry, led by the public prosecution services (*Ministério Público,* MP), and the jurisdictional stage, led by the judge. This two-stage organization promotes the emergence of the young person as the procedural 'subject', bestowed with individual rights and guarantees.

The MP assumes a central investigative role and the conduction of interrogations (Article 75) acting in accordance with the legal principle of speedy procedure (Article 44). The judicial authorities may request information from **the auxiliary body of the judiciary administration concerning the enforcement of juvenile justice measures, which currently is the Directorate General of Reintegration and Prison's Services (DGRSP).** The DGRSP staff is in charge of providing a young person's social report and when there is the option for the imposition of a custodial measure in an educational centre in the open or semi-open regime, this report must include a psychological assessment, and in the cases of a closed regime, the young person psychological assessment in forensic context is mandatory.

If the offence is qualified as a crime punishable with a prison sentence of up to three years, and the MP did not conclude there is the need for education in the law, the case can be closed. In the light of the evidence of the facts, an essential pre-condition for verifying the educational needs, if the MP considers it would be necessary to enforce an educational measure, the jurisdictional stage will follow the investigation. A similar situation happens in all the cases where the offence is qualified as a crime punishable with a prison sentence of more than three years, even when the MP does not consider it to be necessary to apply such order. **After the MP requests to open the jurisdictional stage (Article 86), the judge may dismiss the process in those cases where he/she evaluates the MP's proposal of educational measures as unnecessary.**

The imposition of preliminary measures or of the dismissal of the case requires a prior hearing with the parents. **The Portuguese legislation emphasizes the involvement of parents or the legal guardians in each stage of the youth justice proceedings, court trial and even during the enforcement of the judicial measures.** The young person could also be assisted by an expert in psychiatry or in psychology whenever required for the purpose of assessing the need to apply any educational measure.

The trial audience in the jurisdictional stage can take one of three forms. It could be an informal and short session intended to obtain the young person's agreement concerning the order proposed by the MP in which the judge also agrees or a similar type of session in search for the consensus of the MP regarding an order proposed by the judge. A formal and more complex session with a preliminary audience could be carried out, in which the contradictory procedure of proof is guaranteed prior to the judge's decision. Whenever the MP requests the application of liberty-depriving measures, a formal audience is required.

The educational measures are ordered by a specialized judge, and for the application of a liberty depriving measure is required a panel of three judges, composed by one professional and two social specialized judges (lay judges) (Article 30)**.** In all of the cases, the procedural initiative rests with the public prosecution services.

A formal juvenile audience is public, but the law allows the judge to limit or even exclude the publicity concerning it based on certain limited grounds, such as when is considered that the presence of the public might psychologically affect the young person. **The court's final decision must be always read at public sittings. Each juvenile judicial file is confidential until the court order scheduling a trial; even after, the publicity of the case must respect the young person´s personality and privacy, preserving, as much as possible, his/her identity** (Article 41). According to the law, the judge can determine the media must refrain from narrating or reproducing certain acts or documents of the case file, or disclosing the juvenile offender identity.

A young person can be diverting from a trial in specific cases. Based on the principle of opportunity, if the committed offence by a young person corresponds to a crime punishable with a prison sentence of less than five years, the process may be suspended by the public prosecutor, and instead, a juvenile offender's conduct plan can be executed (Article 84). It is a way of promoting a consensual solution in the cases of minor offences involving both the young person and his/her parents or the legal guardians. **The suspension of the process can take up to a maximum of one year.** In developing and implementing the plan, the young person, his/her parents or the legal representatives or legal guardians may seek the assistance of mediation services. **The conduct plan may require the young person to engage in one or more restorative actions**.

Rules and procedures of interconnection between the protective and educational interventions support the enforcement of promotion and protection measure instead an educational measure for specific cases. In the case of minor offences, and when the young person is in a danger situation, diversion could be used and protection measures can be applied by the local Children and Youth's Protection Commissions (Article 81 of the LPCJP and Article 43º of the LTE).

A major improvement brought up by the Children and Youth Justice Reform regarding youth offending has been the introduction of the young person **defence lawyer, in all the judicial proceedings in which is required his/her participation** (Article 46). The mandatory constitution of assistance by defence lawyer finds its rationale in the need to ensure the effective protection of the child's rights. The young person has the right to constitute or to request the nomination of a defence lawyer, and this right could be exercised by him/her or by the parents or legal guardians. If he/she or the parents or legal guardians cannot afford it, the judge decides to appoint one that will exercise free of charge.

The right to assistance by a defence lawyer must give legal expression to the young person's point of view. Since the first contact with the police, the young person must be assisted by a defence lawyer whose action is extended to all the proceedings and stages of the process in which he/she is participating. It is compulsory for a young person to be assisted by a defence lawyer in the first interrogation when detained, and also in any hearing during the investigation stage and on the trial. When arrested, he/she could communicate in private with the defence lawyer.

The police can only take the responsibility of identifying the juvenile and presenting him/her for interrogation led by the public prosecutor. A young person alleged suspected of having committed a fact qualified by the penal law as crime, cannot remain more than three hours in a police station for purposes of identification. When present at the young person's first interrogation, the parents, legal representative or legal guardians must refrain from any interference.

At any time of the proceeding, the young person has the right to contact in private with the judge**,** with the public prosecutor and **his/her** defence lawyer. It is also required the assistance of the defence lawyer in the cases of revision of the pre-trial detention measure and in the preliminary hearings. The defence lawyer must guarantee assistance to the young person in every stage of custody by analysing the need to apply a liberty-depriving measure, and if the terms of how it is being be applied respect the CRC.

The needs of those placed in custody are not restricted to the intervention of a defence lawyer and all the necessary individual assistance – social, educational, vocational, psychological, medical and physical - during placement in the institution is fully considered by the Portuguese legislation. **In the view of his/her age, sex and personality, the young person might require other specific or more relevant assistance while being subject to liberty depriving measures.**

As highlighted in national and international documents, the existence of independent mechanisms and structures responsible for the inspection, **the supervision and the evaluation of the youth justice system,** is crucial to promote a child-friendly justice. The Portuguese law (LTE), in its Article 209, establishes the constitution of **an independent Commission for the Supervision of the Educational**

Centres *("Comissão de Fiscalização dos Centros Educativos, CESC").* Not only educational centres are supervised and monitored by the court judges, public's prosecutors, and through the visits carried out by families or other entities related to this field, the law states the deprivation of liberty of a young person and the centre's activities should be especially followed and evaluated by an independent commission. The CESC includes two representatives of the Portuguese Assembly of Republic (Parliament), one representative of the Government, one representative of the Superior Council for the Judiciary ("Conselho Superior da Magistratura"), one representative of the Superior Council of Public Prosecution ("Conselho Superior do Ministério Público"), and two representatives of non-governmental children's organizations. This independent commission may request information about the centres and visit them, at any time its members considerer it necessary, in accordance to the law, which grants them free access. Major reports have been produced and made publicly available by the CESC in recent years, the last one in November 2021.

In Portugal there are no specialized police units regarding youth justice. Since 1992, there has been a specialized police program named *Safe School Program* (*Programa Escola Segura*), which is focused on violence in and around schools, including cybercrime involving minors as victims or aggressors[20]. This program is a joint initiative of the Ministry of Internal Affairs, which corresponds to Ministry of Home Affairs in other EU countries, and the Ministry of Education and Science, covering state and private schools, violence within and outside the physical grounds of the school, from pre-school and primary school to university. One of main activities are the *Group Awareness Actions with the School Community* organized and promoted by members of the police forces. Among those, are included the themes of cyberbullying, sexual offences, human trafficking, safe use of digital technologies.

Case Law:

1) ***Acórdão do Tribunal da Relação de Lisboa*** (Decision of the Court of Appeal of Lisboa)[21]

Judge Rapporteur: Carlos Benido Date of Agreement: 30-06-2011 Vote: Unanimity

Procedural Means: Criminal Appeal. National Legislation: LTE

Summary: "I The admission of statements for future memory, in the case provided for in paragraph 2 of article 271, of the Criminal Procedure Code, aims to protect the minor victim of a crime against sexual freedom and self-determination, sparing him/her the trauma of reliving time and time again the events and embarrassment inherent in the solemnity and formalism of a trial hearing; II - That rule, by virtue of art.128, nº1, of the LTE, is subsidiarily applicable to the educational guardianship inquiry, and the underage victim must be heard by the judge at this procedural stage."

2) ***Acórdão do Tribunal da Relação de Coimbra*** (Decision of the Court of Appeal of Coimbra).[22]

Judge Rapporteur: Alice Santos Date of Agreement: 07-03-2007 Vote: Unanimity

Procedural Means: Criminal Appeal. National Legislation: LTE

Summary: "I- It is not enough for a minor under the age of 16 to commit an act qualified by criminal law as a crime for a protective educational LTE measure to be applied. The time of application of the

[20] More information available at https://www.psp.pt/Pages/atividades/programa-escola-segura.aspx
[21] Available at: http://www.dgsi.pt/jtrl.nsf/e6e1f17fa82712ff80257583004e3ddc/3f7dd1ddf61043f3802578d20056073d?OpenDocument
[22] Available at: Acórdão do Tribunal da Relação de Coimbra (dgsi.pt)

measure is required. II- The judge cannot fail to receive the request for opening the judicial phase of the process if the facts are punishable with a maximum prison sentence of more than three years."

3) ***Acórdão do Tribunal da Relação de Lisboa*** (Decision of the Court of Appeal of Lisboa)[23]

Judge Rapporteur: Adelina Barradas de Oliveira. Date: 25-09-2019. Vote: Unanimity

Procedural Means: Criminal Appeal. National Legislation: LTE

Summary: "The measure of placement in an Educational Centre is the last and the most serious of the educational tutelary measures for the autonomy of decision and conduct of life of the minor. In choosing the applicable LTE measure, the court gives preference, among those that prove to be adequate and sufficient, to the extent that it represents less intervention in the minor's decision-making and life-guidance autonomy and that is likely to obtain greater adherence and the adhesion of their parents, legal representative or person who has their custody. The choice of the applicable LTE measure is guided by the interests of the minor. It is not by pushing young people into communities of young people with equal behaviours that we will be able to change them. To take them out of the only nucleus that still, despite everything, offers them security is to destructure them."

4) ***Acórdão do Tribunal da Relação de Guimarães*** (Decision of the Court of Appeal of Guimarães)[24]

Judge Rapporteur: Cruz Bucho. Date: 17-09-2007. Vote: Unanimity

Procedural Means: Criminal Appeal. National Legislation: LTE

Summary: "I – The decision to apply to a minor under the age of 13 at the date of application of the measure, a LTE tutelary measure of internment in an educational centre in a closed regime, violates the provisions of article 17, paragraph 4, b) of Law 166/99, of October 14th. II – Indeed, in article 17, n.º. 4, al. b) of the LTE, it is established as a requirement for the application of the internment measure, that the minor must be over 14 years old on the date of application of the measure, so it is irrelevant that the minor in question completed 14 years of age in 4 days. III – Referring to the fixing of that age, the 14 years, to at least five different moments - date of the practice of the facts; date of initiation of the process; date of application of the measure; date of transit *in rem judicatam* of the decision that applied the measure and date of the beginning of the implementation of the measure -, the legislator clearly adopted the third of the mentioned criteria: the date of application of the measure."

5) ***Acórdão do Tribunal da Relação do Porto*** (Decision of the Court of Appeal of Porto)[25]

Judge Rapporteur: Maria Ermelinda Carneiro. Date: 29-04-2020. Vote: Unanimity

Procedural Means: Criminal Appeal. National Legislation: LTE

Summary: "I – The penal justice model for minors between the ages of 12 and 16 gives rise to the application of a guardianship educational measure (LTE) and its scope is education for the law. II – The LTE intervention is not, therefore, retroactive, but prospective or educational, with the aim of being an accountability law, not punitive, intending to lead young people to internalize the idea that society does not allow behaviours that violate their values. III – Therefore, the criterion for the application of the

[23] Available at: Acórdão do Tribunal da Relação de Lisboa (dgsi.pt)
[24] Available at: Acórdão do Tribunal da Relação de Guimarães (dgsi.pt)
[25] Available at: Acórdão do Tribunal da Relação do Porto (dgsi.pt)

educational guardianship measure is always the interest of the young person, aiming at the correction of his personality, manifested at the moment of the decision, and the concrete gravity of the illicit act committed. IV – The pre-trial measure of custody in an educational centre is not equivalent to preventive detention and may even be applicable in a semi-open regime. V – The regime provided for in the measure of carrying out tasks in favour of the community is not equivalent to the provision of work in favour of the community provided for in the Penal Code, a diploma that has no application, even by remission, in an educational tutelary seat, so here it is not acceptance of the condemned is required. VI – In the application of LTE measures, the principle of adequacy and sufficiency of the measure must be taken into account."

6) ***Acórdão do Tribunal da Relação de Évora*** (Decision of the Court of Appeal of Évora)[26]

Judge Rapporteur: Maria Isabel Duarte. Date: 06-18-2013. Vote: Unanimity

Procedural Means: Criminal Appeal. National Legislation: LTE

Summary: "The application of an LTE educational guardianship measure is only legitimate provided that the following assumptions are cumulatively verified: the minor commits an unlawful act typified in criminal law as a crime; need to correct his personality in terms of the legal duty to be manifested in the practice of the fact; that this need subsists at the time of the decision to apply the measure."

7) ***Acórdão do Tribunal da Relação do Porto*** (Decision of the Court of Appeal of Porto)[27]

Judge Rapporteur: Elsa Paixão Date of Agreement: 22-05-2013 Vote: Unanimity

Procedural Means: Criminal Appeal. National Legislation: LTE

Summary: I - The LTE intervention of the State in relation to young people is justified when "a deviant situation has manifested itself that makes clear the rupture with nuclear elements of the legal order", legitimizing the State to educate young people to the law, even against the will of those invested with parental responsibilities. II - The following are presuppositions of the educational tutelage intervention: - The existence of an offense to fundamental legal interests translated into the practice of a fact considered by law as a crime; - The demand on young people to respect the legal and criminal provisions essential to the normality of life in the community, conforming to their personality in a socially responsible way - need to be educated for the law; The minimum age of 12 years, making the onset of puberty coincide with the threshold of maturity required for understanding the meaning of educational tutelary intervention. III - And it is still necessary that the need for correction subsists at the time of the decision. IV - As with penalties, any retributive purpose is excluded: tutelary measures are not a punishment, an expiation or compensation for the evil of the crime (*punitur quia peccatum est*), but aim to ensure that the development of the minor "occurs in a harmoniously and socially integrated and responsible, having as reference the legal duty embodied in the values legally protected by the criminal law, as minimum and essential values of social coexistence." V – Similar to what happens in criminal proceedings, in which the judge's primary task is to choose the penalty to be applied, also in the tutelary process the judge must begin by considering and deciding which is the most appropriate tutelary measure, the one that best serves the interest of the minor, giving preference to the one that adequately and sufficiently fulfills the purpose underlying its application, that is, the socialization of the minor. VI - In determining the specific dosimetry of the measure to be applied, it is important to observe the criteria of proportionality and the need for correction of the minor's personality manifested in the practice of the

[26] Available at: Acórdão do Tribunal da Relação de Évora (dgsi.pt)
[27] Available at: Acórdão do Tribunal da Relação do Porto (dgsi.pt)

fact and that subsists at the time of the decision. VII - In setting the duration of the measure specifically applied, the court must take into account the seriousness of the act committed, the need for correction of the minor's personality, manifested in the practice of the act, and the actuality of this need for correction. VIII - The Court shall give preference, among the measures that prove to be adequate and sufficient, to the extent that it represents the least intervention in the young person's decision-making and life-guidance autonomy and that is likely to obtain greater adherence and the adherence of the parents, legal representative or person who has de facto custody. IX - The choice of the applicable LTE measure is guided by the interest of the young person (marked by the protection of their fundamental rights, thus requiring compliance within the scope of the educational tutelary process of the principles of legality, typicality, officiality, obtaining material, contradictory, free assessment of evidence and procedural celerity). X - The LTE measure, always of a fixed duration, must be proportionate to the seriousness of the fact and to the youth's need for education in the law, manifested in the practice of the fact and subsisting at the time of the decision.

8) ***Acórdão do Tribunal da Relação de Lisboa*** (Decision of the Court of Appeal of Lisboa)*1*.

Judge Rapporteur: Maria Isabel Duarte Date of Agreement: 31-03-2004 Vote: Unanimity

Procedural Means: Criminal Appeal. National Legislation: LTE

Summary: "The choice of educational tutelary measure (LTE) has as its criterion the principle of adequacy and sufficiency, giving preference to the one that best contributes to the minor being educated for the law and inserting himself in a dignified and responsible way into life in society."

Known issues of application *(most of these issues are transversal to the youth justice, so common to answers from Question 3.7 to Question 3.14)*

- The categorization/classification of a child/young people's online behaviour as criminal offence, and its distinction from what may be an acceptable conduct, even if rude or impolite, often linked to the child/young people development, is a difficulty mentioned by most of the judicial intervenient and, at the same time, is an understudied issue in Portugal;
- Some of the preliminary findings of the author's research project '*Youth Offending in the Juvenile and Criminal Justice Systems in Portuga*l', with the support of a FCT Post-Doctorate Individual Grant (URL), clearly point out the emergence of registered cyber-delinquency within the youth justice proceedings entering the Portuguese Courts in the last years. As a result: (i) (new) practices and profiles of young people under a LTE measure or entering for LTE enquiry stage have emerged; (ii) there is a growing complexity of criminal investigation and profiling of children and young people coming into contact with the youth justice system when ICT are involved that requires an intersection between the Family and Children and the Criminal jurisdictions as international cooperation services; (iii) the reconfiguration of the relationships between online victims and online aggressors (and the constant exchanges of roles identified in some proceedings); (iv) the inadequacy of the current evaluation model and evaluation tools from DGRSP to address the role of ICT and online risks/opportunities in each child/young people life; (iv) the growing awareness of magistrates (judges and prosecutors) on the new challenges the ICT and digital environments place to the judicial decision and their need of continuous training on these matters; (v) the challenges crossing deprivation of liberty, 'education in the law' and digital citizenship; (vi) the lack of data specifically targeting cybercrime involving minors as victims and as aggressors (*A first exploratory paper discusses some of this findings, see*: Carvalho, M. J. L. D. (2021). Youth Justice, 'Education in the Law' and the (In)Visibility of Digital Citizenship. In M. J. Brites, & T. S. Castro (Eds*.), Digital*

citizenship, literacies and contexts of inequalities (pp. 67-78). Edições Universitárias Lusófonas URL);

- The importance of promoting digital citizenship within youth justice custodial institutions (see M. J. Brites, & T. S. Castro (Eds.*), Digital citizenship, literacies and contexts of inequalities* (pp. 67-78). Edições Universitárias Lusófonas (URL);
- The overrepresentation of the so-called "crossover youth" (those who cross the double condition of victim and aggressor) in youth justice population subject to LTE measures, particularly among those placed in educational centres (liberty-depriving measures);
- Insufficient coordination among different levels of interventions and systems (health, child protection services, education), in order to boost the quality of the existing (and limited) responses, is felt in a particular way the mental health cases and where is the need of juxtaposed LPCJ and LTE measures;
- The enforcement of non-institutional educational measures still presents a significant number of challenges and basic needs. The involvement of more service and providers in general, including NGOs, and increased proactive cooperation between services/ professionals, following a teamwork format, are two of the most important needs;
- Since 2012, the auxiliary body of the judiciary administration concerning the enforcement of youth justice measures is the Directorate General of Reintegration and Prison's Services (DGRSP), which could be regarded as quite contradictory when taking into consideration the non-penal nature of the country's youth justice system;
- The continuous lack of human, material and financial resources allocated to the youth justice system, particularly at the DGRSP, that has the task of providing the support to Courts;
- DGRPS still lacks updated technological and ICT tools and it is one of the justice departments at national level with more constraints in this field.
- The knowledge on the Portuguese youth justice system is serious affected by the lack of essential data concerning the enforcement of LTE measures, which means it is difficult to have a complete and reliable portrait of the social and judicial reality of youth offending in the country.
- One of the most important obstacles to having a more effective youth justice, which is not restricted to this jurisdiction but could be regarded as tendency in many other areas of the Portuguese society, is the lack of a community and prevention culture intervention.
- The 16 and 17 years-old are subject to the criminal justice system and in case of liberty-depriving measures they could end up placed in adult prisons since there is only a specialized prison for young adults in the country.

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?

Answer:

According to Council of Ministers Resolution 92/2019 on the Portuguese National Cybersecurity Strategy 2019–2023: cybercrime "corresponds to the facts consistent with crimes typified in the Cybercrime Law [Law no. 109/2009, of 15 September, Approves the Cybercrime Law, transposing to the national legal order Council Framework Decision 2005/222/JHA, of 24 February, on attacks against information systems, and adapts to national law the Convention on Cybercrime of the Council of

Europe[28]] and with other criminal offences committed using technological means, in which these means are essential to the execution of the crime in question."

There are no specific rules or a specific policy that deals with cybercrime by minors as a special topic.

All the facts qualified by the penal law committed by minors between the age of 12 and 16 years, including those corresponding to cybercrime, are addressed within the youth justice jurisdiction through the enforcement of the LTE, as described in Question 3.5. So, a minor may be prosecuted for cybercrime in practice, but just within/under a youth justice procedure (LTE) that follows all the principles, rules and procedures described in our answer to Question 3.5.

For minors up to 12 years-old, there is no possibility of being prosecuted for any sort of criminal offence, including cybercrime, and only protective measures may ben enforced by the Courts or the local Commissions for the Protection of Children and Youth, as explained in our answer to question 3.5.

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?

Answer:

A minor (under the age of 16 years-old) cannot be prosecuted and sentenced for a behaviour that corresponds to online grooming in practice since Article 176-A of the CP establishes that only an adult perpetrator [aged 18 or over] can be prosecuted in such terms.

For minors up to 12 years-old, there is no possibility of being prosecuted for any sort of criminal offence, including cybercrime, and only protective measures may be enforced by the Courts or the local Commissions for the Protection of Children and Youth, as explained in our answer to question 5.

Question 8: 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?

Answer:

A minor (under the age of 16 years-old) may be prosecuted and sentenced for purely online behaviour with a sexual intent when other minors are the victim in practice, depending on age criteria foreseen by the Penal Code, but just within/under a youth justice procedure (LTE) that follows all the principles, rules and procedures described in our answer to Questions 3.5 and 3.6.

[28] Official Portuguese version published in D.R. number 179 (Serie I) of 15 September 2009: https://www.anacom.pt/render.jsp?contentId=985560]

For minors up to 12 years-old, there is no possibility of being prosecuted for any sort of criminal offence, including cybercrime, and only protective measures may be enforced by the Courts or the local Commissions for the Protection of Children and Youth, as explained in our answer to question 5.

Case Law

1) *Acórdão do Tribunal da Relação do Porto* 481/14.5JABRG.P1 (Decision of the Court of Appeal of Porto)[29]

Reporting Judge: Cravo Roxo. Date: 07-06-2017. Vote: Unanimity

Procedural Means: Criminal Appeal.

National Legislation: ART. 176th, n.º 1, al) c) and ART. 177.º of CP (child pornography)

Summary: "It integrates the crime of child pornography p.p. by article 176º nº 6 CP the receivement and storage of photos of a 14-year-old girl of various parts of her body without clothes sent by herself to a third party through Facebook, and who forwarded them to someone else who received and viewed them." In this case, the offender was 17 years-old at the time of the offence: "the degree of illegality is high, even for a 17-year-old, who should be able to consider the dangers of his conduct and the risks, both for himself, for the minor victim, and for his family."

2) *Acórdão do Tribunal da Relação de Évora* (Decision of the Court of Appeal of Évora)[30]

Reporting Judge: José Martins Simão Date: 25-10-2016. Vote: Unanimity

Procedural Means: Criminal Appeal.

National Legislation: ART. 177.º of CP (child pornography)

Summary: "I- Although the age limit of 14 years is normally understood as the border between childhood and adolescence, the truth is that, art. 176 of the Penal Code refers to minors, so it refers to all minors and not only those under 14 years of age, in line with the Convention on Cybercrime, adopted in Budapest on 23.11.2001, approved by the Resolution of the Assembly of the Republic nº 88/2009, ratified by Decree of the President of the Republic nº 91/2009 (in D.R. 1st Series of 15.09.2009), in which in its article 9, persons under 18 years of age are defined as minors deity. II – Pursuant to art. 2, al. c) Additional Protocol to the Convention on the Rights of the Child on Trafficking in Children, Child Prostitution and Pornography, 2002, child pornography is any representation, by any means, of a child in explicit, real or simulated sexual activities or any representation of the sexual parts."

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?

Answer:

[29] Available at: http://www.dgsi.pt/jtrp.nsf/56a6e7121657f91e80257cda00381fdf/cfe90a60bb8af75e8025814500357148?OpenDocument

[30] Available at: http://www.dgsi.pt/jtre.nsf/134973db04f39bf2802579bf005f080b/33c8b21cdcd8094a8025806c0039554a?OpenDocument

A minor (under the age of 16 years-old) may be prosecuted and sentenced for different behaviours that correspond to cyberbullying in practice (since cyberbullying does not exist as separate/autonomous type of crime, as described in Question 2.2), without there being a physical component to the crime, but just within/under a youth justice procedure (LTE) that follows all the principles, rules and procedures described in our answers to Questions 3.5 and 3.6. Those behaviours entitled as cyberstalking and cyber-harassment are related to certain types of crime established in the CP that provide the correspondent legal provisions to be use in youth justice.

For minors up to 12 years-old, there is no possibility of being prosecuted for any sort of criminal offence, including cybercrime, and only protective measures may be enforced by the Courts or the local Commissions for the Protection of Children and Youth, as explained in our answer to question 5.

This is a subject that is little portrayed by Portuguese doctrine and jurisprudence and does not have specific legislation on this type of phenomenon.

Specific known issues of application *(besides those mentioned in our answer to Question 3.5.):*

- There has been discussion, particularly among police officers, public prosecutors and judges, on issues related to the (in)existence of an autonomous type of crime of cyberbullying and if there is a need for making amendments to the current legal framework. Mains questions raised are focused (i) on debating if the current legal framework provide the proper and most suitable responses to this phenomena, in practice; (ii) if there is a gap on the judicial measures to act adequately and on time; (iii) if there are problems answers concerning the articulation, in simultaneously, of concurrent crimes; (iv) the needs for criminal investigation; and (v) the difficulties to distinguish what should be criminalized and considered a criminal offence and not.

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?

Answer:

See our answer to Question 2.3 concerning the inexistence of autonomous crime of wilful misinformation or deception online in Portugal.

A minor (under the age of 16 years-old) may be prosecuted and sentenced for behaviours that correspond, for instance, to pretending to be someone else when accessing other's webpages/online accounts and using them or by presenting false information online with the intention of defaming someone else, but just within/under a youth justice procedure (LTE) that follows all the principles, rules and procedures described in our answers to Question 3.5 and 3.6.

For minors up to 12 years-old, there is no possibility of being prosecuted for any sort of criminal offence, including cybercrime, and only protective measures may be enforced by the Courts or the local Commissions for the Protection of Children and Youth, as explained in our answer to question 3.5.

Case Law:

Acórdão do Tribunal da Relação de Guimarães (Decision of the Court of Appeal of Guimarães)[31]

Reporting Judge: António Condesso. Date: 18-03-2013. Vote: Unanimity

Procedural Means: Criminal Appeal.

Summary: "The creation, on a social network, of a profile in the name of another person, with the inclusion of user characteristics offensive to the honour and consideration of the "owner" of the profile, constitutes a crime of defamation."

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?

Answer:

A minor (under the age of 16 years-old) may be prosecuted and sentenced for different behaviours that correspond for online actions facilitating human trafficking (*which is not usual*), but just within/under a youth justice procedure (LTE) that follows all the principles, rules and procedures described in our answers to Questions 3.5 and 3.6.

For minors up to 12 years-old, there is no possibility of being prosecuted for any sort of criminal offence, including cybercrime, and only protective measures may be enforced by the Courts or the local Commissions for the Protection of Children and Youth, as explained in our answer to question 3.5.

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?

Answer:

A minor (under the age of 16 years-old) may be prosecuted and sentenced in practice for behaviour that corresponds to online piracy, but just within/under a youth justice proceeding (LTE) that follows all the principles, rules and procedures described in our answers to Question 3.5 and 3.6. This type of piracy involves several crimes, from illegitimate access to computer systems – in this case having access to a cable operator to access your signal to give to others –, to the crime of usurpation, as well as tax fraud, money laundering, among others.

For minors up to 12 years-old, there is no possibility of being prosecuted for any sort of criminal offence, including cybercrime, and only protective measures may be enforced by the Courts or the local Commissions for the Protection of Children and Youth, as explained in our answer to question 3.5.

The Cybercrime Law establishes in its Article 8 (Illegal reproduction of protected programmes), that "1 - Whoever illegally publicly reproduces, discloses or communicates a legally protected computer programme, shall be punishable by a term of imprisonment up to 3 years or by fine. 2 - The penalty provided for in paragraph 1 shall also apply to whoever reproduces the topography of a semiconductor

[31] Available at: http://www.dgsi.pt/jtrg.nsf/86c25a698e4e7cb7802579ec004d3832/bca3646374f13de780257b490051e991?OpenDocument

product or commercially operates or imports, for such purposes, topographies or semiconductor products manufactured on the basis of those topographies. 3 - The attempt to commit the established offences shall be punishable."

Under the Portuguese Code of Copyright and Related Rights (Law No. 45/85 of September 17, 1985, last amended by DL n.º 9/2021, de 29/01), crimes related to copyright are qualified as "public", meaning that they do not depend upon the making of a complaint by the injured party. The Portuguese legislator followed the guidelines of the Committee of Europe in relation to the meaning of reproduction. Thus, by reproduction is understood the simple loading of the program/software in question, in memory for its use. Illegal downloads and illegal copies correspond to the crimes of usurpation and counterfeiting, provided for in articles 195 and 196, respectively, of this Code. These crimes can be punished with a prison sentence of up to 3 years and a fine of 150 to 250 days, and negligence is also punished with a fine of 50 to 150 days. There is basis for criminal action for copyright infringement irrespective of intent or even commercial scale of the infringing act. There may also be civil liability, regardless of whether or not criminal proceedings take place.

In what concerns Case Law in his field, three main guidelines emerge: (i) that it is unlawful, in relation to a computer program that has been lawfully purchased, to reproduce it in a number greater than that provided for in the contract; (ii) that these type of crime does not require a profitable intention; and (iii) that its typical core elements (reproduction, dissemination and communication to the public) are not cumulative for this type of crime, being sufficient with only one of them.

According to a study by the European Union Intellectual Property Office (EUIPO, 2019),[32] Portuguese young people aged between 15 and 24 occupy the 4th place in the set of the EU 28 State Memders (at the time of the study).

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?

Answer:

A minor (under the age of 16 years-old) may be prosecuted and sentenced for acts of hacking in practice, but just within/under a youth justice procedure (LTE) that follows all the principles, rules, procedures and enforcement of educational measures described in our answers to Question 3.5 and 3.6.

The reference for starting one LTE proceeding with this type of charge lies on the definition of hacking established by the Portuguese Cybercrime Law in its Article 6 - illegitimate access:

"1 – Whoever, without legal permission or without being authorized by the owner, by another holder of the right of the system or part of it, in any way to access a computer system, is punished with imprisonment up to 1 year or with fine up to 120 days [*the penalties mentioned in this article are the ones applied to a person aged 16 years or over]*.
2 - The same penalty applies to anyone who illegitimately produces, sells, distributes or in any other way disseminates or introduces devices, programs, an executable set of instructions, a code or other computer data intended to produce the unauthorized actions described in one or more computer systems. in the previous number.

[32] Available at: https://euipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/observatory/documents/IP_youth_scoreboard_study_2019/IP_youth_scoreboard_study_2019_en.pdf

3 - The penalty is imprisonment for up to 2 years or a fine of up to 240 days if the actions described in the previous number are intended for access to obtain data registered, incorporated or relating to a payment card or any other device, tangible or intangible, that allow access to a system or means of payment.
4 - The penalty is imprisonment for up to 3 years or a fine if:
a) Access is achieved through breach of security rules; or
b) Through the access, the agent obtains registered data, incorporated or related to the payment card or any other device, tangible or intangible, that allows access to a system or means of payment.
5 - The penalty is imprisonment from 1 to 5 years when:
a) Through access, the agent has become aware of commercial or industrial secret or confidential data, protected by law; or
b) The benefit or equity advantage obtained is of considerably high value.
6 - The attempt is punishable, except in the cases provided for in paragraphs 2 and 3.
7 - In the cases provided for in paragraphs 1, 4 and 6, the criminal procedure depends on a complaint."

For minors up to 12 years-old, there is no possibility of being prosecuted for any sort of criminal offence, including cybercrime, and only protective measures may be enforced by the Courts or the local Commissions for the Protection of Children and Youth, as explained in our answer to question 3.5.

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?

Answer:

A minor (under the age of 16 years-old) may be prosecuted and sentenced for using Cybercrime as a Service (which is not usual), but just within/under a youth justice procedure (LTE) that follows all the principles, rules and procedures described in our answer to Question 3.5 and 3.6.

The intent of the action taken by the minor is always evaluated in correspondence to the principle of "education for the law", which means that the perception of the minor at the time of the fact (namely if he thinks it's a joke) will be dealt in relation to the broader understanding of the minor in all the areas and contexts under evaluation. As for any type of crime, for the Portuguese youth justice the proof of the facts of a criminal offence is indispensable to the lawsuit/proceeding, but merely by itself it is insufficient being also required the evaluation of the young offender's need for 'education in the law' (in which all these issues will be taken into consideration).

For minors up to 12 years-old, there is no possibility of being prosecuted for any sort of criminal offence, including cybercrime, and only protective measures may be enforced by the Courts or the local Commissions for the Protection of Children and Youth, as explained in our answer to question 3.5.

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

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?

Answer:

As an EU member state, Portugal is also part of several bilateral and multilateral agreements referring in general to criminal matters and extradition, consisting of mutual legal assistance and international cooperation, including with non Eu countries, such as Norway, Iceland, United States and Japan. Besides, due to its historical relations Portugal has also with the Portuguese-speaking African countries specific bilateral agreements with the Portuguese-speaking African countries focused on criminal matters and extradition.

The Portuguese Cybercrime Law (Law No. 109/2009 of 15 September) defines, in its article 20, the scope of international cooperation of competent national authorities with competent foreign authorities for the purposes of investigations or proceedings concerning criminal offences related to computer systems and data, or for the collection of electronic evidence of a criminal offence, according to rules on transfer of personal data provided for in Law number 67/98, of 26 October.

To better understand international cooperation within cybercrime matters, it is important to identify the main competent authorities in Portugal:

1) **Public Prosecution Service (MP):** at PGR there is a specialized Cybercrime Office, whose scope is to coordinate all the activities of the Public Prosecutor Service, nationwide. This Cybercrime Office works together with the Family, Children and Young People Office. In recent years (2019-2020), both Offices have implemented the Action Plan "Children and Crimes on the Internet" with the aim of improving the capacity of the MP to deal with the phenomena that occur with the use of communications networks, when they have a criminal nature, or are practiced by young people aged between 12 and 16 years or, in any case, victimize children and young people. Seminars, workshops, training courses in all judicial districts, aimed at Prosecutors of the DIAP and of the jurisdiction of family and children, on the criminal phenomena and investigative techniques on the networks, organization of a roadmap of good practice and research and a set of thematic studies were the main outputs.
   The legal competence to begin and direct criminal investigations belongs to the MP with the technical support from police. It is also a competence from the MP to send and to receive international cooperation requests.

2) **Law enforcement services** in Portugal are provided by different bodies. Recent APAV Report's on the ROAR Project (2019), confirms the organisation of criminal investigation towards cybercrime in Portugal: "Polícia Judiciária has the sole competence to investigate *stricto sensu* cybercrimes, whilst the other police forces (GNR, PSP and other) have the competency to investigate crimes committed through computer means." [33]:

   Polícia Judiciária (PJ) – national criminal investigation police, from the Ministry of Justice: prevention, detection and investigation of violent, organized and financial crime; terrorism; international police cooperation; forensic services; police training (LOIC – Law No. 49/2008 27 August). Since 2017, PJ has a National Directorate unit on cybercrime based in Lisbon

[33] *Policy Paper: challenges in the field of cybercrime and recommendations to overcome them* (APAV, 2019), available at: https://apav.pt/publiproj/images/publicacoes/ROAR_Policy_Paper.pdf

(National Unit to Combat Cybercrime and Technological Crime, abbreviated by the acronym UNC3T). PJ has specific competence to urgent measures regarding expedited preservation of traffic data and to urgent searches and seizure of data. Regarding the rest, depends on the authorisation of the Prosecutor (and sometimes, the Prosecutor will need an authorisation from a Judge).
Complying with Article 35 of the Budapest Convention, for international cooperation purposes, in order to ensure the provision of immediate assistance for the purposes referred to in the preceding article,since 2009 the PJ guarantees the maintenance of a structure ensuring **a point of contact** available on a twenty-four hour, seven-day-a-week basis (article 21 of the Portuguese Cybercrime Law, *International cooperation permanent point of contact*). The same functionality is also used for the G8 network purposes and also for the Interpol Network.

Serviço de Estrangeiros e Fronteiras (SEF) - Foreigners and Borders Agency (Ministry of Internal Affairs): The SEF investigates criminal offenses relating to trafficking of persons, facilitation of illegal migration, counterfeiting, white marriages (suspected/false marriages), as well as other related crimes. It also supports decision-making in the field of asylum applications and Portuguese nationality, by analyzing each case and issuing an opinion. At an international level, the Aliens and Borders Service is the national point of contact within the scope of Frontex. The SEF also represents the country at meetings within Europol, on matters of illegal immigration and trafficking in human beings, as well as within the scope of various EU working groups. This Service has several databases and has several information technologies projects in progress. **To address trafficking of human beings**, "SEF and PJ assume national representation in the European Multidisciplinary Platform against Criminal Threats – EMPACT. They actively participate in the project and contributed decisively to intensifying the Portuguese presence in this forum within the scope of the Operational Action Plan (OAP). From 2019, the EMPACT strategic objectives defined in the area of combating trafficking in persons focused on various operational activities, in which SEF participated on behalf of Portugal under the coordination of the UATP (Anti-Trafficking in Persons Unit)."[34]

Guarda Nacional Republicana (GNR) - National Gendarmerie.

Polícia de Segurança Publica (PSP) - Public Security Police.

Autoridade Tributária (AT) - Customs and Tax Authority.

3) **Comissão Nacional de Proteção de Dados** (CNPD) is the national data protection authority. Data protection is addressed by Law 58/2019 of August 8, which regulates the enforcement of the EU General Data Protection Regulation (2016/679) (GDPR) in Portugal.
4) **Centro Nacional de Cibersegurança (CNCS)** is the specialised Portuguese national authority (establisehd in 2012) entrusted with specific powers for enforcement and organised as a single point of contact for cybersecurity matters.
5) The telecom companies' activities are submitted to the regulation of **ANACOM – National Authority for Telecommunications.**

In a recent article, Pedro Verdelho (2019),[35] Head of the Cybercrime Office at PGR, summarizes two of key points from the Portuguese Cybercrime Law concerning the implementation of international cooperation through/by Portuguese competent authorities in this field:

[34] As presented at: https://ec.europa.eu/home-affairs/policies/internal-security/organised-crime-and-human-trafficking/together-against-trafficking-human-beings/eu-countries/portugal_en#cross-border-cooperation-to-address-trafficking-in-human-beings
[35] Verdelho, P. (2019). Obtaining digital evidence in the global world.*UNIO – EU Law Journal*, 5(2), 136-145. https://doi.org/10.21814/unio.5.2.2298

- "besides the general cases,[36] the Portuguese criminal law is still applicable to facts; (a) practised by Portuguese citizens, if no other law is applicable; (b) committed for the benefit of legal entities established in the Portuguese territory; (c) acts physically committed in Portuguese territory, even if they relate to computer systems located outside that territory; and (d) facts related to computer systems located in the Portuguese territory, regardless of where these facts are physically practiced" (article 27, n.º 1 - *Territorial application of Portuguese criminal law and jurisdiction of Portuguese courts*[37]);
- "Portugal authorizes its criminal justice authorities to act virtually outside the borders of the country, while allowing the authorities of other States (third countries) to act virtually on servers physically located in Portugal, in view of obtaining evidence" (Article 25 - *Trans-border access to stored computer data where publicly available or with consent* [38]).

Moreover, Pedro Verdelho (2019, p. 141)) calls the attention for the provision of Article 15 ("probably, the most interesting and innovative procedural approach of the Cybercrime Law regards the extension of computer searches), which set the guidelines for the for extraterritorial application in the context of cross-border computer searches:

- "Criminal justice authorities are allowed to access a remote computer system, departing from a local computer system, if during a lawful search to this last, they find out that from this particular computer system it is legitimately permitted to access the remote system",
- "Article 15 of the Cybercrime Law[39] provides for the search for computer data, an expression that the law adopted for what could also be referred to as computer search. Basically, the

[36] "In general, the Portuguese criminal law applies, as occurs in many other States, to national citizens and to facts occurring on the national territory." (Verdelho, 2019, p.140)

[37] "N.º 2 - Where on the basis of the applicability of the Portuguese criminal law, both Portuguese courts and courts of another Member State of the European Union claim jurisdiction over a criminal offence established in accordance with this Law, and both courts may start or continue prosecution on the basis of the same facts, the competent judicial authority shall resort to bodies and mechanisms established within the European Union to facilitate cooperation between judicial authorities of Member States and coordination of respective actions, with a view to deciding which of the two States will start or continue prosecution against infringers, in order to centralise prosecution within only one of them.
3 - The decision to accept or to transfer jurisdiction shall be taken by the competent judicial authority, taking into consideration, in turn, the following elements: a) The place where the infringement was committed;
b) The nationality of the infringer; c) The place where the infringer was found.
4 - To criminal offences provided for herein shall apply general rules on court jurisdiction provided for in the Criminal Procedure Code.
5 - Where there is any doubt concerning court jurisdiction, namely where the place where the infringer acted does not correspond to the site of installation of the computer system concerned, jurisdiction shall lie with the court where facts were first reported." (Article 27)

[38] "Competent foreign authorities, without the prior authorisation of Portuguese authorities, according to rules on transfer of personal data provided for in Law number 67/98, of 26 October, are entitled to: a) Access computer data stored in a computer system located in Portugal, where publicly available; b) Receive or access, through a computer system in their territory, stored computer data located in Portugal, by means of a lawful and voluntary consent of the person who has the lawful authority to disclose the data." (Article 25).

[39] "1 - Where, in the course of proceedings, the collection of evidence, necessary to uncover the truth, requires that specified computer data, stored in a specific computer system, are obtained, the competent judicial authority shall authorize or order the search to that computer system, overseeing such investigations whenever possible.
2 - The order provided for in the preceding paragraph shall be valid for a maximum period of 30 days, on pain of being deemed null and void.
3 - Criminal police bodies shall undertake the search, without a prior authorization from the judicial authority: a) Where whoever holds or controls data under consideration voluntarily consents to the search, insofar as the consent is documented in any way; b) In cases of terrorism, violent or highly-organized crimes, or where there is evidence to substantiate the imminent commission of a criminal offence threatening the life or integrity of any person.
4 - Where criminal police bodies undertake the search pursuant to the preceding paragraph: a) In the situation provided for in point b), the investigation shall be promptly communicated to the competent judicial authority, and assessed by the latter as far as the validation of the measure is concerned, on pain of being deemed null and void;

provisions of the article have the common aim of adapting to the digital environment and to computer systems' classic procedural measure of search. Thus, this procedural tool, described in Article 15 of the Cybercrime Law, is a form of coercive access to a computer system. To this end, the rules for the execution of the searches, provided for in the Code of Criminal Procedure also apply to computer searches, unless expressly provided for and *mutatis mutandis*, according to Article 15, paragraph 6 of the Cybercrime Law. The same would already be inferred from the rules on paragraphs 2 to 4, which contain substantive provisions of the same nature as the correspondent rules on searches, within the Code of Criminal Procedure;

- The provision of Article 15, paragraph 5, is clearly inspired by Article 19, paragraph 2 of the Budapest Convention, which already provides for extension of searches when, during a search, there are grounds to believe that the data sought is stored in another computer system."

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)?

Answer:

In Budapest, on the 23rd November 2001, Portugal signed the Council of Europe Convention on Cybercrime, which was later ratified, with reservations (with regard to extradition matters), only on the 15th September 2009, through Resolution of the Portuguese Assembly of the Republic nº 88/2009 and the Decree of the President of the Republic No. 91/2009.

Since then, Portugal is a party to the **Budapest Convention on Cybercrime of the Council of Europe** (CETS 185) and implemented its provisions in their criminal codes. The Budapest Convention serves as a guideline for developing national legislation against cybercrime and as a framework for international cooperation between Portugal and other state parties.

Law n.º 109/2009, of 15 September, approves the Cybercrime Law, transposing to the national legal order Council Framework Decision 2005/222/JHA, of 24 February, on attacks against information systems, and adapts to national law the Convention on Cybercrime of the Council of Europe.

Other relevant legal instruments and legal provisions related to cybercrime are (APAV, 2019)[40]:

- **Law n.º 59/2019**,[41] of 8th of August, transposed Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016, establishing rules on the protection of individuals with regard to the processing of personal data and on the free circulation of that data. It approves the rules on the processing of personal data by the competent authorities for the purpose of preventing, detecting, investigating or prosecuting criminal offenses or executing criminal sanctions establishes the rules Especially important is the prohibition of profiling conducive to discrimination, on the basis of sensitive data, which is laid down on art. º 6 / 2 in conjunction with art.º 11.

b) In any other situation, the report provided for in article 253 of the Criminal Procedure Code shall be drawn up and submitted to the competent judicial authority.
5 - Where, in the course of the search, there are grounds to believe that the data sought is stored in another computer system or part of it, and such data is lawfully accessible from the initial system, the search may be extended to the other system, by means of an authorization or order from the competent authority, pursuant to paragraphs 1 and 2.6 – To the search referred to herein shall apply, duly adapted, the rules on execution of searches provided for in the Criminal Procedure Code and in the Journalists Statute." (Article 15 - Search of computer data).

[40] *Policy Paper: challenges in the field of cybercrime and recommendations to overcome them* (APAV, 2019), available at: https://apav.pt/publiproj/images/publicacoes/ROAR_Policy_Paper.pdf

[41] Available at: https://www.cnpd.pt/home/legis/nacional/Lei_59_2019.pdf and Law No. 58/2019

- **Law n.º 46/2018,** of 13th of August 13th, along with Council of Ministers Resolution 92/2019, set out the cybersecurity legal framework and Portugal's strategy on cybersecurity 2019-2023, respectively. It establishes the minimum standards for procedures of cybersecurity and reporting obligations to all levels of governmental and public institutions, critical infrastructures service providers, essential service providers and digital service providers besides setting up the Superior Council for Cybersecurity (a consultive body to the Prime-Minister and the utmost authority in the country for cybersecurity matters) and the CERT.PT (computer emergency response team).
- **Law n.º 32/2008,** of 7th of July, known as the Data Retention Law,[42] transposed Directive 2006/24/EC and has put forward an obligation for electronic communications services or public communications networks to preserve and retain traffic data for a period of one year for the purposes of investigation, detection and repression of serious crimes (article 6). Recent appreciation from the Constitutional Court (April 2022) has declared the unconstitutionality of this law (*for more information see at the end of the this answer, "known issues of application – Case Law"*).
- **Decree-Law n.º 7/2004,** of 7th of January transposed Directive 2000/31/EC and went further by setting out the obligation for information service providers to report illegal content upon obtaining such knowledge or awareness, as well as the obligation to comply with removal orders from the competent authorities and, in case of manifestly illegal content, the obligation to immediately block or remove it, in spite of being generally liberated from monitoring the information they transmit or store (art.ºs 13, 16 and 15, respectively).

The most relevant international instrument for the legal framework in child justice is the Convention on the Rights of the Child with its optional protocols, all ratified by the Portuguese State. Concerning the impacts on cybercrime involving minors, Portugal is Party/or adopted/transposed into national law (among others): (i) the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse of 25 October 2007 (Lanzarote Convention) in 2012; (ii) the two Directives on combatting child sexual exploitation and abuse and attacks against information systems (Directive 2011/93/EU of the European Parliament and of the Council on combatting the sexual abuse and sexual exploitation of children and child pornography, 13 December 2011), and Directive 2013/40/EU of the European Parliament and of the Council on attacks against information systems, August 2013, respectively); (iii) in August 2015, Portugal consolidated its legal framework in this field with the adoption of law n.º 103/2015, which transposed EU Directive 2011/93/UE on combating the sexual abuse and sexual exploitation of children and child pornography into its domestic legislation; (iv) also, the Committee of Ministers Recommendation CM/Rec(2014)6 to Member States on the Human Rights Guide for Internet Users (Adopted by the Committee of Ministers on 16 April 2014 at the 1197th meeting of the Delegates of Ministers).

Portugal joined the Global Alliance against Child Sexual Abuse online, launched in Brussels in 2012, thereby accepting the commitment to undertake actions in this field.

Know issues of application – Case Law*:*

Recently, on 19th of April 2022, following the request of the Ombudsperson for the appreciation of the constitutionality of Portuguese data retention law,[43] the Portuguese Constitutional Court declared the unconstitutionality of this law (*ACÓRDÃO N.º 268/2022*),[44] with retroactive effect. This law transposed EU Directive 2006/24/CE, of 15 March, into the domestic legal order, on the conservation of data generated or processed in the context of the provision of publicly available electronic communications

[42] Available at: http://dre.pt/pdf1sdip/2008/07/13700/0445404458.PDF
[43] Law n.º 32/2008, of 17th July,
[44] Available at: https://www.tribunalconstitucional.pt/tc/acordaos/20220268.html

services or public communications networks, which was declared invalid by the Court of Justice of the European Union (CJEU) in 2014 (Digital Rights Ireland Lts and other, C-293/12 and C-594/12), and subsequent case law.

The Portuguese Constitutional Court confirmed its decision not only drawing on the previous CJEU decision, but on relevant norms of the Portuguese Constitution and also on GDPR provisions.

The main consequence of this decision is that it did not say whether the collection of metadata would only be prohibited for the future, after the judgment was known; this decision as retroactive effects. As a result, it applies to both the future and the past, affecting all cases since 2008, when the law came into force. This means that without being able to turn to metadata as evidence, many of the criminal investigations and prosecutions in progress can go down and previous convictions based on metadata may be invalidated.

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.)?

Answer:

In Portugal, international cooperation in cybercrime (regulation and practice) does not distinguish youth justice segments from others: everything is treated in a similar way and grounded on the same legal framework for international cooperation.

Portugal is a Party to the Budapest Convention and is also Party to a number of international binding instruments regarding cooperation in criminal matters, such is the case: (i) The European Convention on Mutual Assistance in Criminal Matters of the Council of Europe (the 1959 Convention) and its First and Second Additional Protocols, (ii) The Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime of the Council of Europe (1990), (iii) The Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (2005), (iv) The United Nations Convention against Transnational Organized Crime (Palermo, 2000). Portugal also ratified the Protocol amending the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (CETS No. 223) (Portugal: since 10 October 2018) and Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism (CETS No. 217) (Portugal: since 13 March 2018).

Within the PJ internal structure,[45] the International Cooperation Unit - UCI - is responsible for ensuring the functioning of the EUROPOL National Unit and the INTERPOL National Office.

Concerning the applicable rules for mutual legal assistance, updated and detailed information is available at: https://rm.coe.int/internationalcoop-annex-to-cw-portugal-rev-pv/16809fb356

The Cybercrime Office of the Public Prosecutor's Office participates in the Eurojust, in the European Judicial Cybercrime Network - EJCN (European Judicial Network on Cybercrime) and in 2020 also coordinated the AIAMP's Iberoamerican Network of Specialized Cybercrime Magistrates (CiberRede/CiberRed) and the Lusophone Forum on Cybercrime and Digital Evidence, a network of

[45] Available at: https://www.policiajudiciaria.pt/uci/

magistrates specialized in the area of cybercrime and obtaining of digital proof, created by the Meeting of Attorneys General of the Community of Portuguese Speaking Countries (CPLP), in October 2016.[46]

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?

Answer:

Due to the lack of rigorous data that could provide a broader picture on the evolution of cybercrime committed by minors (rates, nature, profiles and trends), it is not possible to identify and be certain of the impact of the rules and policies on it.

However, it is possible to verify the impact of the international and national rules and policies in the launch of several initiatives targeting these matters aiming a growing public awareness, including among children and young people.

Among those, some initiatives deserve special attention, such as:

- In 2013, Public Prosecution Service (PGR) made publicly available the brochure "*Tu e a Internet* [You and the Internet]" targeting children and young people,[47] which was updated in 2020 when the pandemic of Covid-19 started. As presented in the introductory note written together by the Heads of the PGR Cybercirme Office and the PGR Family, Child and Young People Office , "in order to prevent children and young people from being victims of unlawful conduct and use the Internet more carefully and carefully, *Tu e a Internet* continue to address aspects related to the main criminal activities that are currently committed online. And because it is not always possible to prevent such illicit activities, updated information that will allow victims, children and young people in particular, to know how to react, who to contact and how to establish that contact. The objective remains! We want to continue to help children and young people make safe use of the Internet!". This brochure includes legal information on national legislation and international guidelines in a adapted and child-friendly language as well present information on how/and where to present complaints or where to address/or go in the case further support is needed

- Concerning the victims of cybercrime specifically, it is also relevant to point out the role of Safer Internet Centres and of the Safe Internet project. Co-financed by the European Commission, the Safe Internet Line project draws on a consortium including the FCT – Foundation for Science and Technology, the Directorate General of Education fomr the Ministry of Education, the Portugal Telecom Foundation, the Microsoft Portugal and the IPDJ – Portuguese Institute for Sport and Youth. This project provides a secure and confidential hotline, through a web form, telephone or email, where the general public can report potential illegal content on the Internet. The "Linha Internet Segura" has a twofold mission: Helpline and Hotline. The first aims at providing safety advice on the use of internet, information on cybercrime and on victim's rights, including methods to preserve digital evidence. The second, on the other hand, has specialised training in detection and flagging illegal contents online. It seeks to help block illegal content on the Internet and ensure criminal prosecution of the authors of these publications, namely child pornography, apology for violence and racism. For this purpose, it relies on the police authorities to whom it reports information on the complaints and on national Internet Service

[46] Available at: https://www.ministeriopublico.pt/sites/default/files/documentos/pdf/relatorio_sintese_2020_final.pdf
[47] Available at: https://www.ministeriopublico.pt/sites/default/files/documentos/pdf/brochura_tu_e_a_internet_6-5-2020.pdf

Providers (ISPs) for the rapid removal of such content. Police authorities also have quick forms of reporting for these cases, through the available telephone contacts or even through the electronic complaint on their online pages. Public reports on the activity of the Safer Internet centres are available at: https://www.internetsegura.pt/cis/relatorios-publicos

- A National Council of Children and Young People was launch in 2019, within the National Commission for the Promotion f the Rights and Protection of Children and Young People, where the matters of cybercrime committed by minors have been raised as a main concern by the participants.

5. Other

Question 19: Do you have any information on the rates/statistics of cybercrime in your country and their recent evolution? Of particular interest would be statistics related specifically to the crimes covered in this questionnaire and statistics on cybercrime by minors (ideally also specifically for the crimes covered above)? If there were any (relatively) recent legislative or policy changes, please try to find statistical information on how this has impacted the incidence of cybercrime in practice, and in particular cybercrime by minors.

Answer:

As described in the 2021 Informative Note from the PGR Cibercrime Office,[48] there is a set of constraints on the information on the rates/statistics of cybercrime in Portugal, namely.

1. "- Commonly, the term cybercrime includes a wide and very heterogeneous set of types criminal law. In addition to the offenses described in the Cybercrime Law1 (Law No. 109/2009) so it happens also with many other crimes, whether included in the Penal Code, or from several other separate legal sources.
2. For this reason, the statistical quantification of this reality (cybercrime in a broader sense) does not can be done rigorously.
3. The numbers of so-called classic computer crimes are known, but in fact, this criminal reality also encompasses crimes as diverse as scams on online sales, illicit dissemination of photographs, crimes against honour, dissemination of child pornography or crimes against copyright. A good part of these criminal practices, which already existed before the popularization and massification of electronic communications networks, gained a new space in this environment, where it expanded in an extraordinary way.
4. The statistics of Justice, in general, catalogue the illicit according to the legal types of crime (for example fraud, slander or defamation, crimes against copyright), not considering autonomous or separately those that occur online.
5. The existing statistics system is not like this designed in such a way as to make it possible to perceive the numerical (statistical) dimension of this complex phenomenon.
6. Therefore, it is not easy to assess, from a statistical point of view, the real dimension of cybercrime in Portugal.
7. The Cybercrime Office at PGR has tried to overcome this difficulty through contact with the prosecutors who take part of its network of contact points in all the districts of the country, which report, albeit empirically, this reality.
8. But it has also used, as an indicator of these phenomena, the line for receiving complaints at the Cybercrime Office's email address)."

[48] Available at: https://cibercrime.ministeriopublico.pt/sites/default/files/documentos/pdf/denuncias-de-cibercrime-25-01-2022.pdf

As a result, all the existent data on cybercrime in Portugal is serious limited and far from being rigorous and it is scarce among different sources. The Polícia Judiciária (PJ) will be best official source in relation to these types of crime since has the competence to criminal investigation - although the information may be also limited due to the absence of clear information concerning all the types of crime.

The Safe Internet Line[49] provides each year a public report presenting the available data on the complaints received.

The Annual report from the Ministry of Internal Affairs on the registered criminal occurrences to the police forces in Portugal, presents some information concerning the crimes registered under the Cybercrime Law. The data on 2021 is not yet available.

Question 20: Do you have any other comments to make that may be relevant to your jurisdiction?

Answer:

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[49] Available at: https://internetsegura.pt/sites/default/files/2022-02/Estatisticas_APAV_LinhaInternetSegura_2021.pdf