

# Social Fieldwork Research (FRANET)

## Procedural safeguards for children who are suspects or accused persons in criminal proceedings

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## **PART A. EXECUTIVE SUMMARY**

This report is based on the results of 20 semi-structured interviews with judges, public prosecutors, lawyers, police officers and specialists, as well as desk research. Interviewees made a positive overall assessment of the legal framework for the protection of children suspected or accused in criminal proceedings, with special emphasis on the right to be assisted by a lawyer – a right that most interviewees see as the foundation that ensures the fulfilment of the other procedural safeguards. Nonetheless, interviewees also have identified circumstances that challenge the application of those safeguards in practice. These challenges relate to practices that may undermine the legal framework in place, to the need to improve the current legal framework, namely by reviewing and amending the Young Adult's Special Penal Regime, or to the need to invest and improve the training of the professionals dealing with children suspected or accused of a crime.

### **General implementation of the procedural safeguards for children who are suspects and accused persons in criminal proceedings as regulated by the Directive (EU) 2016/800:**

Most of the provisions of Directive (EU) 2016/800 were considered to have already been implemented under the Portuguese legal framework prior to the approval of the Directive, mainly through three different sets of provisions: 1) through the specific provisions of the Code of Criminal Procedure addressed to defendants under the age of 21, enhancing these defendants' rights; 2) through the Young Adult's Special Penal Regime - a special regime that applies to children and young adults who, at the time of the crime, were over 16 and under 21 years of age; and 3) through specific provisions provided by the Code on Enforcement of Prison Sentences or Measures on the execution of imprisonment sentences to persons under 21. The transposition of the Directive into the Portuguese legal framework operated by Law 33/2019 introduced changes in three key areas: in the right to privacy for defendants under 18; in the individual assessment of defendants under the age of 18; and to include the participation of the holder of parental responsibilities when the defendant has not reached the age of 18.

### **Age assessment and the presumption to be a child in case of remaining uncertainty:**

One of the amendments to the Code of Criminal Procedure following the approval of the Directive was the introduction of a provision that states that where, after all steps have been taken to identify the defendant, it is still uncertain whether the defendant has reached the age of 18, the defendant shall be presumed to be under 18. The different professionals interviewed under the current project highlight the rarity of situations of uncertainty related to the age of a suspect or an accused person. In those rare cases, the age of a person is assessed and determined in practice during the investigation phase (by the police or by the public prosecutor) and, when in doubt, the defendant shall, in practice, be presumed to be under 18.

### **The rights to information, having the holder of parental responsibility informed and audio-visual recording of the questioning:**

Despite the fact that the right to information is legally guaranteed and that the interviewees affirm that care is taken to adapt the language in the oral transmission of information to underage defendants, especially in the pre-trial phase, the interviewees report the existence of practices that challenge its effectiveness. Professionals who work with underage defendants report situations where

these defendants had difficulty understanding the information provided, particularly with regard to the general rules of the conduct of the proceedings.

All interviewees mention that, with the amendment to the Code of Criminal Procedure made by virtue of Directive 2016/800, holders of parental responsibilities are informed when the underage defendant becomes a defendant and receives the same information on the defendants' rights that is provided to the defendants themselves. This implies that the quality of the information provided is the same to that provided to the defendant and, thus, may lack effectiveness in what concerns its comprehensibility, since, usually, it is not explained in clear language and the information is, as a rule, provided with the first contact with the criminal proceedings, at a time of particular stress for the defendant and their holder of parental responsibilities

As for the audio-visual recording of the procedural acts involving underage defendants, the same rules that are in place for cases involving adult defendants apply. That is, audio-visual recording is only used where available. In practice, questioning by the police and the public prosecution during the investigation phase is, as a rule, not recorded, since an audio-recording system is not available. In these cases, written minutes are used. Where an audio-recording system is available, the questioning is audio-recorded. Nonetheless, questioning before a pre-trial judge is, as a rule, audio-recorded - as is the trial.

#### **The rights to be assisted by a lawyer and legal aid:**

One of the fundamental rights of any defendant is the right to be accompanied by a defence lawyer in all procedural acts. This is a right that a defendant under the age of 21 cannot waive. Interviewees state that there is no barrier to the effective participation of lawyers in criminal proceedings. Nonetheless, they question the effectiveness of this right in two particular situations. Firstly, lawyers report situations in which the police have informal conversations with defendants prior to questioning and without the presence of the lawyer. Secondly, there are reports of inadequate defence, attributed either to the intimidating attitude of some public prosecutors and judges and the unwillingness of lawyers to confront them, or to a lack of knowledge and experience of lawyers.

The mandatory appointment of a lawyer does not entail, per se, the right to free legal aid. All defendants, adults or children, must apply for legal aid and be subjected to an assessment of financial means. Dealing with the bureaucracy of this application can be challenging for underage defendants.

#### **The right to an individual assessment:**

The transposition of Directive (EU) 2016/800 into the Portuguese legal framework operated by Law 33/2019 introduced two new provisions on individual assessment of defendants under the age of 18. Firstly, in the bill of indictment produced at the end of an investigation against a defendant under 18, the public prosecution must attach a social report or information on the defendant produced by the social rehabilitation services, except when these documents are not yet prepared and it is considered to be unnecessary according to the best interests of the underage defendant. Secondly, during the trial phase, when the defendant is under 18 and the social report or the information on the defendant produced by the social rehabilitation services has not yet been incorporated into the file, the court shall order it to be drafted and incorporated into the court file, unless the relevant exemption is justified in view of the circumstances of the case and provided that it is compatible with the best interests of the child.

In practice, although the individual assessment can be carried out upon request of the suspect or accused child or their defence lawyer, usually it is the court who request it and, as a rule, the individual



assessment is only conducted during the trial phase and is usually used for sentencing. Thus, even when a provisional suspension measure is applied by the public prosecution, in the pre-trial stage, as a rule, there is no previous individual assessment of the underage defendant.

**Deprivation of liberty as a last resort and safeguards for children who are deprived of their liberty:**

The overwhelming majority of the various professionals interviewed stress that deprivation of liberty is used as a last resort measure for children. Police custody, pre-trial detention and post-trial detention are only applied after all alternatives have been analysed and deemed insufficient or inadequate, according to the criteria foreseen by law (e.g. the crimes involved).

In the special prison (known by Prison-School of Leiria) built to house offenders from 16 to 21 years of age, children are held separately in individual detention cells in three different blocks, according to their age and whether they are detainees serving a final sentence or pre-trial detainees. Nevertheless, there are a few people under 21 in pre-trial detention and post-trial detention at other prisons, mainly due to geographical reasons associated with the proximity to the defendant's residence. Especially in these institutions, it seems to be very difficult to guarantee that children are held separately from adults.

**The rights to effectively participate in and be accompanied during the trial:**

According to the interviewees, the only difference between a trial of underage defendants and adult defendants is the presence of the holder of parental responsibilities or of a person designated for that purpose. Interviewees note that there is no change in the layout of the trial room or the way the defendant is heard. However, they also note that special care is taken to adapt the language used when dealing with vulnerable defendants regardless of their age.

## PART B. INTRODUCTION

In total, **20 interviews** were carried out within the timeframe of 11 March to 06 July 2021. They were conducted, mainly, via electronic means, due to the Covid-19 pandemic.

The fieldwork research achieved the objective of providing evidence-based analysis on the practical application of the criminal procedural rights of children, as enshrined in Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings. This Directive was transposed into the Portuguese legal framework in May 2019, through an amendment to the Criminal Procedural Code<sup>1</sup> that came into force on the 23 May 2019. The fieldwork research benefited from the extraordinary collaboration of all interviewees, both in scheduling the interviews and answering the questions according to their perspectives and professional experience.

The interviewees were selected considering their profile, knowledge and practical experience in dealing with children who are suspects or accused persons in criminal proceedings. Since the knowledge of the interviewees is limited to their professional activities (police officers have little knowledge of what happens during the trial phase; non legal specialists have little knowledge of what happens in court or at the police; the experience of judges is limited to the concrete phase of the criminal proceeding in which they work – pre-trial stage, trial stage or enforcement stage; etc) there was a special concern to interview professionals with experience in different stages of the criminal proceedings. Also, interviewees were selected from different geographical areas and there was a concern to reach a gender balance in the sample.

Most of the interviewees do not have experience with detained children. Therefore, some of them have limited knowledge on prison conditions. This is due, mainly, to two factors. First of all, because the number of detained children is limited and has been declining for the past 20 years. On the other hand, most professionals, mainly those involved in the pre-trial stage and trial stage, do not work directly within the prison system.

The sample of interviewees consists of 4 police officers, 5 defence lawyers, 3 public prosecutors, 2 judges and 6 non-legal specialists.

As regards, police officers, two criminal investigation police officers from the Public Security Police (*Polícia de Segurança Pública, PSP*), and two from the Criminal Police (*Polícia Judiciária, PJ*) were interviewed. The National Republican Guard (*Guarda Nacional Republicana, GNR*) refused to collaborate with the project.

The selection of defence lawyers to be interviewed under this project took into consideration their experience with criminal justice involving children and expertise in criminal law and children's rights, and their geographic areas of practice. The professional experience of these interviewees ranges from 10 years of professional activity to 50 years of experience. Also the sample includes both defence lawyers who are and who are not enrolled in the legal aid system.

The specific concern as for the 5 public prosecutors and judges selected for interviews was to ensure that it included interviewees with professional experience in different stages of the criminal proceedings. Three were public prosecutors, who act mainly in the investigation phase of the criminal

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<sup>1</sup> Portugal, [Lei n.º 33/2019, de 22 de maio](#) (Law 33/2019 that amended the Criminal Procedural Code), 22 May 2019.

field. As for the two judges, one had experience both as a criminal judge and in serving at a court for the enforcement of sentences; and the other had experience in serving at a local criminal court.

As regards the group of non-legal specialists, the team members had an explicit concern to interview specialists from the two main national organisations working with children who are suspects or accused in criminal proceedings and detainees. Five interviewees were from the General Directorate of Rehabilitation and Prison Services (*Direção-Geral de Reinserção e Serviços Prisionais*, DGRSP). The Directorate-General for Reintegration and Prison Services is the organization responsible for crime prevention, execution of penalties, social reintegration and management of the educational centres and the prison system. The sample included interviewees with professional experience in the different areas of DGRSP intervention that both work with children who are or are not deprived of their liberty.

The other non-legal specialists interviewed was from the National Institute of Legal Medicine and Forensic Sciences (*Instituto Nacional de Medicina Legal e Ciências Forenses*, INMLCF).

The INMLCF provides services to courts and other administration of justice bodies, in areas involving the application of medical-legal knowledge and other forensic sciences. The technical services include the Forensic and Pathology Service, Forensic Chemistry and Toxicology Service, Forensic Genetics and Biology Service, Forensic and Criminal Technologies Service. The selection of the specialist from the INMLCF was made on the basis of their experience in conducting individual assessments of children suspected or accused of crime.

#### ○ **PREPARATION OF FIELDWORK, IDENTIFICATION AND RECRUITMENT OF PARTICIPANTS**

The identification and selection of the interviewees was carried out according to the FRA's guidelines and the approved profile, without any difficulties. Despite the COVID-19 pandemic, the fieldwork was performed without constraints. Scheduling and conducting interviews did not raise any embarrassment and all interviewees were very willing to participate sincerely during the interviews

In the case of judges, public prosecutors and lawyers, the selection, according to the profile approved by FRA, was made directly by the team, so there was always direct contact with each interviewee.

Regarding the police officers and specialists, the selection of the interviewees brought up some differences associated with the selection procedure. Due to the requirement for authorisation from their superiors to collaborate with this research project, we contacted the national directors of the main police forces in Portugal – Criminal Police, Public Security Police and National Republican Guard – and from the two main national organisations working with children who are suspects or accused persons in criminal proceedings and detainees - the General Directorate of Rehabilitation and Prison Services (DGRSP) and the National Institute of Legal Medicine and Forensic Sciences (INMLCF) - to request permission to interview police officers and specialists selected by them in accordance with the requested profile.

After identifying and contacting the interviewees, they immediately expressed their willingness to collaborate with the team. The only exception, as mentioned above, was the case of the National Republican Guard, that declined to participate in the research. Thus, an additional police officer from the Criminal Police was interviewed.

#### ○ **SAMPLE AND DESCRIPTION OF FIELDWORK**

Police officers:  
Requested: 4, completed: 4

Defence lawyers:  
Requested: 5, completed: 5

Judges/prosecutors:  
Requested: 5, completed: 5

(Non-legal) Specialists:  
Requested: 6, completed: 6

**Table 1: Sample Professionals**

<b>Code</b>	<b>Group</b>	<b>Expertise in juvenile criminal justice</b>	<b>Gender</b>
Police officer, Portugal	Police officer	Criminal investigation police officer with more than 20 years of experience in operational work.	Female
Police officer, Portugal	Police officer	Criminal investigation police officer with more than 10 years of experience in operational work.	Male
Police officer, Portugal	Police officer	Criminal investigation police officer with more than 20 years of experience in operational work.	Male
Police officer, Portugal	Police officer	Criminal investigation police officer with more than 10 years of experience in operational work.	Male
Lawyer, Portugal	Defence lawyer	Lawyer, with more than 25 years of experience in defending both adults and children.	Male
Lawyer, Portugal	Defence lawyer	Lawyer with more than 50 years of experience acting mainly in the criminal field, for both children and adults.	Male
Lawyer, Portugal	Defence lawyer	Lawyer with more than 15 years of experience.	Female
Lawyer, Portugal	Defence lawyer	Lawyer with more than 15 years of experience as a defence lawyer, both with adults and children.	Female
Lawyer, Portugal	Defence lawyer	Lawyer with more than 10 years of experience, as a defence lawyer for both children and adults.	Female
Public prosecutor, Portugal	Prosecutor	Public Prosecutor, with more than 10 years of experience in the criminal field,	Male

		working in a Criminal Investigation Office with regional extended competence.	
Public prosecutor, Portugal	Prosecutor	Public Prosecutor, with more than 5 years of experience in the criminal field, working in a Criminal Investigation Office with regional extended competence.	Female
Judge, Portugal	Judge	Judge with more than 10 years of experience, working as sentence enforcement judge.	Male
Public prosecutor, Portugal	Prosecutor	Public Prosecutor, with more than 10 years of experience in the criminal field, working in a Criminal Investigation Office with regional extended competence.	Male
Judge, Portugal	Judge	Judge with more than 15 years of experience, working as criminal judge.	Female
Non-legal specialist, Portugal	(Non-legal) Specialist	Forensic Psychologist, working in the National Institute of Legal Medicine and Forensic Sciences, with more than 10 years' experience in performing psychological examinations required in the context of criminal proceedings, regardless of the age of the suspect (adult or child).	Female
Non-legal specialist, Portugal	(Non-legal) Specialist	Professional from the General Directorate of Rehabilitation and Prison Services (DGRSP), with more than 20 years' experience in working with children in criminal proceedings.	Female
Non-legal specialist, Portugal	(Non-legal) Specialist	Professional from the General Directorate of Rehabilitation and Prison Services (DGRSP), with more than 5 years' experience in working with children in criminal proceedings.	Female
Non-legal specialist, Portugal	(Non-legal) Specialist	Professional from the General Directorate of Rehabilitation and Prison Services (DGRSP), with more than 20 years' experience in working with children in criminal proceedings.	Female
Non-legal specialist, Portugal	(Non-legal) Specialist	Professional from the General Directorate of Rehabilitation and Prison Services (DGRSP), coordination of the field teams working with defendants in criminal proceedings responsibilities.	Female
Non-legal specialist, Portugal	(Non-legal) Specialist	Professional from the General Directorate of Rehabilitation and Prison Services (DGRSP), with more than 20 years in working with children deprived of liberty.	Female

The average length of the interviews was about one and a half hour (90 minutes), varying between the shortest interview lasting about 45 minutes and the longest interview lasting about two and a half hours.

The level of trust achieved between interviewers and interviewees was appropriate and there was no constraint in the provision of information by the interviewees. Both interviews face-to-face and via digital means were fluent.

Most of the interviewees found it difficult to focus exclusively on criminal cases involving underage defendants. There was often a need to remind them that the focus of the study was on defendants between the ages of 16 and 18 involved in criminal proceedings and not on younger children that are monitored under the Educational Guardianship Law.

The diverse experience of the professionals in the different stages of the criminal proceedings caused the various interviewees to focus, with different intensities, on certain issues addressed in the interview script.

#### ○ **DATA ANALYSIS**

The methodological approach used was qualitative content analysis. Interviews were carried out according to a semi-structured script and all of them were audio-recorded, with the informed consent of the interviewee. Each interview was then analysed according to the structure and contents of the interview reporting templates provided by FRA, synthesising qualitative data into a structured thematic analysis. The analysis was conducted in order to identify the common and diverse elements that emerge from the information collected and to detect regularities and differences relevant to understanding the practical implementation of the procedural safeguards enshrined in Directive 2016/800. The synthesis provided by the interview reporting templates was systematically revised and the key findings that arose from such interviews discussed among the research team.

The final draft of the country report is a result of this discussion and is based on the content analysis that was carried out throughout the fieldwork. The scientific supervision and review of the country report by the senior expert was fundamental to guarantee its global coherence.

Besides the interview analysis, the desk research (legal overview, including the relevant legal provisions regarding the transposition of Directive 2016/800) was also carried out through the methodological approach of qualitative content analysis. Thus, the following sections of this country report present an analysis that cross-references the results of the two methods. A critical analysis of the interviews is presented in conjunction with the legal framework described under the legal overview of the sections.

This study was complemented with 6 semi-structured interviews carried out with children who have been suspects or accused persons in criminal proceedings. The methodology and findings of those interviews are described in a dedicated report. However, where relevant to highlight confluences or discrepancies, this report also refers to the conclusions drawn in that report.

#### ○ **BRIEF OVERVIEW OF THE REPORT'S CONTENTS**

This report focuses on the criminal procedural rights of children, as enshrined in Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards

for children who are suspects or accused persons in criminal proceedings, and is based on the results of 20 semi-structured interviews with judges, public prosecutors, lawyers, police officers and specialists, as well as desk research.

The report is divided into 4 sections. Firstly, there is an introduction that clarifies the focus of the study and the methodology of the research. The following section provides the main research findings in the seven key areas of the Directive 2016/800: a) the implementation of the Directive and its scope; b) the age assessment and the presumption of being a child in the event of remaining uncertainty; c) the rights to information, having the holder of parental responsibility informed and audio-visual recording of the questioning; d) the right to be assisted by a lawyer and to receive legal aid; e) the right to an individual assessment; f) the deprivation of liberty as a last resort and safeguards for children who are deprived of their liberty; and g) the rights to effectively participate in and be accompanied during the trial.

The third section includes the main challenges identified by the interviewees with regard to guaranteeing their procedural safeguards in criminal proceedings, as well as promising practices and suggestions for improvements.

Finally, there is a general conclusion, summarising key recurrent issues and crucial findings of the research.

## PART C. RESEARCH FINDINGS

### C.1 Implementation of Directive (EU) 2016/800

a.

Directive (EU) 2016/800 was transposed into the Portuguese legal framework in May 2019, through an amendment to the Criminal Procedural Code<sup>2</sup> that came into force on 23 May 2019. This amendment provided for special provisions in the procedural regime applicable to minors who are suspected of perpetrating a criminal offence while they are between the ages of 16 and 18 and become the suspect of a crime, or are accused of one, prior to turning 18.

Most of the provisions of the Directive were considered to be already implemented under the Portuguese legal framework prior to the approval of the Directive, mainly through three different sets of provisions. Firstly, through the specific provisions of the Criminal Procedure Code addressed to defendants under the age of 21, enhancing these defendants' rights. Until the transposition of Directive (EU) 2016/800, there were no specific additional provisions relating to defendants under 18. But there were specific provisions to those under 21 (thus, also applicable to defendants under 18). For example, defendants under 21 must be assisted by a defence lawyer in every procedural act<sup>3</sup>.

Secondly, through the Young Adult's Special Penal Regime<sup>4</sup> - a special regime that applies to children and young adults who, at the time of the crime, were over 16 and under 21 years of age. This allows for the application of reduced sentences<sup>5</sup> and corrective measures<sup>6</sup>, as an alternative to a prison sentence of up to two years, such as a warning, imposition of obligations, a fine and detention in a detention centre. This special regime is not, however, mandatory. The court shall analyse whether, in a given case, this special regime should be applied and shall justify the decision taken. For example, in cases where the unlawfulness of the acts committed is high and the culpability is serious, the judge may decide not to apply the reduced sentence, on the grounds that it is not credible that there will be advantages for the social reintegration of the young adult<sup>7</sup>. Nonetheless, the Young Adult's Special Penal Regime is considered to be a neglected piece of legislation that never underwent the necessary regulation required to implement, in practice, some of its solutions. For example, this special legal act foresees the possibility to apply a corrective measure of detention in a detention centre for young offenders from 18 to 21 years of age, but these detention centres were never built<sup>8</sup>. In the words of Sílvia Gomes et al (2018: 67), "despite these alternatives, young adults have been neglected over the last few decades, as it is not possible to fully implement the special regime due to the lack of coordination with various changes in the Portuguese Penal jurisdiction. Not only is it based on a law dating back to the 1980s, which has not been reformulated since then, but changes in young peoples'

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<sup>2</sup> Portugal, [Lei n.º 33/2019, de 22 de maio](#) (Law 33/2019 that amended the Criminal Procedural Code), 22 May 2019.

<sup>3</sup> Portugal, [Código de Processo Penal](#) (Code of Criminal Procedure), approved by Decree-Law 78/87, 17 February 1987. Last amended by Law 57/2021, 16 August. Article 64 (d)..

<sup>4</sup> Portugal, [Regime aplicável em matéria penal aos jovens com idade compreendida entre os 16 e os 21 anos](#) (Young Adult's Special Penal Regime), approved by Decree-Law 401/82, 23 September 1982.

<sup>5</sup> Portugal, [Regime aplicável em matéria penal aos jovens com idade compreendida entre os 16 e os 21 anos](#) (Young Adult's Special Penal Regime), approved by Decree-Law 401/82, 23 September 1982. Article 4.

<sup>6</sup> Portugal, [Regime aplicável em matéria penal aos jovens com idade compreendida entre os 16 e os 21 anos](#) (Young Adult's Special Penal Regime), approved by Decree-Law 401/82, 23 September 1982. Article 6.

<sup>7</sup> Figueiroa, F. (2010), "Punição no limiar da idade adulta: o regime penal especial para jovens adultos e, em especial, a interactividade entre penas e medidas tutelares educativas". *Julgar*, 11, 147-173.

<sup>8</sup> Barbosa e Silva, J. (2017). "Entre o 8 e o 80 – jovens adultos, Lei Tutelar Educativa e o regime penal de adultos". *Jornadas Sistema Prisional – Execução de Penas – Direitos Humanos*. 71-77.



lives obliges us to consider the need for new, updated and more appropriate responses to youth criminality, as is already happening in other EU countries”<sup>9</sup>.

Finally, through specific provisions provided by the Code of Enforcement of Prison Sentences or Measures<sup>10</sup> on the execution of imprisonment sentences to persons under 21. Under this legislation, for example, prisons or units specially dedicated to the implementation of sentences and custodial measures applied to young people up to 21 years old or, whenever it proves beneficial for their prison treatment, up to 25 years old should be provided<sup>11</sup>.

The transposition of Directive (EU) 2016/800 into the Portuguese legal framework operated by Law 33/2019 introduced changes in three key areas: in the right to privacy for defendants under 18; in the individual assessment of defendants under the age of 18; and to include the participation of the holder of parental responsibilities when the defendant has not reached the age of 18. The details of these innovations are outlined in the specific sections of this report.

#### b. Scope of the Directive’s application and relevant age categories

In Portugal, the age of criminal responsibility is 16<sup>12</sup>. In 1999, the approval of two new laws – the Promotion and Protection Law for Children and Young People in Danger<sup>13</sup> and the Educational Guardianship Law<sup>14</sup> that came into force on 1 January 2001 – redesigned the Portuguese juvenile justice system. These two laws identify children that are considered in danger<sup>15</sup> and, therefore, are in need of a protective measure, and children between the ages of 12 and 16 who have perpetrated an act legally qualified as a crime and, thus, may be subjected to a youth justice measure, under the Educational Guardianship Law<sup>16</sup>.

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<sup>9</sup> Gomes, S., Leote de Carvalho, M., Oliveira, R., and Duarte, V. (2018), “[Trends and challenges in the Portuguese Penitentiary System: from law to practice](#)”, *Revista Antigone*, 1/2 2018, 61-102.

<sup>10</sup> Portugal, [Código da Execução das Penas e Medidas Privativas da Liberdade](#) (Code of Enforcement of Prison Sentences or Measures involving the deprivation of liberty), 12 October 2009. Last amended by Law 27/2019, 28 March.

<sup>11</sup> Portugal, [Código da Execução das Penas e Medidas Privativas da Liberdade](#) (Code of Enforcement of Prison Sentences or Measures involving the deprivation of liberty), 12 October 2009. Last amended by Law 27/2019, 28 March. Article 9.

<sup>12</sup> Portugal, [Código Penal](#) (Penal Code), approved by Decree-Law 48/95, 15 March 1995. Last amended by Law 57/2021. 16 August 2021. Article 19.

<sup>13</sup> Portugal, [Lei de proteção de crianças e jovens em perigo](#) (Promotion and Protection Law for Children and Young in Danger), approved by Law 147/99, 1 September 1999. Last amended by Law 26/2018, 5 July 2008.

<sup>14</sup> Portugal, [Lei Tutelar Educativa](#) (Educational Guardianship Law), approved by Law 166/99, 14 de September 1999. Last amended by Law 4/2015, 15 January 2015.

<sup>15</sup> A child is considered to be in danger or at risk when parents, the legal representative or the person who has the child in de facto custody endanger the child’s safety, health, training, education or development, or when such danger results from an action or omission of a third party or of the child and the holder of parental responsibilities does not attempt in an adequate manner to remove that danger. The law provides for a non-exhaustive list of possible circumstances: a) when the child is abandoned or is left to live by themselves; b) when the child suffers physical or psychological maltreatment or is a victim of sexual abuse; c) when the child does not receive care or affection appropriate to their age and personal situation; d) when the child is in the care of third parties, during a period of time in which the establishment of a strong relationship with them has been observed and simultaneously the parents are not exercising their parental responsibilities; e) when the child is subjected to activities or work that are excessive or inappropriate to their age, dignity and personal situation, or harmful to their training or development; f) when the child is subjected, directly or indirectly, to behaviours that seriously affect their safety or emotional balance; g) when the child engages in behaviour or in activities or consumption that seriously affect their health, safety, training, education or development without their parents, legal representative or guardian opposing them in an appropriate way to remedy that situation; h) when the child has a foreign nationality and is hosted in a public, cooperative, social or private institution with a cooperation agreement with the State, without a residence permit in Portuguese territory - Portugal, [Lei de proteção de crianças e jovens em perigo](#) (Promotion and Protection Law for Children and Young in Danger), approved by Law 147/99, 1 September 1999. Last amended by Law 26/2018, 5 July 2008. Article 3.

<sup>16</sup> For children between 12 and 16 who have committed an act qualified by law as a crime since 2001, the Portuguese juvenile justice system relies on the notion of the need for the offender to be educated on fundamental community values. A child

Children over the age of 16 accused of perpetrating a crime are tried by general criminal courts and the general provisions of the criminal procedural law and penal law apply to them, although, as mentioned before, there are special provisions for defendants aged between 16 and 21.

The amendment to the Code of Criminal Procedure operated by Law 33/2019 provided for special provisions in the procedural regime applicable to the underage who are suspected of perpetrating a criminal offence while they are between the ages of 16 and 18 and become the suspect of a crime, or are accused of one, prior to attaining 18 years of age. The explanatory memorandum of the Draft Law 169/XIII presented by the Government to Parliament on 30 November 2018 was clear about the scope of application of Directive (EU) 2016/800 in Portugal: “minors between 16 and 18 who are suspected of having committed a crime and, therefore, may be criminally liable”<sup>17</sup>.

c. Special training

i. Legal overview

Initial and on-going training of judges and public prosecutors is mainly provided by the Centre for Judicial Studies (CEJ) – a judicial school under the responsibility of the Ministry of Justice, although with legal personality and administrative autonomy. The on-going training plan is drafted yearly by the CEJ in cooperation with the High Councils of Judges and Public Prosecutors.

In November 2018, the Centre for Judicial Studies (the judicial professional school for judges and public prosecutors) organised a seminar on the procedural safeguards for suspects and defendants in light of the changes produced by European Law. Ninety judges and public prosecutors attended this seminar<sup>18</sup>. The issue was also addressed in initial training of judges and public prosecutors that started on 15 September 2019.

The Training Department of the Court Clerks’ Trade Union issued an informative text with notes and comments on Law 33/2019, which transposed Directive 2016/800, of the European Parliament and of the Council, of 11 May 2016, on procedural guarantees for suspected or accused minors in criminal proceedings<sup>19</sup>.

ii. Special training received by interviewees

The interviewees' answers regarding specific training on the rights of children who are suspected or accused of a crime differ according to the professional group to which they belong. The majority of the judges, public prosecutors and lawyers interviewed state that they had not had specific training in this area and, moreover, the majority say that they do not know that such training existed. Some mention that the Directives of the Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings, but particularly Directive 2016/800, were poorly promoted and that this was due to the fact that the Directives didn't have much effect on the Portuguese law,

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who has committed an act that infringes the criminal law rules, regardless of it being public (when the case begins regardless of the victim's wishes and may be reported by anyone), semi-public (when the victim must file a complaint in order to begin the case) or private (when the case only begins if the victim files a complaint and the victim is required to acquire the status of assistant) in nature, may be subjected to an educational measure if it is considered that the offender needs to be educated on fundamental community values. The proceedings that fall under the Educational Guardianship Law are not criminal proceedings, but proceedings which are specially designed for children which can lead to educative measures. These children are tried by the family and youth courts.

<sup>17</sup> Portugal, [Draft Law 169/XIII](#), 30 November 2018.

<sup>18</sup> Centro de Estudos Judiciários (2019), [Relatório de Atividades 2018/2019](#), Lisbon, Centro de Estudos Judiciários.

<sup>19</sup> Court Clerks’ Trade Union [website](#).

since Portuguese law was considered to already be mostly aligned with the Directives. Nonetheless, these interviewees also mention that the Directive was addressed, albeit in a cursory manner, at some conferences they attended.

The police officers interviewed, on the other hand, although indicating that they had not had specific training in this area, mention that such training exists internally but has not reached all police officers yet.

The rehabilitation professionals interviewed claim either to have received training on the theoretical models for assessing defendants and on individual assessment of defendants, provided internally by the Directorate-General for Rehabilitation and Prison Services, or to have received written guidelines on the drafting of assessment reports of children who are suspected or accused of a crime and of a report model. These guidelines focused on the rights of children who are suspected or accused of a crime, specifically on the right to information and on the right of the child to be accompanied by the holder of parental responsibility or a legal representative.

#### d. Effectiveness of measures / Monitoring

There is no public assessment or monitoring directly addressing the effectiveness of the Directive.

## **C.2 Age assessment and the presumption to be a child in case of remaining uncertainty**

#### a. Legal overview

Children over the age of 16 who have perpetrated a crime are criminally liable<sup>20</sup>. Age assessment is made, primarily, by the identification of the suspect. The police can identify any person found in a place which is public, open to the public or subject to police surveillance, whenever there are well-founded suspicions of crimes having been committed, of a pending extradition or expulsion proceedings, of illegal entry or residence in Portuguese territory or of a pending arrest warrant<sup>21</sup>. Identification is provided by the suspect by presenting their identity card or passport (if the suspect is a Portuguese citizen) or a residence permit, identity card, passport or document that replaces the passport (if the suspect is a foreign citizen)<sup>22</sup>. If the suspect is not able to present such documents, the law provides for some alternatives: the suspect may identify themselves by presenting an original document, or certified copy, containing their full name, signature and photograph<sup>23</sup>; the suspect can communicate with a person who may be able to present the identification documents<sup>24</sup>; the suspect can travel, accompanied by the police, to the place where the identification documents are located<sup>25</sup>; or the identity of the suspect can be recognised by an identified person who guarantees the veracity of the personal data indicated by the person being identified<sup>26</sup>. If, notwithstanding, it is still impossible

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<sup>20</sup> Portugal, [Código Penal](#) (Penal Code), approved by Decree-Law 48/95, 15 March 1995. Last amended by Law 57/2021, 16 August 2021. Article 19.

<sup>21</sup> Portugal, [Código de Processo Penal](#) (Code of Criminal Procedure), approved by Decree-Law 78/87, 17 February 1987. Last amended by Law 57/2021, 16 August. Article 250(1).

<sup>22</sup> Portugal, [Código de Processo Penal](#) (Code of Criminal Procedure), approved by Decree-Law 78/87, 17 February 1987. Last amended by Law 57/2021, 16 August. Article 250(3).

<sup>23</sup> Portugal, [Código de Processo Penal](#) (Code of Criminal Procedure), approved by Decree-Law 78/87, 17 February 1987. Last amended by Law 57/2021, 16 August. Article 250(4).

<sup>24</sup> Portugal, [Código de Processo Penal](#) (Code of Criminal Procedure), approved by Decree-Law 78/87, 17 February 1987. Last amended by Law 57/2021, 16 August. Article 250(5)(a).

<sup>25</sup> Portugal, [Código de Processo Penal](#) (Code of Criminal Procedure), approved by Decree-Law 78/87, 17 February 1987. Last amended by Law 57/2021, 16 August. Article 250(5)(b).

<sup>26</sup> Portugal, [Código de Processo Penal](#) (Code of Criminal Procedure), approved by Decree-Law 78/87, 17 February 1987. Last amended by Law 57/2021, 16 August. Article 250(5)(c).

to identify the suspect, the police can move the suspect to the nearest police station and compel them to remain there for the time strictly necessary for identification (in no case for more than 6 hours), and if necessary, take fingerprints, photographs or similar tests and invite the suspect to indicate the residence where they can be found and receive communications<sup>27</sup>.

However, whenever an investigation is conducted into a specific person, that person mandatorily becomes a defendant if there are grounds to suspect that the person has committed a criminal offence, if they make statements before any judicial authority or criminal police, if a coercive or patrimonial guarantee is to be imposed, or if they are detained<sup>28</sup>. One of the duties of a defendant is to truthfully answer questions addressed by the competent authority on their identity<sup>29</sup>. Another is to make a statement about their identity and residence, even when they have already been identified under Article 250 of the Code of Criminal Procedure<sup>30</sup>.

One of the amendments to the Code of Criminal Procedure was the introduction of a provision that states that where, after all steps have been taken to identify the defendant, it is still uncertain whether the suspect has reached the age of 18, the defendant shall be presumed to be under 18<sup>31</sup>. Thus, the special provisions of the Criminal Procedure Code that grant underage defendants special rights must be applied. If this presumption is violated, the special procedural provisions are not applied to the defendant. The defendant may contest the failure to comply with such formalities by arguing the invalidity of the act before a judge or by appealing the decision of a judge that fails to provide for the application of such special provisions. The legal remedies to such a violation depend on the type of formalities that are breached. The Criminal Procedure Code foresees three types of invalidities: irreparable nullities, which must be declared ex officio by the court at any stage of the procedure<sup>32</sup>; nullities that must be argued by the interested party in a given time of the procedure<sup>33</sup>; and irregularities<sup>34</sup>. One example of the first kind of invalidity (irreparable nullity) is the absence of the defendant's lawyer in cases where the law requires their presence. As mentioned below, defendants under 21 are mandatorily assisted by a defence lawyer in every procedural act. If, in any case, due to the violation of the presumption that the defendant is under 18, their lawyer is not present in any procedural act, it is considered to be an irreparable nullity.

- b. How is the age of a person suspected or accused of a crime assessed and determined in practice?

The age of a person is generally assessed and determined during the investigation phase, primarily by the police, through the identification provided by the suspect, such as their identity card. If the suspect is not able to present such a document, the interviewees mainly mention one of the alternatives

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<sup>27</sup> Portugal, [Código de Processo Penal](#) (Code of Criminal Procedure), approved by Decree-Law 78/87, 17 February 1987. Last amended by Law 57/2021, 16 August. Article 250(6).

<sup>28</sup> Portugal, [Código de Processo Penal](#) (Code of Criminal Procedure), approved by Decree-Law 78/87, 17 February 1987. Last amended by Law 57/2021, 16 August. Article 58.

<sup>29</sup> Portugal, [Código de Processo Penal](#) (Code of Criminal Procedure), approved by Decree-Law 78/87, 17 February 1987. Last amended by Law 57/2021, 16 August. Article 61(6)(b).

<sup>30</sup> Portugal, [Código de Processo Penal](#) (Code of Criminal Procedure), approved by Decree-Law 78/87, 17 February 1987. Last amended by Law 57/2021, 16 August. Articles 61(6)(c) and 196.

<sup>31</sup> Portugal, [Código de Processo Penal](#) (Code of Criminal Procedure), approved by Decree-Law 78/87, 17 February 1987. Last amended by Law 57/2021, 16 August. Article 61(5).

<sup>32</sup> Portugal, [Código de Processo Penal](#) (Code of Criminal Procedure), approved by Decree-Law 78/87, 17 February 1987. Last amended by Law 57/2021, 16 August. Article 119.

<sup>33</sup> Portugal, [Código de Processo Penal](#) (Code of Criminal Procedure), approved by Decree-Law 78/87, 17 February 1987. Last amended by Law 57/2021, 16 August. Article 120.

<sup>34</sup> Portugal, [Código de Processo Penal](#) (Code of Criminal Procedure), approved by Decree-Law 78/87, 17 February 1987. Last amended by Law 57/2021, 16 August. Article 121.

provided by the law: the identity of the suspect is recognised by an identified person who guarantees the veracity of the personal data indicated by the person being identified<sup>35</sup>.

*(...) Se não tiver nenhum documento com ele, pela identificação verbal que ele der que pode ser confirmada.... Quando há menores, na experiência os pais são chamados à esquadra. Mas, geralmente, a identificação da pessoa, nos termos da lei geral, pode ser confirmada por outras duas pessoas e nós na nossa base de dados pelo nome que a pessoa disser conseguimos ter acesso ao documento de identificação da pessoa automaticamente.*

*(...) If they don't have any documents with them, by the verbal identification they give that can be confirmed.... My experience is that when there are children involved parents are called to the police station. But generally, the person's identification, under the general law, can be confirmed by two other people. In our database, we can access the person's identification document automatically by searching by the name that the person gives (Public prosecutor, Portugal).*

A police officer states that they carry out all the necessary actions in order to ascertain the age and identification of the person, that is they contact family members, schools, and other persons that may be able to make such identification.

*Fazemos todas as diligências possíveis junto da residência, de familiares, procuramos saber se anda na escola, contactamos a escola se for durante o dia. Devemos esgotar todas as possibilidades para o identificar convenientemente e para termos a certeza com quem estamos a falar. Até porque temos o dever e a obrigação de comunicar com os responsáveis pela responsabilidade parental, normalmente os pais, mas pode ser um tutor ou uma instituição.*

*We carry out all possible actions at the place where they live, with relatives. We try to find out if the child goes to school. We contact the school if it is during the day. We should exhaust all possibilities to identify them properly and to be sure who we are talking to. We have the duty and obligation to communicate with holders of parental responsibility, normally the parents, but it could be a tutor or an institution (Police officer, Portugal).*

Nevertheless, if it is still impossible to identify the suspect, which happens more frequently with foreign people, the interviewees mention that the police can keep a suspect in custody for no more than 6 hours to contact other entities (such as the Portuguese Immigration and Borders Service (SEF), embassies, and consulates) and, if necessary, to take fingerprints.

*(...) Quando não é possível atestar a idade pela exibição do documento identificativo, temos uma série de diligências que podemos fazer, nomeadamente tentar através das impressões digitais identificar a pessoa. (...) Da experiência que eu tenho, isso não sucede muito com jovens que sejam portugueses, mas poderá suceder com alguma frequência em jovens estrangeiros.*

*(...) When it is not possible to certify the person's age by displaying the identification document, we have a series of steps that we can take, namely trying*

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<sup>35</sup> Portugal, [Código de Processo Penal](#) (Code of Criminal Procedure), approved by Decree-Law 78/87, 17 February 1987. Last amended by Law 57/2021, 16 August. Article 250(5)(c).

*to identify the person through fingerprints. (...) From the experience I have, this does not happen very much with young people who are Portuguese, but it may happen with some frequency in foreign young people (Police officer, Portugal).*

When the police cannot determine the person's age, the suspect is presumed to be underage. The special provisions of the Criminal Procedure Code that grant underage defendants special rights are applied and the public prosecutor is informed. The public prosecutor then conducts an investigation (at the pre-trial stage) to determine the age of the defendant.

*Com as crianças indocumentadas, segundo o que está previsto na lei, deve ser dado o benefício e consideram-se menores, a não ser que tenhamos fundadas suspeitas de que não o são. Em caso de dúvida devem ser considerados e tratados como menores. Idealmente, seria comunicado ao Ministério Público para ser pedida uma perícia na medicina legal.*

*With undocumented children, according to the law, they must be given the benefit of the law and considered minors, unless we have reasonable suspicions that they are not. In case of doubt, they should be considered and treated as minors. Ideally, the Public Prosecutor's Office should be informed and a forensic report should be requested (Police officer, Portugal).*

In those situations, the interviewees state that the public prosecutors should request an expert examination of the bone structure and teeth in order to try to determine the age of the defendant. Two of the interviewees, a public prosecutor and a lawyer, mention that it is not always possible to make a precise determination of age and, if it is still uncertain whether the suspect has reached the age of 18, the defendant is presumed to be underage.

*(...) Na altura o que se fazia era, havendo a dúvida, colocava-se a questão à medicina legal e pedia-se a realização de uma perícia através da estrutura óssea e denteição e, na dúvida, por exemplo, entre 15 e 16, considerava-se que teria 15 anos porque seria mais benéfico para a pessoa.*

*At that time, if there was any doubt, the question was put to the National Institute of Legal Medicine and Forensic Sciences and a forensic examination was carried out through the bone structure and teeth. And, if there was any doubt, for example, between 15 and 16, the child was considered to be 15 because it would be more beneficial for the person (Public prosecutor, Portugal).*

When specifically asked about what happens in practice when the age of a suspect or an accused person cannot be determined, the interviewees highlight that according to the legal framework the most favourable status applies to the child, in regard to two different situations: if it is uncertain whether the suspect has reached the age of 18, the defendant is presumed to be under 18 and the special provisions of the Criminal Procedure Code that grant underage defendants special rights must be applied; if it is uncertain whether the suspect is 15 or 16, the suspect is presumed to be under 16, and the Educational Guardianship Law is applied.

One lawyer mentions the law principle "*in dubio pro reo*", arguing that if the person's age cannot be determined, the court presumes that the suspect is under 16 and the Educational Guardianship Law shall apply, since it is to the defendant's benefit.

*Há um grande princípio no direito que é in dubio pro reo. Se não for possível, aplica-se o estatuto mais favorável e considera-se que tem menos de 16 anos. Esta é a nossa solução legal. Como disse, não conheço caso nenhum que tenha sido preciso determinar isso.*

*There is a great principle in law that is in dubio pro reo. If it is not possible, the most favourable status applies to the child and the suspect is considered to be under 16 years old. This is our legal solution. As I said, I don't know of any cases where the person's age had to be determined (Lawyer, Portugal).*

Another lawyer says that when in doubt the defendant is presumed to be underage, and the rights provided by law for children must be applied.

*Na dúvida, (...) devemos considerar que é criança. (...) entre os dezasseis e os vinte é muitas vezes difícil, mas na dúvida nós devemos sempre trabalhar como se fosse criança e exercer os seus direitos previstos na lei como se fosse criança.*

*When in doubt, (...) we must consider that the person is a child. (...) between sixteen and twenty it is often difficult, but when in doubt we should always work as if the person is a child and exercise their rights under the law accordingly (Portugal, Lawyer).*

A specialist reports the case of a detainee of foreign nationality who was held in pre-trial detention in the Prison-School (which houses prisoners from 16 to 21 years of age), based on the legal presumption to be a child, until their real age was determined. Later, the detainee was sent to another prison because they were over 18 years of age.

*Por norma, (...) é o tribunal que nos dá essa informação. Quando ele chega, já vem com a identificação (...) e com a idade determinada. Por vezes depois somos informados de que aquela não era a identidade correta. Lembro-me, por exemplo, de dois casos (...). (...) houve uma situação em que a idade não correspondia. Ele tinha mais idade do que aquela que nos foi informada e depois também ele foi transferido da cadeia, porque aquela cadeia é mais vocacionada para jovens.*

*Usually, (...) it is the court that gives us this information. The detainee arrives with identification (...) and with a determined age. Sometimes we are later told that this was not the correct identity. I remember, for example, two cases (...). (...) there was a situation in which the age did not correspond. The detainee was older than we were first informed, so he was transferred from prison because the prison where the detainee was at is aimed at young people (Non-legal specialist, Portugal).*

A lawyer described a case, previous to the transposition of the Directive (that foresees the presumption of being under 18), where a 15 year-old defendant was subjected to pre-trial detention, since, due to her physical development, she appeared to be over 18. It was a case of a Roma girl who was lacking any official documents. The family didn't know her exact age, but claimed she was under 16 (the legal age for criminal liability), so the lawyer conducted a research and found the birth certificate of the girl that attested that she was, in fact, 15. They presented it to court, the girl was set free and the criminal case was dismissed (since she was under 16).

*Nas vésperas do julgamento, consegui chegar à certidão de nascimento. Mais do que um familiar me dizia que ela não tinha 16 anos. Eu perguntava: "mas quando*

*é que ela nasceu?”. Eles respondiam: “não sei”. (...) No início do julgamento, requeri a junção aos autos da certidão de nascimento e ela foi imediatamente libertada.*

*Right before the trial, I managed to get to the birth certificate. More than one family member told me that she was not 16. I asked: “but when was she born?”. They replied: “I don't know”. (...) At the beginning of the trial, I requested the birth certificate to be added to the case file and she was immediately released (Lawyer, Portugal).*

### c. Discussion of findings

The different professionals interviewed highlight the rarity of situations of uncertainty related to the age of a suspect or an accused person. The vast majority of the interviewees even mention that this has never happened throughout their professional experience. Thus, some of the interviewees, namely specialists and judges, involved mostly in the trial stage, have limited knowledge on age assessment and did not mention the presumption of being a child in cases of continued uncertainty. Nonetheless, some interviewees report that this happens with undocumented children from other countries, with children that are not registered, and with children that are registered more than once, for example in different countries.

In those cases, the police or by the public prosecutor determine a person's age in practice during the investigation phase. By the trial stage, the age of the defendant is already determined. The police use four progressive methods to determine the suspect's age: first, the identification provided by the suspect; second, contacting an identified person who guarantees the veracity of the personal data indicated by the person being identified; thirdly, searching in databases and contacts with consulates, embassies etc; fourth, collecting fingerprints. If after this, the police still cannot determine the person's age, the public prosecutor starts an investigation and requests a forensic examination of the bone structure and teeth.

When asked about what happens in practice when the age of a suspect or an accused person cannot be determined, most interviewees mention the provision that states that if the age remains uncertain, the defendant shall be presumed to be under 18 and the legal principle *dubio pro reo* is applied. One of the interviewees reports a case where this legal provision was applied to a defendant in pre-trial detention, who was presumed to be underage and detained in the Prison-School, and later sent to a common Prison. Thus, the presumption of being a child in cases of continued uncertainty is generally applied.

## **C.3 The rights to information, having the holder of parental responsibility informed and audio-visual recording of the questioning**

### a. The right to information

#### i. Legal overview

Article 61 of the Code of Criminal Procedure provides for the general statement of the defendant's rights at all stages of the proceedings that include: a) the right to attend all procedural acts that directly affect them; b) the right to be heard by the court or the pre-trial judge whenever they render a decision that personally affects them; c) the right to be informed on the charges against them prior



to making any statements before an authority; d) the right to remain silent; e) the right to choose a lawyer or ask the court to appoint a lawyer; f) the right to be assisted by a lawyer in all procedural acts in which they take part and, when detained, to contact such counsel in privacy; g) the right to take part in the investigation and to provide evidence; h) the right to be informed of their rights every time they appear before a judicial authority or the police; i) the right to appeal, under the law, against any decision to their detriment. Law 33/2019 added a new right to this list that applies only to defendants between the ages of 16 and 18. That is the right to be accompanied, during the procedural acts in which they take part, by the holders of parental responsibilities, by the legal representative or by a person who has *de facto* custody. When it is impossible to contact these people, or in special circumstances based on the child's interest or where the needs of the proceedings impose, and only as long as those circumstances persist, children may be accompanied by another suitable person indicated by the defendant and accepted by the competent judicial authority<sup>36</sup>.

Whenever a suspect becomes a defendant, the authority in charge must mention and, if necessary, explain the procedural rights and duties of a defendant<sup>37</sup>. In practice, a document is handed to the defendant specifying their rights and duties, by transcribing Article 61 of the Code of Criminal Procedure. This document therefore includes the list of rights described above. Failure to comply with, or breach of, these information formalities prevents the use as evidence of any statements made by the person concerned<sup>38</sup>.

The right to be informed is also provided for in other stages of the criminal proceedings. During the first judicial questioning of a detained defendant, the pre-trial judge must provide information to the defendant. The pre-trial judge must inform the defendant of their rights as referred to in Article 61 of the Code of Criminal Procedure, explaining to them if necessary and of their right to remain silent and of the consequences should they choose not to remain silent. The pre-trial judge also has to inform the defendant of the reasons behind their detention, of the acts which are the basis of the charges, including, if known, the circumstances of time, place and method, and of the evidence obtained. Information on the evidence obtained is only provided whenever the communication of such information does not jeopardize the investigation, does not hamper the discovery of the truth and does not endanger the life, the physical or psychological integrity or the freedom of the parties to the case or of the victims of the crime<sup>39</sup>. The same rule applies to questioning before a public prosecutor during investigations<sup>40</sup>.

A defendant in pre-trial detention or an individual serving time in a prison, immediately after admission to prison, is entitled to be personally informed of their rights and duties and the rules in force, which are explained and translated, if necessary<sup>41</sup>. They should be handed a leaflet setting out their rights, duties and the rules in force that are relevant to the execution of the sentence or measure. This leaflet should include the information necessary for their integration into the prison

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<sup>36</sup> Portugal, [Código de Processo Penal](#) (Code of Criminal Procedure), approved by Decree-Law 78/87, 17 February 1987. Last amended by Law 57/2021, 16 August. Article 61(1)(i).

<sup>37</sup> Portugal, [Código de Processo Penal](#) (Code of Criminal Procedure), approved by Decree-Law 78/87, 17 February 1987. Last amended by Law 57/2021, 16 August. Article 58(4).

<sup>38</sup> Portugal, [Código de Processo Penal](#) (Code of Criminal Procedure), approved by Decree-Law 78/87, 17 February 1987. Last amended by Law 57/2021, 16 August. Article 58(5).

<sup>39</sup> Portugal, [Código de Processo Penal](#) (Code of Criminal Procedure), approved by Decree-Law 78/87, 17 February 1987. Last amended by Law 57/2021, 16 August. Article 141(4).

<sup>40</sup> Portugal, [Código de Processo Penal](#) (Code of Criminal Procedure), approved by Decree-Law 78/87, 17 February 1987. Last amended by Law 57/2021, 16 August. Article 143(2).

<sup>41</sup> Portugal, [Código da Execução das Penas e Medidas Privativas da Liberdade](#) (Code of Enforcement of Prison Sentences or Measures involving the deprivation of liberty), 12 October 2009. Last amended by Law 27/2019, 28 March. Article 7(1)(j) and 16(2).

establishment, particularly on the services and activities available to them and their opening hours, as well as the place where the legislation and regulations relevant to the execution of the sentence or measure may be consulted.<sup>42</sup>

Although the law foresees the right to an individual assessment, the right to limitation on deprivation of liberty and to the use of alternative measures, including the right to periodic review of detention and the right to specific treatment during deprivation of liberty, it does not include any disposition obliging the competent authorities to inform underage defendants of such rights.

ii. Information about procedural rights and safeguards in practice

All interviewees state that defendants, regardless of their age, are informed about their rights when they are formally declared defendants in a criminal case. Although there are specific rights for defendants under 18, according to the interviewees, the forms with the defendants' rights that are handed over are the same for adult or underage defendants.

*Tanto quanto sei os formulários são iguais e indistintos entre um jovem de 16 anos e um individuo de 60 anos*

*As far as I know the forms are the same and no different for a 16-year-old and a 60-year-old individual (Public prosecutor, Portugal).*

The paper setting out the rights of the defendants is not written in plain language and is handed to the defendants along with a number of other documents, such as the statement of identity and residence and information on the possibility of receiving legal aid, making it difficult to understand its contents. Nonetheless, interviewees report that the information on the defendants' rights is given also orally and explained to the defendants.

*É-lhes dado a ler um documento com os direitos e os deveres, é-lhes resumido e é-lhes perguntado se compreenderam.*

*A document with the [defendant's] rights and duties is given to them to read, it is summarized and the defendant is asked if they have understood (Public prosecutor, Portugal).*

Interviewees vary in their perceptions about the effectiveness of the oral information that is provided to defendants. According to some, especially prosecutors and police officers, there is an effort to adapt the language and clearly explain the rights of the accused.

*Quando é constituído arguido, é o órgão de polícia criminal que geralmente informa desses direitos. Quando é feito no próprio Ministério Público, (...) tenho o cuidado de explicar não com a nomenclatura que está no Código, (...) quais são os direitos que têm.*

*It is usually the criminal police who informs the person about these rights when the accused becomes a defendant. When it is done at the Public Prosecutor's Office, (...) I am careful to explain, not using the nomenclature that is in the Code, (...) what rights they have (Public prosecutor, Portugal).*

Others, however, report the absence of such an effort.

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<sup>42</sup> Portugal, [Regulamento Geral dos Estabelecimentos Prisionais](#) (General Rules on Prison Establishments), approved by Decree-Law 51/2011, 11 April 2011. Last amended by Decree-Law 70/2019, 24 May 2019. Article 9.

*Tanto quanto sei - mas pode haver práticas não uniformes, quer na polícia, quer no Ministério Público - mas tanto quanto sei não há esse cuidado. Deveria haver porque se para adultos é difícil, para crianças, pior. Às vezes temos crianças e jovens com défices muito grandes de educação (...). Há crianças com níveis de escolaridade baixíssimos ou sem escolaridade sequer. Por exemplo, no caso dos estrangeiros não sabemos que escolaridade têm. Isso torna as coisas complexas. É tudo oral e o que é escrito vale zero para eles. A informação oral é que vale.*

*As far as I know - but there may be non-uniform practices, both in the police and in the Public Prosecutor's Office - but as far as I know there is no such care. There should be, because if it is already difficult for adults, it is even more difficult for children. Sometimes we have children and young people with very big gaps in education (...). There are children with very low levels of education or even no schooling at all. For example, in the case of migrants we don't know their level of education. This makes things complex. Everything is oral and what is written is worth nothing to them. Oral information is what counts (Public prosecutor, Portugal).*

*Às vezes os destinatários não compreendem a informação pela forma como ela é dada (...). Aquilo é lido de tal maneira que o próprio destinatário que muitas vezes está sob pressão não percebe o que lhe estão a dizer. Contudo, há uma preocupação, está institucionalizado entre nós há bastantes anos, de informar.*

*Sometimes the recipients do not understand the information the way it is given (...). It is read in such a way that the recipient, who is often under pressure, does not understand what they are being told. However, there is a concern, it has been institutionalized among us for many years, to inform (Lawyer, Portugal).*

Professionals that get in touch with the children at a later stage of the proceedings, after they have already received the information on their rights, report that the information provided to these underage defendants is limited or, at least, not correctly understood by the recipient of the information.

*Eu penso que a informação que têm é muito limitada, ou seja, a informação que eles obtêm será decorrente dos vários passos processuais até chegarem aqui. Que alguém os tenha informado que têm direito à presença de mandatário, que têm direito a acompanhamento... Este direito à informação parece-me que será muito escasso. Ao chegarem ali muitos deles nem sabem muito bem o que estão ali a fazer. (...) Acho que também tem que ver com o nível económico, porque muitos deles não terão advogado contratado pelo própria meio, é um defensor oficioso, normalmente.*

*I think the information they have is very limited; in other words, the information they obtain is due to the various procedural steps until they reach here. That someone has informed them that they are entitled to be assisted by a lawyer, that they are entitled to be accompanied... This right to information seems to me to be very scarce. When they arrive, many of them do not even know what they are doing there. (...) I think it also has to do with their socio-economic level because most of them do not have a hired lawyer. Normally, it is an officially-appointed lawyer (Non-legal specialist, Portugal).*

This information on the defendants' rights is usually provided by the police or the public prosecutor's office during the first questioning of the defendant. Defendants under 21 years of age must be assisted by a lawyer during this procedural act. According to most of the interviewees, this is the main guarantee that these defendants effectively understand the information provided to them. More than that: some interviewees mention that it is the lawyers who end up explaining their clients their rights. According to some interviewees, when the lawyer is present, the police or judicial authority will just read the defendants' rights and say that the lawyer will then explain the content to them.

*Não há grande diferença entre os jovens e os adultos. A regra é ler o papel. Os magistrados o que dizem é "se tiver dúvidas pergunte aí ao seu advogado".*

*There is no big difference between young people and adults. The rule is to read the paper. The magistrates say "if you have any doubts ask your lawyer" (Lawyer, Portugal).*

*Daquilo que eu assisto, é-lhes entregue o termo de identidade e residência e não lhes são explicados os direitos. O direito a defensor já lhes há-de ter sido comunicado [antes de o defensor chegar]. Não por isso lhes ser explicado, mas pelo facto de ser obrigatório por lei a presença do defensor. Quanto aos demais direitos não lhes são explicados. Aquilo que normalmente acontece é dizerem: "Depois a advogada explica".*

*From what I witness, the statement of identity and residence is given to the defendants and their rights are not explained. The right to a lawyer is communicated to them [before the lawyer arrives]. Not because the right is explained to them, but because it is mandatory by law for the defence lawyer to be present. As for the other rights, they are not explained to them. What normally happens is that they [the police officers, the public prosecutors or the court clerk] say: "The lawyer will explain it all to you later" (Lawyer, Portugal).*

*A: Havendo alguma coisa que não percebam nessas idades, também têm os advogados para esclarecer.*

*Q: Os advogados fazem esse papel?*

*A: Sim, embora nós possamos explicar, a competência é do advogado .*

*If there is something that they do not understand at these ages, they also have lawyers to clarify.*

*Q: Do lawyers play this role?*

*A: Yes, although we can explain, it's within the powers of the lawyer (Police officer, Portugal).*

### iii. Information about the general conduct of the proceedings

Taking as reference the representations of the interviewees throughout the fieldwork, the practices regarding the provision of information on the general conduct of the case are disparate.

All lawyers interviewed state that they explain to their clients how the case will unfold, giving some examples of how they adapt their language to their interlocutor. One lawyer, for example, states that before the trial, they try to draw on a piece of paper a courtroom to explain to the defendant who will be present, where each person will sit and the order in which people will speak. These professionals

mention that this is the job of the lawyers and that rarely does the Public Prosecutor's Office or the police provide this kind of more general information.

*Q: As crianças são informadas sobre os aspetos gerais da tramitação dos processos penais, por exemplo, o curso, o objetivo do processo, do procedimento, o papel das partes? Se sim, por quem e como?*

*A: São informados quando corre bem (...) pelo magistrado do Ministério Público que o chama e que ouve o menor pela primeira vez. (...). Quando corre mal, não são informados por ninguém porque a PSP [Polícia de Segurança Pública] não está preparada para estes processos.*

*Q: Are children informed about the general aspects of the conduct of criminal proceedings - i.e. the course and purposes of proceedings, the role of the parties, etc.? If yes, by whom and how?*

*A: They are informed when it goes well (...) by the public prosecutor who calls them and who hears the child for the first time. (...). When it goes wrong, they are not informed by anyone because the PSP [Public Security Police] is not prepared for these cases (Lawyer, Portugal).*

The police officers interviewed do not share this view. They mention that there is an established practice of explaining the general aspects of the conduct of criminal proceedings, especially the pre-trial stage, including the questioning of child suspects/defendants. They argue that the first time a child faces a criminal procedure, there is a lot of confusion, and that there is an explanation of the role of the parties involved - the criminal police, the public prosecutor and the judge.

*Nós tentamos sempre informar as pessoas diretamente envolvidas nos processos, neste caso arguidos menores, de todas as vicissitudes processuais que decorrem do inquérito-crime. Muitas vezes há muita confusão quando chegam aqui à Polícia pela primeira vez e quando enfrentam um processo-crime pela primeira vez. (...) com os jovens é sempre também do nosso interesse que eles entendam todo o procedimento penal e saberem que o facto de estarem detidos não quer dizer que estejam condenados (...). (...) e que eles entendam que o objetivo principal de um órgão de polícia criminal é chegar à verdade dos factos e não é condenar ou absolver ninguém.*

*We always try to inform the people directly involved in the proceedings, in this case, child defendants, of all procedural issues that arise from the criminal investigation. There is often a lot of confusion when they first come to the police here and when they face a criminal proceeding for the first time. (...) With young people, it is always in our interest that they understand the entire criminal procedure, that they know that being detained does not mean that they have been convicted (...) and that they understand that the main objective of the police investigation is to arrive at the truth of the facts and not to convict or absolve anyone (Police officer, Portugal).*

This information provided by the police, according to the police officers that were interviewed, focuses mainly on the procedural act taking place before the police.

*Normalmente fazemos uma pequena explicação, não de toda a tramitação legal, (...) mas relacionada com o momento que a criança está a viver, ou seja, com a*

*detenção da criança, com a apresentação da criança a primeiro interrogatório sobre um juiz e sobre a questão das medidas de coação que lhe podem ser aplicadas.*

*We usually give a little explanation, not about the entire criminal proceeding, (...) but related to the stage the child is experiencing, in other words, related to the child's detention, with the first interrogation and the coercive measures that can be applied to them (Police officer, Portugal).*

Judges and public prosecutors have a different approach. While the prosecutors report making an effort to simplify the language used in communicating with underage defendants, the judges report no difference in conducting a trial where the defendant is underage. However, emphasis is always placed on the presence of the lawyer as a guarantee of correct understanding on the part of the defendant.

*Eu acho que há coisas muito complexas e que às vezes temos mesmo que trocar as palavras por miúdos. Eu costumo dizer assim “isto são palavras muito complicadas para compreenderes, mas o que eu te queria explicar é, se cumprires estas horas de trabalho é como se o processo nunca tivesse existido e se não cometeres mais crimes, o processo morre”. Uso este tipo de palavras para eles compreenderem. Quando percebo que há alguma dúvida, interrompo para o advogado falar com o arguido ou digo “olhe, o Sr. Dr. lá fora contigo explica-te o que pode acontecer se fores a julgamento”.*

*I think that there are very complex things and that sometimes we have to put it simply. I usually say, “these are very complicated words to understand, but what I wanted to explain to you is, if you do these hours of work, it is as if the case never existed and if you do not commit any more crimes, the case dies”. I use these kinds of words for them to understand. When I realize that there is some doubt, I interrupt so that the lawyer can speak to the defendant or say “look, outside [your lawyer] will explain what can happen if you go to trial” (Public prosecutor, Portugal).*

*(...) Tento não colocar o tom formal que se coloca nessas situações, porque isso é extraordinariamente difícil de compreender (...). A linguagem jurídica é muito difícil de compreender. (...) tento pô-los à vontade no sentido (...) de explicar com calma o que é que aconteceu, que ninguém vai sair dali preso e que estão ali para explicar a situação. (...) e dou sempre a palavra no fim aos pais e ao advogado do menor (...).*

*(...) I try not to use the formal tone in these situations because that is extraordinarily difficult to understand (...). Legal language is very difficult to understand. (...) I try to put them at ease in the sense (...) of calmly explaining what happened, that no one is going to get arrested and that they are there to explain the situation. (...) and at the end, I always give the floor to the child's parents and lawyer (...) (Public prosecutor, Portugal).*

Judges are clear on the fact that there is no difference in conducting the trial for underage and adult defendants.

*No início do julgamento há alguma diferenciação na prestação de informação para os jovens?*

*Não, não há.*

*At the start of the trial is there any difference in the provision of information for young people?*

*No, there isn't (Judge, Portugal).*

The procedural rules are the same for underage and adult defendants, with the exception of the additional procedural rights children have, considering their age and vulnerability. According to the judges interviewed, if the judge realizes that the defendant does not understand the proceedings, it is their duty and obligation to explain better, but they should not downgrade the seriousness and solemnity of the trial.

*As regras processuais são as mesmas, com a exceção das alterações ao Código de Processo Penal (...). (...) Se eu tenho um jovem de dezasseis anos arguido, poderei explicar-lhe os direitos de uma forma mais completa do que faria a um adulto, mas, na realidade, as regras processuais são as mesmas. (...)*

*O arguido está a ser ouvido, é inocente até prova em contrário e tem todos os direitos e garantias, mas também é importante que ele perceba que é um julgamento. A nossa abordagem nunca pode ser demasiado infantil. (...)*

*The procedural rules are the same, with the exception of amendments to the Code of Criminal Procedure (...). (...) If I have a sixteen-year-old defendant, I can explain their rights more fully than I would to an adult, but the procedural rules are the same. (...) The defendant is heard, is innocent until proven guilty and has all the rights and guarantees, but it is also important that they understand that this is a trial. Our approach can never be too childish. (...) (Judge, Portugal)*

Two non-legal specialists refer their perception that children, who are defendants in criminal proceedings, have little information about the proceedings they are involved in. These professionals get in touch with the children at a later stage of the proceedings, after they have already received the information on their rights, and, in the case of one of the professionals interviewed, after the trial of the child. Nevertheless, their perceptions are that the underage defendants find it difficult to correctly understand the information that is given.

*Eu penso que as instituições ligadas à justiça têm em geral uma linguagem pouco clara com toda a gente. É uma linguagem fechada, tecnicista, que muitas vezes não é entendida por quem recebe a mensagem. Nós tentamos dar toda essa informação de uma forma simples e compreensível, mas não deixa de ser informação complexa. (...) Nós quando entrevistamos, tentamos sempre adaptar a nossa linguagem e a comunicação ao jovem e aos pais ou responsáveis educativos que estão com ele. Tentamos sempre fazer isso de forma clara. É uma preocupação especial que nós temos, que é perceber quem temos na nossa frente, que características tem aquele jovem e de que forma nós podemos conversar com ele de maneira a que ele entenda o que está ali a fazer.*

*I think that institutions linked to justice generally use unclear language with everyone. It is a closed, technical language, which is often not understood by whoever receives the message. We try to give all this information simply and understandably, but it is still complex information. (...) When we intervene, we always try to adapt our language and communication to the young person and to the parents or guardians who are with them. We always try to do this in a clear way. We have a special concern in understanding the person we have in front of us, the characteristics of that young person and how we can talk to them so that they understand what they are doing there (Non-legal specialist, Portugal).*

The General Directorate of Rehabilitation and Prison Services (DGRSP) provides guidelines for their professionals on how to act and what to do during their intervention with children, namely while conducting their individual assessment or when assisting them during the trial. Following the transposition of the Directive 2016/800, in 2019, those guidelines were amended. One of the modifications made in the guidelines was to clarify the need to explain to children the general conduct of the proceedings and of the role of each professional, when the professional of the DGRSP is asked to be at the trial with the child. Nonetheless, this apparently does not occur often.

b. Right to have the holder of parental responsibility informed

i. Legal overview

One of the most significant amendments to the Code of Criminal Procedure operated by Law 33/2019 was the inclusion of the participation of the holder of parental responsibilities when the defendant has not reached the age of 18. When an underage suspect formally becomes a defendant, this act is immediately communicated to the holders of parental responsibilities, their legal representative or the person who has their in *de facto* custody<sup>43</sup>. Whenever an investigation is conducted into a specific person, that person mandatorily becomes a defendant if there are grounds to suspect that the person has committed a criminal offence, if they make statements before any judicial authority or criminal police, if a coercive or patrimonial guarantee is to be imposed, or if they are detained. This act is conducted through the formal declaration as a defendant. The status of defendant is acquired by the notification to the concerned person, either orally or in writing, by a judicial authority or criminal police body that, as of that moment, they have the status of defendant in criminal proceedings. The status of defendant following notification by a criminal police body is reported to the judicial authority within 10 days. The judicial authority shall then have a 10-day period for examination and validation or non-validation of the act. At this point, the defendant is informed of the particulars of the case and of defendant's procedural rights and duties<sup>44</sup>.

Furthermore, when a coercive or patrimonial guarantee measure (other than the statement of identity and residence) is imposed on an underage defendant, the decision is immediately communicated to the holders of parental responsibilities, their legal representative or the person who has their in *de facto* custody<sup>45</sup>.

The holders of parental responsibilities, the legal representative or the person who has the defendant in *de facto* custody have the right to be informed of the defendant's rights every time they appear before a judicial authority or the police, and, therefore, the right to be informed of the statement of rights foreseen in Article 61 of the Code of Criminal Procedure<sup>46</sup>.

When it is impossible to contact these people, or in special circumstances based on the defendant's interest or where the needs of the proceedings impose, and only as long as those circumstances persist, another suitable person indicated by the defendant and accepted by the competent judicial

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<sup>43</sup> Portugal, [Código de Processo Penal](#) (Code of Criminal Procedure), approved by Decree-Law 78/87, 17 February 1987. Last amended by Law 57/2021, 16 August. Article 58(7).

<sup>44</sup> Portugal, [Código de Processo Penal](#) (Code of Criminal Procedure), approved by Decree-Law 78/87, 17 February 1987. Last amended by Law 57/2021, 16 August. Article 58.

<sup>45</sup> Portugal, [Código de Processo Penal](#) (Code of Criminal Procedure), approved by Decree-Law 78/87, 17 February 1987. Last amended by Law 57/2021, 16 August. Article 194(11).

<sup>46</sup> Portugal, [Código de Processo Penal](#) (Code of Criminal Procedure), approved by Decree-Law 78/87, 17 February 1987. Last amended by Law 57/2021, 16 August. Article 61(3).



authority shall be appointed<sup>47</sup>. Where the defendant does not indicate a suitable person or such person is not accepted by the judicial authority, the judicial authority designates a specialised professional<sup>48</sup>. Although the law does not clarify the grounds on which a judicial authority may justify a decision not to accept the person indicated by the defendant, this possibility is allowed to those cases where there is a strong suspicion that the indicated person may be either involved in the criminal act or may hinder the best interests of the child. The law does not provide for further clarification or detail on the specialised professional that may be appointed. During the legislative procedure and the parliamentary debate on the Draft Law that gave rise to the amendment to the Code of Criminal Procedure, the Public Prosecutor's Office, in its written opinion to the Draft Law, agreed with this general wording. According to this opinion, the wording of the proposal is in line with other national legislation, in particular with that used in the Educational Guardianship Law, which provides for the possibility of appointing a social worker or other specially qualified person to accompany the child to the hearing. This specialised professional, according to the opinion of the Public Prosecutor's Office, must be a professional with special knowledge of accompanying children within the justice system<sup>49</sup>. The defendant may contest the failure to comply with these formalities, by arguing the nullity of the act before a judge<sup>50</sup>. The decision on the arguing of this nullity may be appealed.

ii. Informing the holders of parental responsibility

All interviewees mention that, with the amendment to the Code of Criminal Procedure made by virtue of Directive 2016/800, holders of parental responsibilities are now informed when the underage defendant becomes a defendant and receives the same information that is provided to the defendants themselves. As mentioned, this is a novelty introduced by Law 33/2019.

*Q: O titular da responsabilidade parental é informado dos direitos da criança enquanto suspeita ou arguida?*

*A: Sim. Geralmente os menores são sempre acompanhados pelos pais, pelo pai e pela mãe e são explicados os direitos e os deveres que eles têm. Eles estão presentes no interrogatório (...) e ouvem a leitura dos direitos que são efetuados ao menor.*

*Q: Is the person with parental responsibility informed about the child's rights as a suspect or accused person?*

*A: Yes. Generally, children are always accompanied by their parents, father and mother, and the rights and duties are explained. They are present at the interrogation (...) and hear the reading of the child's rights (Lawyer, Portugal).*

*Eles [os titulares da responsabilidade parental] estão sempre na sala quando eu estou a informar o menor. (...) Eles estão lá e ouvem todo o interrogatório, inclusivamente esta parte preambular. Eles ouvem toda esta conversa sobre os direitos sempre.*

*They [the holders of parental responsibilities] are always in the room when I'm informing the child. (...) They are there and listen to the entire interrogation, including*

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<sup>47</sup> Portugal, [Código de Processo Penal](#) (Code of Criminal Procedure), approved by Decree-Law 78/87, 17 February 1987. Last amended by Law 57/2021, 16 August. Article 61(1)(i)..

<sup>48</sup> Portugal, [Código de Processo Penal](#) (Code of Criminal Procedure), approved by Decree-Law 78/87, 17 February 1987. Last amended by Law 57/2021, 16 August. Article 61(4).

<sup>49</sup> Attorney General Office (2018), [Parecer da Procuradoria Geral da República sobre a Proposta de Lei 169/XIII/4](#), 12 December 2018.

<sup>50</sup> Portugal, [Código de Processo Penal](#) (Code of Criminal Procedure), approved by Decree-Law 78/87, 17 February 1987. Last amended by Law 57/2021, 16 August. Article 120..

*this preamble. They hear all this talk about rights always (Public prosecutor, Portugal).*

This implies that the quality of the information provided is similar to that provided to the defendant and, thus, may not be very effective.

*Q: E o titular das responsabilidades parentais é informado destes direitos da criança?*

*A: É feito assim “en passant”. Ninguém se prende com pormenores ou se a pessoa alcançou o sentido do direito que lhe está atribuído.*

*Q: Is the person with parental responsibility informed about the child’s rights as a suspect or accused person?*

*A: It is done “lightly”. Nobody is concerned with details or if the person understood the rights (Lawyer, Portugal).*

Also, according to one interviewee the holder of parental responsibility is neither given any documents with the child’s rights, nor do they sign anything, hence the information is only given orally.

Some interviewees mention that, although the holder of parental responsibility can attend the procedural acts, sometimes, it is not in the best interest of the child or of the investigation to do so. Interviewees give the example of cases in which the holder of parental responsibility is involved in the crime or where the holder of parental responsibilities may become a witness in the case.

*Para além da assistência do advogado, eles têm que ser informados e são informados de que podem solicitar a presença de um titular da responsabilidade parental. Aqui, o que por vezes sucede é que nós temos de perceber é se a pessoa nomeada pelo jovem será a pessoa mais indicada para defender os seus interesses no âmbito desse processo-crime em específico. (...) até porque muitas vezes até podem estar envolvidas, nem que seja indiretamente, na prática desses crimes (...). (...) Para além dos pais ou algum familiar direto, ele tem o direito de nomear outra pessoa (...), se chegarmos à conclusão que qualquer das pessoas não defende os interesses do jovem da melhor forma, informamos o Ministério Público para que nomeie um técnico especializado para o efeito, (...) no sentido de prestar apoio ao jovem sem prejudicar a investigação.*

*In addition to the assistance of the lawyer, they have to be informed and are informed that they can request the presence of the holder of parental responsibility. What sometimes happens is that we have to check whether the person appointed by the child will be the best person to defend the child’s interests in the context of that specific criminal process, because they may be involved, even if indirectly, in the crimes. In addition to the parents or a direct family member, the child has the right to appoint another person. If we realize that neither of them uphold the interests of the child, we inform the Public Prosecutor to appoint a specialised officer for this purpose, (...) to provide support to the young person without jeopardizing the investigation (Police officer, Portugal).*

### iii. Having a nominated/designated person informed

Not all of the interviewees have experience with cases where another suitable person indicated by the defendant and accepted by the competent judicial authority was appointed. The most common cases reported are those that involved underage defendants that are institutionalised. In these cases,

interviewees mention that it is common to appoint the head of the institution where the child is accommodated and these defendants tend to be accompanied by a professional from this institution.

As regards the ability of the defendant to indicate a suitable person, most of the interviewees that reported having experience with these situations say that the defendants will tend to be devalued. Interviewees report situations which reveal that the right of the child to be accompanied by a person is carried out automatically in the person of their parents, without consideration of the concrete situation.

*Q: E as autoridades nacionais avaliam se existe algum motivo para o contrário, ou seja, para não informar o titular das responsabilidades parentais? E se sim, que tipo de motivos é que eles consideram?*

*A: Não, informar os pais é um procedimento automático. Tanto que eu já tive casos em que os pais, que abandonaram os filhos, são chamados (...) quando a criança está a ser ouvida (...) porque agrediu o monitor da instituição. A criança fica absolutamente confusa. (...) Não, não avaliam, chamam automaticamente os pais como se os pais fossem todos protetores e capazes. Muitas vezes os miúdos não querem sequer ver os pais, portanto, não, não avaliam.*

*Q: Do national authorities examine whether there are any reasons not to inform the holder of parental responsibility and what would such reasons be?*

*A: No, informing parents is an automatic procedure. So much so that I've had cases where the parents who have abandoned their children are called (...) when the child is being questioned (...) because they assaulted the institution's monitor. The child is totally confused. (...) No, they don't evaluate, they automatically call the parents as if the parents were all protective and capable. Often kids don't even want to see their parents, so no, they don't evaluate this (Lawyer, Portugal).*

A professional from General Directorate of Rehabilitation and Prison Services (DGRSP) states that sometimes, the court finds a temporary solution for the designation of the person who accompanies the underage defendant, in order to comply with the formality and perform the initial questioning, and then, as the case unfolds, the accompaniment ends up being done by another person more suitable.

*Por vezes, o tribunal encontra uma solução para ultrapassar o primeiro interrogatório. Mas imagine que temos uma avó que é muito idosa e que é a tutora deste jovem ou que o jovem é adotado e já não está com a família adotiva há muito tempo. Nessas situações, encontramos sempre uma pessoa que seja da confiança do jovem (professores, madrinhas). (...) Conseguimos encontrar sempre alguma pessoa com quem o jovem se sinta confiante (...). Nessas circunstâncias, sendo o jovem a indicar-nos é com eles que trabalhamos e depois informamos o tribunal.*

*Sometimes the court finds a solution to overcome the initial questioning of the defendant. But imagine that we have a grandmother who is very old and is the guardian of this child, or that the child is adopted and has not been with the adoptive family for a long time. In these situations, we always find a person who is trusted by the child (teachers, godparents). (...) We always manage to find someone with whom the child feels confident (...). In those circumstances, as it is the child who indicates to us, it is with them that we work and then we inform the court (Non-legal specialist, Portugal).*

iv. Involvement of parents or designated persons in the criminal proceedings

All of the interviewees agree that the holder of parental responsibilities can attend the procedural acts, but cannot intervene directly in the proceedings. The holder of parental responsibilities only attends the procedural acts and has the right to talk with the child and child's lawyer. The lawyer can also ask the judge to interrupt the hearing to talk with the holder of parental responsibility.

*O legal representante é informado, (...) através das notificações que são feitas ao longo do processo. Depois é notificado para comparecer em julgamento (...). Não tem é uma intervenção no processo, está só a assistir (...). Ele fica a assistir na sala com o menor, tem direito a falar com o menor e tem direito a falar com o defensor do menor.*

*The legal representative is informed, (...) through the notifications that are made throughout the proceedings. They are then notified to appear at trial (...). They have no intervention in the proceedings (...). They assist the hearing with the child and have the right to speak with the child and with the child's lawyer (Judge, Portugal).*

Regarding the involvement of the holder of parental responsibilities, the perceptions of the interviewees are highly influenced by their experiences and the types of cases they handle. In the interviews conducted with underage defendants, the level of participation of the holder of parental responsibilities seems to have a direct relationship with their perceptions of the criminal process. The participation of the holder of parental responsibilities varies from case to case. Judges and public prosecutors mention that some children appear at the trial alone, despite the holder of parental responsibility being notified to also attend the trial, and others are accompanied by the holder of parental responsibility, who seems concerned. Police officers argue that with recurrent offenders it is particularly difficult to contact the holders of parental responsibilities, since they are not concerned with the fate of the child. Lawyers and professionals from the General Directorate of Rehabilitation and Prison Services (DGRSP) state that there is no single pattern of parental behaviour: some parents are always present during the criminal proceedings, get involved and try to support the defendant; others turn out to be completely absent.

*Q: As famílias envolvem-se no processo, nas diferentes fases?*

*A: Varia muito. Não posso dizer que há um padrão. Há aqueles que vão a correr "coitadinho no menino, o polícia é que é o mau" e depois há os outros que dizem "deixem-no estar que ele está lá bem, ver se aprende". Não há um padrão de comportamento. (...) Quando começa a chegar a julgamento as pessoas percebem que é mais sério e sinto que acompanham mais, mas na primeira fase não.*

*Q: Do families get involved in the case, in the different phases?*

*A: It varies a lot. I cannot say that there is a pattern. There are those who come running, saying "poor boy, the policeman is the bad guy" and then there are others who say "let him be there, to see if he learns". There is no pattern of behaviour. (...) When it comes to trial, people realize that it is more serious and I feel that they are more involved, but not in the first phase (Lawyer, Portugal).*

*Pois, isso é complicado, temos de tudo. Temos pais que vêm preocupados (...) e dizem "estamos aqui para ajudar" (...), "Foi um caso isolado, nunca tinha acontecido".*

*Vemos que são pais atuantes, pais que se preocupam (...). Outras vezes temos pais verdadeiramente ausentes que até se insurgem, (...) que se revoltam (...).*

*Well, this is complicated, we have everything. We have parents who come worried (...) and say “we are here to help” (...), “It was an isolated case, it has never happened before”. We see that they are active parents, parents who care (...). Other times we have truly absent parents who even object, (...) who rebel (...) (Non-legal specialist, Portugal).*

c. Audio-visual recording of questioning and due verification of written records

i. Legal overview

There are no special rules for defendants under 18 as to audio-visual recording of statements. The only specific rule is, as mentioned, the mandatory assistance of a defence lawyer in every procedural act (other than the formal declaration as a defendant) for defendants under 21<sup>51</sup>.

Trials are, as a rule, always audio recorded and courts are equipped with an audio recording system<sup>52</sup>. The law also allows for audio-visual recording, but most courts are not equipped accordingly. In the other phases of the criminal procedure, for example, the questioning of the defendant during the investigation phase, the general rule is to make use of written minutes. Nonetheless, audio or audio-visual recording may also be used where available<sup>53</sup>.

ii. Implementation in practice

Interviewees agree that, in practice, that questioning by the police and the public prosecution, during the investigation phase, is, as a rule, not recorded, since an audio-recording system is not available. In these cases, written minutes are used. Where an audio-recording system is available, the questioning is audio-recorded. Nonetheless, the questioning before a pre-trial judge is usually audio-recorded.

*Se virem nos autos de interrogatório, por norma diz que a diligência não é gravada ou filmada por não haver meios para o efeito. (...) Essa devia ser a regra, mas infelizmente não temos meios. (...) A. Sim, é escrito. Pode ser gravado, às vezes, dependendo ... podemos fazer uma teleconferência e fica gravado em áudio, mas depois o julgamento é todo gravado.*

*If you look at the records of the questionings, it usually says that the act is not recorded or filmed because there are no means to do so. (...) That should be the rule, but unfortunately we don't have the means. (...) Yes, written minutes are used. It can be recorded, sometimes, depending ... we can do a teleconference and it's audio recorded, but then the whole trial is recorded (Public prosecutor, Portugal).*

On the other hand, the trial is always audio-recorded. There are some places where there is video recording, but it is very rare. One lawyer, nevertheless, points out that the current legal regime on irregularities concerning the audio record of the hearings does not guarantee the defendant's right to fully appeal. According to the procedural law, the parties must argue any deficiency of the record within 10 days from any hearing, that is, if a hearing is spread over several days, the time limit to argue

<sup>51</sup> Portugal, [Código de Processo Penal](#) (Code of Criminal Procedure), approved by Decree-Law 78/87, 17 February 1987. Last amended by Law 57/2021, 16 August. Article 64 (d).

<sup>52</sup> Portugal, [Código de Processo Penal](#) (Code of Criminal Procedure), approved by Decree-Law 78/87, 17 February 1987. Last amended by Law 57/2021, 16 August. Article 364.

<sup>53</sup> Portugal, [Código de Processo Penal](#) (Code of Criminal Procedure), approved by Decree-Law 78/87, 17 February 1987. Last amended by Law 57/2021, 16 August. Article 99 and 101.

any deficiency is independent of the number of days. When the party does not argue the deficiency of the audio record timely and the audio record is not audible, the appeal court cannot rule on the facts based on the recorded testimonies. The interviewee claims that this is an unlawful burden on the defendant, since one should rely on the efficiency of the system and the defendant should not be penalised by an error of the court or an inadequacy of the equipment in the court.

d. Discussion of findings

*Summarize the findings of the chapter by relevant section.*

Despite the fact that the right to information is legally guaranteed and that the interviewees affirm that care is taken to adapt the language in the oral transmission of information to underage defendants, especially in the pre-trial phase, the interviewees report the existence of practices that challenge its effectiveness. Most of the interviewees state that the correct transmission of information to defendants about their rights is guaranteed through the mandatory presence of a lawyer in any procedural act, thus leaving the task of clarifying any doubts the defendant has to the lawyer representing them.

However, interviewees (mainly professionals who have contact with defendants at a more advanced stage of the criminal process) report frequent situations where underage defendants have not correctly understood the information transmitted to them. This inability to understand the information transmitted is particularly noticeable with regard to the general rules on the conduct of the proceedings. Some professionals refer the difficulty for underage defendants to understand, for example, the consequences of a provisional suspension of the proceedings or of a suspended prison sentence, which challenges the very purposes of the sentences. This too was confirmed by the interviews conducted with children.

All interviewees mention that, with the amendment to the Code of Criminal Procedure made by virtue of Directive 2016/800, holders of parental responsibilities are informed when the underage defendant becomes a defendant and they receive the same information that is provided to the defendants themselves. This implies that the quality of the information provided is the same to that provided to the defendant and, thus, may lack effectiveness as regards its comprehensibility, since they are not written in clear language.

The procedure used in practice in order to designate another suitable person to accompany the underage defendant is unclear. When the underage defendant is institutionalised, according to the interviewees, it is common to designate the head of the institution where the child is accommodated. Apart from these situations, the concrete procedure appears to be case-by-case.

According to the interviewees, the actual involvement of the holder of parental responsibilities in the criminal proceedings depends on that person's attitude, since the right to be involved is guaranteed by law, but some choose not to exercise it.

As for the audio-visual recording of the procedural acts involving underage defendants, interviewees agree that, in practice, the questioning by the police and the public prosecution during the investigation phase is, as a rule, not recorded, since an audio-recording system is not available. In these cases, written minutes are used. Where an audio-recording system is available, the questioning is audio-recorded. Nonetheless, the questioning before a pre-trial judge is, as a rule, audio-recorded as is the trial.

## C.4 The rights to be assisted by a lawyer and legal aid

### a. Legal overview

Every defendant, regardless of their age, has the right to choose a lawyer or ask the court to appoint them a defence lawyer<sup>54</sup>. Whenever a suspect becomes a defendant, the authority that presides over the act informs the defendant of this right<sup>55</sup>. This information is also given at the beginning of the first judicial questioning of a detained defendant<sup>56</sup> and at the beginning of the questioning before a public prosecutor during investigations<sup>57</sup>.

During the investigation phase, defendants may waive their right to have a lawyer present during statements. There is, nevertheless, an exception for defendants who are under 21, deaf, mute, blind, illiterate, unfamiliar with the Portuguese language or thought not to have legal capacity. In these cases, the assistance of a defence lawyer in every procedural act (other than the formal declaration as a defendant) is compulsory<sup>58</sup>. Thus, if the defendant, in these cases, does not choose or appoint a lawyer, the presiding authority of the procedural act proceeds with the appointment of a lawyer to the defendant *ex officio*. This appointment is made under the legal aid system and the assistance is provided by a lawyer appointed by the Bar Association from the list of registered lawyers in the legal aid system according to their preferred areas of practice. Nonetheless, this mechanism does not grant, per se, free legal aid. That is, although a lawyer is appointed *ex officio*, the defendant will have to pay for court and lawyer's fees. In order to benefit from free legal aid, the person must apply for it, submitting an application to the social security services, and meet the requirements of means-testing based on their household income<sup>59</sup>.

When a defendant is subject to the statement of identity and residence, the defendant issues a statement regarding their household's income, assets and permanent expenditure, which may lead to a provisional granting of free legal aid<sup>60</sup>. Nonetheless, defendants are always obliged to apply for free legal aid if they want to benefit from it. Applications for legal protection are decided by the social security services (*Instituto da Segurança Social*, ISS). The applications may be submitted in person, by fax, by post or online and must be accompanied by the documents that prove the applicant's lack of means<sup>61</sup>. The decision of the ISS should be given within 30 days<sup>62</sup>.

### b. Assistance by a lawyer and legal aid

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<sup>54</sup> Portugal, [Código de Processo Penal](#) (Code of Criminal Procedure), approved by Decree-Law 78/87, 17 February 1987. Last amended by Law 57/2021, 16 August. Article 61(1)(e).

<sup>55</sup> Portugal, [Código de Processo Penal](#) (Code of Criminal Procedure), approved by Decree-Law 78/87, 17 February 1987. Last amended by Law 57/2021, 16 August. Article 58(4).

<sup>56</sup> Portugal, [Código de Processo Penal](#) (Code of Criminal Procedure), approved by Decree-Law 78/87, 17 February 1987. Last amended by Law 57/2021, 16 August. Article 141(4).

<sup>57</sup> Portugal, [Código de Processo Penal](#) (Code of Criminal Procedure), approved by Decree-Law 78/87, 17 February 1987. Last amended by Law 57/2021, 16 August. Article 143(2).

<sup>58</sup> Portugal, [Código de Processo Penal](#) (Code of Criminal Procedure), approved by Decree-Law 78/87, 17 February 1987. Last amended by Law 57/2021, 16 August. Article 64 (d).

<sup>59</sup> Portugal, [Lei do Acesso ao Direito e aos Tribunais](#) (Legal Aid Act), approved by 29 July 2004. Last amended by Law 2/2020, 31 March 2020. Article 39.

<sup>60</sup> Portugal, [Lei do Acesso ao Direito e aos Tribunais](#) (Legal Aid Act), approved by 29 July 2004. Last amended by Law 2/2020, 31 March 2020. Article 39.

<sup>61</sup> Portugal, [Lei do Acesso ao Direito e aos Tribunais](#) (Legal Aid Act), approved by 29 July 2004. Last amended by Law 2/2020, 31 March 2020. Article 8-B.

<sup>62</sup> Portugal, [Lei do Acesso ao Direito e aos Tribunais](#) (Legal Aid Act), approved by 29 July 2004. Last amended by Law 2/2020, 31 March 2020. Article 25(1).

The mandatory right of defendants under 21 to be assisted by a lawyer in every procedural act is recognised by every interviewee. Since non-compliance with this rule entails the nullity of the procedural act, the appointment of an *ex officio* lawyer to a defendant under 21 who does not choose their own lawyer is an automatic procedure.

*Q: Em comparação com os procedimentos criminais para adultos, as autoridades nacionais aplicam medidas específicas para garantir que as crianças são sempre ativamente assistidas por um advogado?*

*A: É automático. Se acontecer é nulo e nada daquilo vale. O arguido não poderá ser prejudicado por essa falha da justiça, porque é como se o processo tivesse parado ali, nunca pode ser tido em conta. (...) Entende-se que dada a idade, terem menos informação e maturidade, têm que ter mais direitos que as outras [pessoas]...*

*Q: Compared to criminal proceedings for adults, do national authorities apply particular measures to ensure that children suspected or accused of crime are always actively assisted by a lawyer throughout pre-trial and trial proceedings?*

*A: It is automatic. If [a defence lawyer is not present], it is null and none of that is worth it. The accused cannot be harmed by this failure of justice because it is as if the case had stopped there, it can never be taken into account. (...) It is understood that given their age, having less information and maturity, they have to have more rights than other [people]... (Public prosecutor, Portugal)*

Underage defendants are, thus, always accompanied by a defence lawyer in every procedural act.

*Todos os menores de 21 anos são sempre assistidos por advogado. Não há ato processual que não exija a presença de advogado. É obrigatória a presença sob pena de vício e irregularidade do ato.*

*All persons under 21 are always assisted by a lawyer. There is no procedural act that does not require the presence of a lawyer. The presence [of a lawyer] is mandatory under penalty of irregularity of the act (Lawyer, Portugal).*

In fact, the mandatory presence of a defence lawyer of a defendant under 21 in every procedural act is seen by most of the interviewees as a guarantee that all other rights of these defendants are ensured and, particularly, that the right to information of these defendants is guaranteed.

*(...) Há uma norma que (...) impõe que, em qualquer fase, ainda que não esteja obrigatoriamente prevista a presença de advogado, neste caso específico de menores de 21 anos, ele tem que estar. E essa foi a forma genérica como a nossa lei pretendeu que houvesse aqui um esclarecimento adicional, para que a pessoa nunca ficasse desacompanhada de estar representado por advogado. Eu acho que isto era pouco (...). Mas se estiver acompanhado por advogado, esse dever de esclarecimento fica assegurado.*

*(...) There is a regulation which (...) imposes that, in any phase of the procedure, even though the presence of a lawyer is not compulsory for the general defendants, in this specific case of minors under 21 years of age, the lawyer has to be present. And this was the general way in which our law intended there to be additional clarification, so that the person would never be unaccompanied by being represented by a lawyer. I think this was not enough (...). But if the person is accompanied by a lawyer, this duty of clarification is assured (Judge, Portugal).*



Nonetheless, lawyers specifically report a practice that challenges this right to be assisted by a lawyer: the so-called “informal conversations”, that is conversations that take place before the lawyer arrives. This, too, is confirmed by the children interviewed. Lawyers report that often the police start to talk with the defendants before the lawyer arrives. These conversations have no formal legal value; nonetheless, the defendants are not informed that they have the right not to talk. One lawyer gives the example of a specific case, where these informal conversations took place before a public prosecutor. The underage defendant told the police and the public prosecutor everything before the defence lawyer arrived.

*Às vezes, começam a falar com os arguidos e a extrair informações. Não lhes é dito que eles não têm que falar. Muitas vezes, eu depois de falar com os arguidos, digo para eles não falarem e (os polícias) ficam muito aborrecidos. Dizem: "então, mas eu já tinha estado a falar com ele. Ele quer falar." (...) Ainda há pouco tempo me aconteceu. (...) Quando eu cheguei, a identificação estava feita e já estava tudo pronto para redigir o auto. Eu falei com ele e disse que não ia prestar declarações. A frustração foi imensa, tanto por parte dos polícias como da parte do Ministério Público, que ficou muito irritado. (...) Tinham estado a falar com o miúdo antes de eu chegar e estava tudo já arranjado para o miúdo falar.*

*Sometimes, they make the identification before I arrive and wait for the defence lawyer to arrive. Sometimes, they start talking to the defendants and extract information. The defendants are not told that they don't have to talk. Many times, after I talk to the defendant, I tell the defendant not to talk and they [(the police)] get very upset. They say: ' but I have already been talking to them. They want to talk.' (...) Just recently it happened. (...) When I arrived, the identification was done and everything was ready to write the report. I spoke with the defendant and said that the defendant was not going to make a statement. The frustration was immense, both, on the part of the police and the public prosecutor, who was very angry. (...) They had been talking to the kid before I arrived and everything was already arranged for the kid to talk (Lawyer, Portugal).*

Furthermore, the mandatory appointment of a lawyer does not entail, per se, the right to free legal aid. All defendants, adults or children, are currently subject to questioning on their financial means in order to make a first assessment of the possibility to be granted free legal aid. According to one lawyer, underage defendants often don't even know how to answer most of the questions (like the net income of their family, or the value of their home). Moreover, they seldom have their parents' help, since they often come from dysfunctional families. Nonetheless, the police or the court clerk that conducts such questioning does not inform them on how to apply for legal aid. Moreover, the interviewee points out that underage defendants have no ability to take care of the paperwork necessary to request free legal aid. Most of them don't even know how the tax declaration (one of the documents required) works.

*(...) Eles não têm maturidade para tratar destes papéis. Já podem ser responsabilizados penalmente, mas tratar desta papelada não têm maturidade. Nem fazem ideia do que é o IRS [Imposto sobre o Rendimento das Pessoas Singulares], nem querem saber. Comprovativos de morada, declarações de rendimentos dos pais dos últimos 6 meses... Quer dizer, eles não têm forma de me trazer isso. A maior parte dos pais nem querem saber. (...) Eles não têm acesso a estes documentos a não ser que os pais colaborem. A maior parte dos pais não*

*querem saber, nem aparecem nas audiências. Está garantido o direito ao defensor, porque é obrigatório para arguidos com menos de 21 anos, se não nem isso tinham.*

*They don't have the maturity to deal with these papers. They can be held criminally responsible, but they don't have the maturity to deal with this paperwork. They have no idea what IRS is [Personal Income Tax, Imposto sobre o Rendimento das Pessoas Singulares], nor do they want to know. Proof of address, parents' income statements for the last six months... I mean, they have no way of bringing those documents to me. Most of the parents don't even want to know. (...) They don't have access to these documents, unless the parents cooperate. Most of the parents don't want to know, they don't even show up for the hearings. The right to a lawyer is guaranteed, because it is mandatory for defendants under 21, otherwise they wouldn't even have that (Lawyer, Portugal).*

This difficulty is highlighted in the interviews conducted with underage defendants who mistake the ex officio appointment of a defence lawyer for exemption from payment of court costs and fees.

### c. Effective participation of a lawyer

Most interviewees relate the term “effective participation of a lawyer” to the right to present evidence, to make requests, to have a decision in due time, to have justified decisions, to intervene in the proceedings, to be heard at any moment of the proceedings, to meet with the defendant, to explain to the family and to inform and advise the defendant.

*A participação efetiva é mais que uma participação formal. (...) Com a participação efetiva pretende-se que o advogado intervenha efetivamente em cada um dos atos: solicitar ao juiz que seja feito certo tipo de perguntas, (...) esclarecer a família e o arguido, discutir com o arguido a estratégia que vão tomar. (...) A ideia de participação efetiva significa que é preciso dar tempo ao advogado para poder estudar o processo, falar com o jovem e desenhar com ele a estratégia.*

*Effective participation is more than formal participation. (...) With effective participation, it is intended that the lawyers intervene effectively in each of the acts: request the judge to ask certain types of questions, (...) explain to the family and the defendant, discuss the strategy with the defendant. (...) The idea of effective participation means that you need to give the lawyer time to study the case, talk to the young person and draw up the strategy with them (Lawyer, Portugal).*

Two public prosecutors, however, report that they are sometimes confronted with inadequate defences. This can be attributed to the intimidating attitude of some public prosecutors and judges, but also to a lack of knowledge and experience of these lawyers.

*Qualquer advogado deve ter uma participação efetiva, mas isso, infelizmente, não acontece muitas vezes. Um advogado com participação efetiva deve pedir para consultar o processo (...) e aconselhar o melhor possível o seu cliente (...). Os advogados às vezes têm receio... até podiam ter junto qualquer coisa que beneficie o arguido e não juntam. (...) Sim, acredito que este tipo de postura seja quase que imposta por alguma atitude dos magistrados judiciais ou do Ministério Público (...). (...) há juízes com uma postura intimidatória (...). Por outro lado, também pode ser falta de conhecimento, profissionalismo.*

*Any lawyer should be able to intervene effectively, but that, unfortunately, does not happen very often. A lawyer who intervenes effectively should ask to consult the case and advise their client in the best possible way (...). Lawyers are sometimes afraid ... they could present something that benefits the defendant, and they don't. (...) Yes, I believe that this type of attitude is almost imposed by the attitude of some judges and public magistrates (...). (...) There are judges with an intimidating attitude (...). On the other hand, it can also be a lack of knowledge, professionalism (Public prosecutor, Portugal).*

One public prosecutor recommends the creation of a pool of specialised lawyers for underage defendants in criminal proceedings. According to this interviewee, this solution would improve the quality of lawyers acting in this area and provide them with specific training.

One lawyer also points out that some lawyers, particularly in smaller cities and ex officio lawyers, tend to refrain from active and effective intervention. This lawyer explains this behaviour with the proximity between judges, prosecutors, lawyers and court clerks in smaller cities, where there are family ties between some professionals and, thus, there is no willingness to be openly combative in court.

- d. Communication with the child and other important aspects when defending and assisting a child who is suspected or accused of a crime

The lawyers interviewed tend to value their role as privileged interlocutors of underage defendants and as key players that need to create a bond of trust with their clients. They thus assume the role not only of translator of the criminal procedure (adapting their language to the defendant), but, essentially, of the person who enlightens them on the importance of the outcome of the case for their future. Lawyers thus emphasise the importance of explaining to underage defendants the seriousness of being involved in a criminal case and of the possible consequences. They try to exert a positive influence on their future by encouraging them to follow the law and, thus, help them beyond the criminal case and the legal assistance.

*O problema é fundamentalmente fazer com que o jovem perceba a gravidade do ato que praticou. Eles não têm ainda a maturidade para compreender isso. Insultar um polícia, não é nada para eles. (...) Destruir algo ou fazer uma pintura no mobiliário urbano, não tem significado para eles. Há este papel de explicar o porquê de ser proibido e o porquê de o ato ser crime ou não. (...) É preciso encontrar a linguagem dele, metê-lo à vontade e tentar estabelecer a comunicação (...) uma ligação de confiança.*

*The problem is fundamentally to make the young person realize the seriousness of the act committed. They do not have the maturity to understand this. Insulting a police officer is nothing for them ... Destroying something or painting street furniture is meaningless to them. There is this role of explaining why it is prohibited and why the act is a crime or not. (...) It is necessary to find their language, put them at ease and try to establish communication.... a bond of trust (Lawyer, Portugal).*

One lawyer states that the most important role the lawyer plays is to widen the child's horizons, to help the child beyond the criminal case, by encouraging them to study and learn. The interviewee claims that "a lawyer that only knows the law, does not even know the law".

*Abrir-lhes horizontes. Dizer-lhes que podem ambicionar serem muito mais do que motoristas de longo curso. Explicar-lhes que a verdadeira essência da vida é o conhecimento, a leitura. (...) que têm que ler muito e aprender muito.*

*To open horizons for them. Tell them that they can aspire to be much more than long-distance lorry drivers. Explain to them that the true essence of life is knowledge, reading. (...) They have to read a lot and learn a lot (Lawyer, Portugal).*

e. Confidential and private consultations and meetings

Interviewees believe that the right of the defendants to confidential and private consultations and meetings with their lawyer is widely ensured in practice, both for underage defendants and adults, regardless of the fact they are deprived of their liberty or not, and they could not identify any challenges.

*Aqui também não há diferenças entre jovens e adultos. Podem conferenciar em privado com o seu defensor, é um direito básico (...).*

*There is no difference between juveniles and adults here either. They can confer in private with their lawyer, it's a basic right (...). (Public prosecutor, Portugal).*

f. Cooperation with the child's holder of parental responsibility

According to the lawyers that were interviewed, cooperation with the child's holder of parental responsibility is different from case to case, depending more on the attitude of the parents than on the standard procedure followed by lawyers. Most lawyers report that there are some challenges in cooperating with the defendant's holder of parental responsibility. One interviewee describes one case, in which the mother of an underage defendant went to their office asking to let her child go to prison. Another lawyer gives the example of a father who said that he was tired of paying fines and asked the interviewee to leave the son detained for a few days to see if he learned. This interviewee also mentions that sometimes parents say: "I am the one who pays you...". Another example the interviewee gives is the parents, especially of the higher classes, who over-protect their children, that have difficulties in perceiving the injunctions that are applied.

*(...) A função do advogado é sempre a defesa do seu cliente e no caso a do jovem. Muitas vezes é preciso defender os jovens dos próprios pais... (...) A nossa função é defender o jovem. (...) Se conseguir conciliar com os pais, tudo bem, se não poder... o foco é sempre o jovem. Às vezes isto é muito difícil porque depois tenho o pai a dizer "olhe que quem lhe paga sou eu...". Mas nesses casos, se não der mesmo eu digo "então arranje outro advogado". Muitas vezes o advogado não abandona o patrocínio a pensar no jovem.*

*The role of the lawyer is always to defend their client and, in this case, the young person. It is often necessary to defend young people from their own parents ... (...) Our job is to defend the young person. (...) If you manage to reconcile them with their parents, that's fine, if you can't ... the focus is always on the young person. Sometimes this is very difficult because afterwards, the father says to me "I am the one who pays you...". But in those cases, if it is really impossible to continue, I say "then get another lawyer". Often the lawyer abandons the case not because of the young person (Lawyer, Portugal).*

#### g. Discussion of findings

One of the fundamental rights of any defendant is the right to be accompanied by a defence lawyer in all procedural acts. This is a right that a defendant under the age of 21 cannot waive. This rule of the mandatory presence of a lawyer in all procedural acts when the defendant is under 21 years of age is considered, by the interviewees, as an essential basis that guarantees the effectiveness of all other rights - from the right to information to the right to participate in the court proceedings.

However, the effectiveness of this guarantee is questioned by the interviewees with regard to two specific aspects. Firstly, lawyers report situations in which the police have informal conversations with defendants prior to interrogation and without the presence of the lawyer. These conversations have no legal validity, but they undermine the right to remain silent that must be guaranteed to defendants. Secondly, there were reports of inadequate defences, attributed either to the intimidating attitude of some public prosecutors and judges and the unwillingness of lawyers to confront them, or to a lack of knowledge and experience of these lawyers.

In general, the interviewees state that there is no barrier to the effective intervention of lawyers in criminal proceedings, describing in detail the acts that such intervention should entail. In addition, interviewees believe that the right of the defendants to confidential and private consultations and meetings with their lawyer is widely ensured in practice, both for underage defendants and adults.

Lawyers also tend to value their role in exerting a positive influence on the underage defendants' future by encouraging them to follow the law and, thus, helping them beyond the criminal case and the legal assistance. In order to do so, lawyers believe that it is essential to create a bond of trust with the defendant.

This bond of trust is not easily transposed to the relationship between lawyers and the child's holder of parental responsibilities. According to the lawyers that were interviewed, cooperation with the child's holder of parental responsibility is different from case to case, depending more on the attitude of the parents than on the standard procedure followed by lawyers. This can lead to difficulties for lawyers defending children due to parents exerting pressure on them to achieve a certain outcome or act in a certain way (not necessarily in the best interest of the child).

### **C.5 The right to an individual assessment**

#### a. Legal overview

The transposition of Directive (EU) 2016/800 into the Portuguese legal framework operated by Law 33/2019 introduced two new provisions on individual assessment of defendants under the age of 18. Firstly, in the bill of indictment produced at the end of an investigation against a defendant under 18, the public prosecution must attach a social report or information on the defendant produced by the social rehabilitation services, except when these documents are not yet available and it is considered to be unnecessary in the best interests of the underage defendant<sup>63</sup>. Although the law does not clarify under which circumstances this would be the case, the Public Prosecutor's Office, in its written opinion on the Draft Law that gave rise to the amendment to the Code of Criminal Procedure, recalls the examples given by recital 39 of the Directive 2016/800: where a child is in pre-trial detention and

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<sup>63</sup> Portugal, [Código de Processo Penal](#) (Code of Criminal Procedure), approved by Decree-Law 78/87, 17 February 1987. Last amended by Law 57/2021, 16 August. Article 283(3)(g).

waiting for the individual assessment to become available would risk unnecessarily prolonging such detention<sup>64</sup>.

Secondly, during the trial phase, when the defendant is under 18 and the social report or the information on the defendant produced by the social rehabilitation services has not yet been incorporated into the file, the court shall order it to be drafted and incorporated into the court file, unless, reasonably, the relevant exemption is justified in view of the circumstances of the case and provided that it is compatible with the best interests of the child<sup>65</sup>. The decision to exempt the drafting of the social report may be appealed<sup>66</sup>.

This social report or the information on the defendant produced by the social rehabilitation services is taken into account in determining the sanction that may be applied<sup>67</sup>, for the purpose of applying the Young Adult's Special Penal Regime<sup>68</sup> and, particularly, deciding on the application of reduced sentences<sup>69</sup> and of corrective measures<sup>70</sup>.

The Social Rehabilitation Services adapted the methodologies, information sources and technical contents of the information to be provided to courts regarding a child who is a suspect or the accused in a criminal proceeding, namely by ensuring that the holder of parental responsibility, their legal representative or the de facto custody holder is included in the interview carried out by the services and is informed of the purpose of this intervention and of the proceedings.

#### b. Individual assessment and exceptions in practice

The interviewees identify two main cases in which an individual assessment is conducted: during the investigation phase, when the public prosecutor proceeds with the bill of indictment; and, during the trial phase, when the defendant is under 18. Both judges interviewed mention that, even before the amendment to the Code of Criminal Procedure, during the trial phase, when the defendant was under 18, as a rule, the court ordered the preparation of a social report on the defendant, particularly when there was the possibility of applying a prison sentence.

*A: Mesmo antes da diretiva já se pediam relatórios sociais quando os arguidos eram menores de idade?*

*Q: Claramente, quando era ponderada a aplicação de uma pena de prisão a uma pessoa menor de 18 anos isto era muito escalpelizado em termos de relatórios sociais para perceber o contexto.*

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<sup>64</sup> Public Prosecutor's Office (2018), [Parecer da Procuradoria Geral da República sobre a Proposta de Lei 169/XIII/4](#), 12 December 2018.

<sup>65</sup> Portugal, [Código de Processo Penal](#) (Code of Criminal Procedure), approved by Decree-Law 78/87, 17 February 1987. Last amended by Law 57/2021, 16 August. Article 370(2).

<sup>66</sup> Portugal, [Código de Processo Penal](#) (Code of Criminal Procedure), approved by Decree-Law 78/87, 17 February 1987. Last amended by Law 57/2021, 16 August. Article 399.

<sup>67</sup> Portugal, [Código de Processo Penal](#) (Code of Criminal Procedure), approved by Decree-Law 78/87, 17 February 1987. Last amended by Law 57/2021, 16 August. Article 370(1).

<sup>68</sup> Portugal, [Regime aplicável em matéria penal aos jovens com idade compreendida entre os 16 e os 21 anos](#) (Young Adult's Special Penal Regime), approved by Decree-Law 401/82, 23 September 1982.

<sup>69</sup> Portugal, [Regime aplicável em matéria penal aos jovens com idade compreendida entre os 16 e os 21 anos](#) (Young Adult's Special Penal Regime), approved by Decree-Law 401/82, 23 September 1982. Article 4.

<sup>70</sup> Portugal, [Regime aplicável em matéria penal aos jovens com idade compreendida entre os 16 e os 21 anos](#) (Young Adult's Special Penal Regime), approved by Decree-Law 401/82, 23 September 1982. Article 6.

*A: Even before the directive, social reports were already requested when the defendants were minors?*

*Q: Clearly, when a prison sentence was being considered for a person under the age of 18, this was very much scrutinised in terms of social reports to understand the context (Judge, Portugal).*

According to the interviewees, one typical case in which an individual assessment is not conducted is when the measure of provisional suspension is applied by the public prosecution, in the pre-trial stage. Article 281 of the Code of Criminal Procedure establishes that, if the crime is punishable with a prison sentence of no more than 5 years or with a penalty other than imprisonment, the public prosecution, of its own motion or at the request of the defendant or the assistant, determines, with the agreement of the pre-trial judge, the suspension of the proceedings. This suspension is subjected to the imposition on the defendant of injunctions and rules of conduct, whenever the following prerequisites are met: a) agreement of the defendant and the assistant; b) absence of previous conviction for a crime of the same nature; c) no previous application of provisional suspension of proceedings for a crime of the same nature; d) no internment as a security measure; e) there is no high level of guilt; and f) compliance with the injunctions and rules of conduct can be expected to sufficiently satisfy the requirements of prevention in the case in question. If the defendant complies with the injunctions and rules of conduct, the public prosecution will close the case and it cannot be reopened.

One judge and one public prosecutor argue that, although the individual assessment of the child is not mandatory during the investigation phase, it should probably be so, in order to have some information on the defendant and determine the injunctions and rules of conduct. However, the public prosecutor also considers that, in those cases, an individual assessment may delay the proceedings unnecessarily.

*[A avaliação individual] não é obrigatória, mas, na suspensão provisória do processo, devia ser porque também há indícios da prática de crime, mas só que esses relatórios como demoram (...). Se calhar estar a arrastar a situação para um pedido de relatório desses pode ser contraproducente. (...) Portanto, não vale a pena estar a protelar porque isso também causa sofrimento aos menores, pensar o que é que vai acontecer.*

*[Individual assessment] is not mandatory, but in the provisional suspension of proceedings, it should be because there are also signs of a crime, but these reports take time (...). Maybe dragging out the situation to request a report could be counterproductive. (...) It is not worth delaying because this also causes suffering to children, to think about what is going to happen (Public prosecutor, Portugal).*

In contrast, a specialist from the Directorate-General of Social Rehabilitation and Prisons (DGRSP) claims that an individual assessment made before the bill of indictment is particularly dubious, since it may be a way to provide for further evidence to the criminal proceedings and this is not the job of the individual assessment. Furthermore, the specialist mentions that public prosecutors initially requested an individual assessment before the bill of indictment with a view to provisionally suspending the process. Thus, there was a need to liaise with the public prosecution what to ask and when.

*Os relatórios para acusação foi um rasgar do nosso serviço. Há matérias que são tão sensíveis. Ao estarmos a dar as características destes jovens, nós podemos estar a dar mais prova. E o nosso serviço ou é uma coisa ou é outra. Não podemos*

*ser a instância que está a avaliar e a instância que está a carrear prova para o processo. (...) Os procuradores começaram a misturar tudo. (...) O que nos começaram a pedir foi: “nos termos do artigo 283.º façam-nos o relatório social com vista à suspensão provisória do processo”.*

*The reports for the prosecution was a rip-off of our service. There are matters that are so sensitive. By giving the characteristics of these children, we may be giving more evidence. And our service is either one thing or another. We cannot be the body that is evaluating and the body that is bringing evidence to the proceedings. (...)The prosecutors started to mix everything up. (...) What they started asking us was: "under the terms of Article 283, please give us the social report with a view to provisionally suspending the process" (Non-legal specialist, Portugal).*

From the interviewees' experience, although the individual assessment can be carried out, in any case, on request of the suspect or accused child or their defence lawyer, usually it is carried out *ex officio* during the trial stage. One public prosecutor mentions that the defence lawyers can request an individual assessment in any stage of the proceeding. But, in the event of an indictment, the assessment is prepared by court request, regardless of whether or not the lawyers ask for it. Similarly, a lawyer mentions that back in the day, they used to request an individual assessment, but, nowadays, they don't have to, since the public prosecutor or the judge always requests it during the trial stage. According to the law, the judge may decide not to request the individual assessment of the child, even during the trial stage, when, reasonably, the relevant exemption is justified in view of the circumstances of the case and provided that it is compatible with the best interests of the child. Nonetheless, interviewees state not to have experienced any case in which the individual assessment of the child, before sentencing, was exempted.

The individual assessment is usually carried out by the Directorate-General of Social Rehabilitation and Prisons (DGRSP), which have multidisciplinary teams comprised of specialists, with degrees in law, psychology or social work. The coordinator of the Social Rehabilitation Services checks if they have all the necessary official documents (filling of the report and bill of indictment) and distributes the request to one of the specialists, depending on the specifics of the case. One of the specialists gives the example that cases of children with personality problems are referred to the psychologist, while cases of road traffic offences are referred to the specialist with a law degree.

*Nós somos equipas multidisciplinares (...). Todas as equipas têm Serviço Social, Psicologia e Direito. (...) Dependendo do tipo de crime e do menor, o coordenador inclina-se para um técnico ou para outro. Quando há casos mais complicados ao nível da personalidade há o cuidado de indicar um psicólogo (...), que terá um know-how maior para poder abordar estes casos. Já, por exemplo, quando aparecem conduções de veículo em estado de embriaguez (...) ou sem habilitação legal poderá atribuir a um técnico de Direito (...). Claro que agora com a pandemia houve restrições, mas não há um único relatório elaborado que não tenha entrevista com o arguido, entrevista com os pais do arguido, entrevista com o diretor da escola ou com outra pessoa que possa representar a escola e se for necessário também com os serviços de saúde. (...) No fim fazemos um balanço dos aspetos positivos e negativos mais relevantes abordados, identificando as necessidades pessoais e sociais de reinserção social, (...) bem como as correspondentes ações específicas que se possam vir a desenvolver. Por exemplo, frequentar determinado curso (...).*



*We are multidisciplinary teams (...). All teams have specialists with Social Work, Psychology and Law degrees. (...) Depending on the type of crime and the child, the coordinator leans towards one specialist or another. When there are more complicated cases in terms of personality, they are careful to appoint a psychologist (...), who has greater know-how to deal with these cases. Now, for example, driving under the influence of alcohol or without a license can be allocated to a specialist with a law degree (...). Now with the pandemic, there were restrictions, but there is not a single report prepared that does not have an interview with the defendant, an interview with the defendant's parents, an interview with the school director or with another person who can represent the school and if necessary also with the health services. (...) In the end, we take stock of the most relevant positive and negative aspects addressed, identifying the personal and social needs for social reintegration, (...) as well as the corresponding specific actions that may be developed. For example, attending a certain training course (...) (Non-legal specialist, Portugal).*

The Directorate-General for Rehabilitation and Prison Services has a form with several items to be evaluated and that includes the social and family background, the educational profile, financial situation, social integration, health issues, criminal record/contact with the justice system. Finally, the report identifies the child's social reintegration needs and vulnerabilities, and permeability and adherence to the specialist intervention proposed, such as attending training or undergoing medical treatment. The individual assessments include interviews with the child and the holder of parental responsibility and/or with specialists from the residential institutions (if the child is institutionalized), who are interviewed both together and separately. Besides the interviews, the individual assessments may include gathering information from other relevant sources such as schools, associations, sports clubs, family members and neighbours, depending on the concrete evaluation of the case made by the specialist.

The interviewees state that, although the individual assessment can be updated throughout the proceedings, it is rare. Notwithstanding, one of the specialists reports a specific case where, after the report was done, one of the defendant's teachers reached out to them with new information and they included it in an updated report. A judge argues that there is no need to ask for an assessment to be updated throughout the proceedings because the assessment is requested at the beginning of the trial stage and arrives two or three months before the judgment.

Besides the individual assessment carried out by the DGRSP, the interviews identified other types of individual assessment, such as the psychological evaluation, that is conducted during the criminal proceedings by the National Institute of Legal Medicine and Forensic Sciences (INMLCF) or a Hospital's child psychiatry department. According to a specialist interviewed, the psychological examination is carried out by psychologists, and when necessary in conjunction with psychiatrists. It adopts a comprehensive and multidisciplinary approach for the child, considering the needs and vulnerabilities, personality and maturity, as well as the social and family background of the child. The examinations include psychometric tests on the child, interviews with the child, with family members, and with specialists from the residential institutions (if the child is institutionalized). Additionally, they gather information from the child's school and/or professional environment.

*Algumas perícias, inclusivamente, são efetuadas em conjunto pela psiquiatria e pela psicologia, porque temos quesitos específicos da psiquiatria e quesitos específicos da psicologia (...). (...) Fazemos sempre entrevistas com o agregado*

*familiar, seja genético ou não. Às vezes, é necessário colher informações em meio escolar ou até em meio profissional, se for esse o caso, para saber se aquela alteração de comportamento que ocorreu e que levou a um processo penal está relacionada com o contexto.*

*Some assessments are even carried out jointly by psychiatry and psychology because we have specific questions of psychiatry and specific questions of psychology (...). (...) We always do interviews with the household, whether genetic or not. Sometimes, it is necessary to collect information in the school environment or even in the professional environment, if that is the case, to find out if the change in behaviour that occurred and led to the criminal investigation is related to the context (Non-legal specialist, Portugal).*

Additionally, in prison, the educational professionals assess the individual characteristics and situation of the detained children, during the first 72 hours after their admission, through interviews with the child. This assessment covers the personality, risk-of-suicide evaluation, and social and family background of children. After this assessment, a deeper and multidisciplinary assessment is made during the first 60 days, to prepare an individual rehabilitation plan for each child, which must be updated annually.

- c. How and for what purposes are the results of the individual assessment used by national authorities in practice?

The results of the individual assessment are used by national authorities in practice to determine the measures and sanctions, according to the child's needs and, similarly to the educational measures applied under the Educational Guardianship Law, aim to socialize and educate defendants about the values protected by the penal law. As a public prosecutor puts it:

*É para saber exatamente, se tiver que ser aplicada uma pena, qual é que será a pena mais indicada ao menor, na perspetiva da educação para o Direito (...).*

*It is to find out exactly, if a sanction is to be applied, which will be the most suitable for the child, from the perspective of 'education in the law' (...) (Public prosecutor, Portugal).*

Similarly, another public prosecutor says that individual assessment is used to get to know the defendant and to determine the sentence, according to the child's needs and considering their social reintegration.

*Eu penso que, e até deve ser essa a razão de ser do 283.º, será para conhecer o arguido. Os tribunais não têm tempo para o conhecer. Isto permite que profissionais conheçam melhor o arguido para aplicarmos uma pena ou o que quer que seja de acordo com as necessidades que ele tenha no sentido da reintegração do arguido na sociedade.*

*I think that, and that should be the reason for Article 283, it will be to get to know the defendant. The courts don't have time to get to know the defendant. This allows professionals to get to know the defendant better so that we can apply a penalty or whatever it may be according to their needs for the defendant's reintegration into society (Public prosecutor, Portugal).*

Nonetheless, one specialist argues that, depending on the judge's sensitivity, some of them do not take the individual assessment into consideration.

*(...) Focámo-nos há pouco na sensibilidade de quem julga. Muitas vezes as decisões (...) não têm muito em consideração o relatório do técnico.*

*(...) We focused earlier on the sensitivity of the judge. Often decisions (...) do not take much account of the expert's report (Non-legal specialist, Portugal).*

A lawyer also states that often judges do not follow the recommendations of the individual assessment, namely when the reports states that it is possible to serve a non-custodial sentence, for example, by suspending the prison sentence subject to probation. The interviewee states that there is a tendency to sentence defendants to prison when they have a criminal record, although this is not a criterion in law.

*(...) Não é raro os relatórios apontarem num sentido, (...) por exemplo a possibilidade de cumprimento da sentença na comunidade. Se pessoas que são especializadas, que têm este trabalho, apontam nesse sentido, eu fico pasmado de ver depois os juízes decidirem ao contrário, concretamente a questão da suspensão ou não suspensão da pena. A maior parte dos juízes agora não aplicam o artigo 50.º do Código Penal. Aplicam uma convicção pessoal. O artigo 50.º diz que sempre que a pena for igual ou inferior a cinco anos de prisão, deve a mesma ser suspensa na sua execução, a menos que existam razões ponderosas que obstaculizem a que se proceda dessa forma. O que os juízes fazem é: acrescentam lá uma frase que não está lá, que é: "se as penas forem iguais ou inferiores a cinco anos e os arguidos não tiverem antecedentes criminais".*

*(...) It is not rare for the reports to point in one direction (...) for example, the possibility of serving the sentence in the community. If people who are specialised, who have this work, point in that direction, I am amazed to see judges deciding the opposite, specifically on the issue of suspension or non-suspension of the prison sentence. Most judges now do not apply Article 50 of the Penal Code. They apply a personal conviction. Article 50 says that whenever the sentence is equal to or less than five years' imprisonment, it shall be suspended in its execution, unless there are serious reasons for not doing so. What judges do is: they add a sentence that is not there, which is: "if the sentences are equal to or less than five years' imprisonment and the defendants have no criminal record" (Lawyer, Portugal).*

#### d. Challenges

The interviewees did not identify any challenges faced by particular groups with regard to the individual assessment, but identified challenges related with when, how and for what purposes the individual assessment is conducted and used.

With regard to when the individual assessments are conducted, one specialist from the DGRSP (General Directorate of Rehabilitation and Prison Services) says that none of these individual assessments are made before sentencing, in a phase where it is not yet known if the child will be acquitted or convicted. This, according to the interviewee, poses a difficulty in conducting the interviews and designing the report.

*A linha de pensamento de todos os relatórios de que estamos a falar é esta: olhar para o crime e perceber na trajetória de vida deste sujeito quais são os fatores emergentes desta prática. (...) Tenho que ver o que é que faz sentido na vida desta pessoa para não voltar a cometer crimes. Aí vem a segunda dificuldade. Noutros países eu já tenho os factos provados. No sistema português, eu ainda não tenho os factos comprovados. (...) Ele ainda tem a possibilidade de ser absolvido e eu estou a fazer o relatório convicta de que vai ser condenado, o que é estranho.*

*The line of thought of all the reports we are talking about is this: to look at the crime and understand in the life trajectory of this subject the emerging factors of this criminal practice. (...) I have to see what makes sense in the life of this person in order for them not to commit crimes again. Here comes the second difficulty. In other countries I already have the facts proven. In the Portuguese system, I still don't have the facts proven. (...) They still have the possibility of being acquitted and I am writing the report convinced that they will be convicted, which is strange (Non-legal specialist, Portugal).*

As regards how the individual assessments are conducted, one lawyer highlights three problems. Firstly, the assessments are often inaccurate. The lawyer interviewed gives the example of an assessment that was made that reported having interviewed the brother-in-law of the defendant that did not exist. Secondly, the specialists take too long to conclude the reports and it often leads to a postponement of the trial or, at least, of the ending of the trial. The report needs to be in the case file prior to the sentencing. Thus, the judge only closes the trial for sentencing after the delivery of this report. Thirdly, the lawyer interviewed reports that when a defendant has multiple criminal proceedings in different years, the social rehabilitation team uses the same report. It doesn't conduct new interviews or visits to the place where the defendant lives. The interviewee states that they often question the validity of the reports made by the social rehabilitation teams.

Finally, some of specialists interviewed mention that they have limited knowledge on how and for what purposes the national authorities use the results of the individual assessment and its impact in the criminal proceedings, arguing that it would be important to improve their work.

*Eu sei que houve uma ou duas situações em que na sequência dos nossos relatórios foram propostas suspensões provisórias do processo com obrigação de prestação de serviços de interesse público. Em relação a outras não sei, desconheço. (...) Não temos tido grande feedback do Ministério Público em relação ao desfecho destes casos e era importante termos. Nós nos ofícios em que enviamos os relatórios pedimos sempre para termos conhecimento da decisão, mas não temos tido grande feedback.*

*I know that there were one or two situations in which, following our reports, provisional suspensions of the proceedings were proposed with an obligation to provide services of public interest. In relation to others, I do not know. (...) We haven't had much feedback from the Public Ministry regarding the outcome of these cases and it was important to have. When we send the reports, we always ask to know about the decision, but we have not had much feedback (Non-legal specialist, Portugal).*

e. Discussion of findings

The right to an individual assessment is generally fulfilled in practice at the end of the investigation in the event of indictment, or at the trial stage, if the report has not yet been incorporated, according to the two provisions introduced by the Law 33/2019, which transposed the Directive (EU) 2016/800. The individual assessment is not typically conducted during the investigation phase, namely when the measure of provisional suspension is applied by the public prosecution, in the pre-trial stage. The different professionals interviewed disagree as to whether the individual assessment should be mandatory or not during the investigation phase. Some interviewees argued that it would help to have some information on the defendant and determine the injunctions and rules of conduct. However, one specialist states that individual assessment made before the bill of indictment may provide further evidence to the criminal proceedings, which is not the role of the individual assessment.

The different professionals interviewed highlight that, although the individual assessment can be carried out on request of the suspect or accused child or their defence lawyer, usually it is the court that requests it.

The individual assessment foreseen by the new legal provisions is carried out by specialists from the Directorate-General of Social Rehabilitation and Prisons (DGRSP). However, the professionals interviewed identified other kinds of individual assessments that can be conducted during the criminal proceedings, based on their professional experience, such as psychological examinations.

The report template from the Directorate-General for Rehabilitation and Prison Services encompasses social and family background, the educational profile, financial situation, social integration, health issues, criminal record/contact with the courts. The individual assessments include joint and separate interviews with the child and the holder of parental responsibility and/or with specialists from the residential institutions (if the child is institutionalized), and gathering of information from other relevant sources, such as schools. The assessments aim to identify the children's social reintegration needs and vulnerabilities and their permeability and adherence to technical intervention. The interviewees state that, although the individual assessment can be updated throughout the proceedings, it is rare.

When asked about how and for what purposes the results of the individual assessment are used in practice by national authorities, all the interviewees mention sentencing. However, some interviewees highlight that some public prosecutors and judges do not take the individual assessment into consideration.

The interviewees do not identify any challenges faced by particular groups with regard to individual assessment, but some mention challenges related with when, how and for what purposes the individual assessment is conducted and used. The specialists mention that, since the individual assessments are conducted before sentencing, in a phase where it is not yet known if the child will be acquitted or convicted, it makes conducting the interviews and designing the report difficult. Additionally, some specialists say that they have limited knowledge on how and for what purposes the national authorities use the results of the individual assessment and its impact in the criminal proceeding, arguing that this would be important to improve their work. One lawyer claims that the assessments are often inaccurate and time-consuming (with which the judges and public prosecutors agree).

## **C.6 Deprivation of liberty as a last resort and safeguards for children who are deprived of their liberty**

### **a. Deprivation of liberty as a last resort measure**

### i. Legal overview

The general rules of the Code of Criminal Procedure are applied to the pre-trial detention of persons under 18. Pre-trial detention may only be imposed when all other precautionary measures are deemed insufficient or inadequate and the defendant is suspected of having committed a crime as described in the catalogue, such as an intentional crime punishable by a prison sentence of a maximum of more than 5 years or an intentional crime of aggravated assault, aggravated theft, aggravated damage, computer and communication fraud, forgery or counterfeiting of a document, undermining the safety of road transport, punishable by a maximum prison sentence of more than 3 years<sup>71</sup>. Rules regarding the duration and the periodic review of pre-trial detention are the same for adults and defendants under 18. Pre-trial detention shall be over after 4 months if a bill of indictment is not served; after 8 months if there is no judicial decision to indict; after one year and two months without a conviction in the first instance; and one year and six months without a conviction *in res judicatam*<sup>72</sup>. These maximum deadlines for the pre-trial detention can, however, be extended in particular cases, according to the type of crime and complexity of each case. In particularly complex cases, due to the number of defendants or victims or because it involves highly organised crime, the pre-trial detention can be extended, respectively, for one year, one year and four months, two years and six months and three years and four months<sup>73</sup>. The pre-trial detention must be reviewed every three months<sup>74</sup>.

As for prison sentences, the Young Adult's Special Penal Regime, applicable to children and young adults who were over 16 and below 21 years of age at the time of the crime, allows the application of reduced sentences<sup>75</sup> and of corrective measures<sup>76</sup> as an alternative to an up to two-year prison sentence, such as a warning, imposition of obligations, fine and detention in a detention centre. The Young Adult's Special Penal Regime is considered to be an abandoned piece of legislation that never underwent the necessary regulation required to effectively implement, in practice, some of its solutions. For example, this special legal act foresees the possibility to apply a corrective measure of detention in a detention centre for young offenders from 18 to 21 years of age, but these detention centres were never developed<sup>77</sup>. A study from Sílvia Gomes et al (2018) found that there was a steady decrease in the number of prisoners aged 16 to 20 between 2000 and 2017, going from 813 prisoners to 189 prisoners<sup>78</sup>. Furthermore, a recent article, that analyses official statistics on offenders aged between 16 and 21 convicted of a crime between 1993 and 2018, reveals that there was a fall in the percentage of actual imprisonment in the last few years. Between 1993 and 1997, the annual percentage of actual imprisonment peaked, with variations between 23% (1994) and 30% (1995), while the lowest figures were recorded in 2006 (5.7%) and in 2018<sup>79</sup>.

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<sup>71</sup> Portugal, [Código de Processo Penal](#) (Code of Criminal Procedure), approved by Decree-Law 78/87, 17 February 1987. Last amended by Law 57/2021, 16 August. Article 202.

<sup>72</sup> A Portugal, [Código de Processo Penal](#) (Code of Criminal Procedure), approved by Decree-Law 78/87, 17 February 1987. Last amended by Law 57/2021, 16 August. Article 215.

<sup>73</sup> Portugal, [Código de Processo Penal](#) (Code of Criminal Procedure), approved by Decree-Law 78/87, 17 February 1987. Last amended by Law 57/2021, 16 August. Article 215(3).

<sup>74</sup> Portugal, [Código de Processo Penal](#) (Code of Criminal Procedure), approved by Decree-Law 78/87, 17 February 1987. Last amended by Law 57/2021, 16 August. Article 213.

<sup>75</sup> Portugal, [Regime aplicável em matéria penal aos jovens com idade compreendida entre os 16 e os 21 anos](#) (Young Adult's Special Penal Regime), approved by Decree-Law 401/82, 23 September 1982. Article 4.

<sup>76</sup> Portugal, [Regime aplicável em matéria penal aos jovens com idade compreendida entre os 16 e os 21 anos](#) (Young Adult's Special Penal Regime), approved by Decree-Law 401/82, 23 September 1982. Article 6

<sup>77</sup> Barbosa e Silva, J. (2017) "[Entre o 8 e o 80 – jovens adultos, Lei Tutelar Educativa e o regime penal de adultos](#)". *Jornadas Sistema Prisional – Execução de Penas – Direitos Humanos*. 71-77.

<sup>78</sup> Gomes, S., Leote de Carvalho, M., Oliveira, R., and Duarte, V. (2018) "[Trends and challenges in the Portuguese Penitentiary System: from law to practice](#)", *Revista Antigone*, 1/2 2018, 61-102..

<sup>79</sup> Leote de Carvalho, M. (2020). "Uma realidade invisível: os jovens adultos condenados em Tribunais Judiciais de 1.ª Instância em Portugal (1993-2018)". *Revista do Ministério Público*, 162, April-June 2020, 117-148.

- ii. Deprivation of liberty as a last resort measure and the application of measures alternative to detention

The interviewees almost unanimously state that deprivation of liberty is used as a last resort measure for children.

Notwithstanding, as mentioned, the majority of the interviewees highlight the application of alternative measures to police custody, pre-trial detention and post-trial detention for children.

Regarding police custody, one police officer reports that detention by the police is applied only after all the other alternatives have been previously analysed and considered inadequate. Additionally, the police officer states that an arrest warrant is only issued and executed when summoning underage defendants to appear at the police station is deemed insufficient, according to the crimes involved.

*A nível de órgão de polícia criminal (...) primeiramente e desejavelmente é sempre feita a notificação para eles comparecerem nas nossas instalações [em vez do mandato de detenção]. (...) só quando se conclui que essa notificação não será suficiente para assegurar a comparência do menor em causa, então aí sim (...) será emitido um mandado de deteção (...).*

*In terms of the criminal police, (...) first and desirably, notification to appear before the police is always used [instead of the arrest warrant]. (...) only when it is considered that such notification will not be sufficient to ensure the appearance of the child before the police, then (...) an arrest warrant will be issued (...) (Police officer, Portugal).*

As regards pre-trial detention, public prosecutors and judges argue that it is only imposed when other precautionary measures are deemed insufficient or inadequate, according to the criteria foreseen by law. From the interviewees' experience, the most common coercive measure applied to children is the statement of identity and residence and the suspension of the proceedings, through the imposition on the defendant of injunctions and rules of conduct, namely an apology to the victim and community service.

*Com o que eu tenho visto de suspensão provisória do processo que tem sido aplicada... Em termos de execução de pena, temos mais de 60% de acompanhamentos de suspensão provisória do processo.*

*With what I have seen of provisional suspension of proceedings that has been applied... In terms of execution of sentence, we have more than 60% of accompaniments of provisional suspension of the process (Non-legal specialist, Portugal).*

The evaluation of insufficiency or inadequacy of other precautionary measures rather than pre-trial detention is often made according to the crimes involved. The interviewees give the example of drug trafficking and child pornography where it is more common to have a pre-trial detention. Moreover, when applying pre-trial detention as a preventive measure, home detention is always preferred to imprisonment to avoid the harmful effect it has on people's lives, as this public prosecutor mentions:

*(...) Se for uma coisa muito grave que se esteja a pensar na prisão preventiva, só se não for possível é que não se aplica uma permanência na habitação.*

*(...)When it is a very serious matter and one could think of applying a pre-trial detention as a preventive measure, home detention is in fact applied, unless this preventive measure is not possible at all (Public prosecutor, Portugal).*

Regarding post-trial detention for children, public prosecutors and judges state that the application of an effective prison sentence to children is rare and applied as a last resort. From the interviewees' experience, the alternative measures usually applied to child offenders are a warning and a fine. However, one judge argues that there are situations where there is no alternative, as follows: when, for medium-level criminality, defendants are given a suspended prison sentence, conditional on the fulfilment of some obligations, and the obligations are violated or other crimes are subsequently committed; in a serious crime, such as rape or kidnapping.

*(...) A primeira fase é a pena de prisão suspensa [quando o crime é grave]. (...). Se durante o período de suspensão os miúdos incumprem as obrigações e voltam a cometer os mesmos crimes, não há margem, sob pena de se desvalorizarem totalmente as medidas penais. (...) Isto na média criminalidade. (...) Depois temos a criminalidade das violações, dos sequestros, dos roubos, dos homicídios. Nesses não há hipótese. O regime penal prevê a pena especialmente atenuada, mas há casos em que não há hipótese. (...) em 8 anos em que estive no tribunal criminal, nunca apliquei nenhuma pena de prisão efetiva a nenhum jovem. (...) Não quer dizer que essas penas não viessem a ser revogadas mais tarde, por não cumprimento das obrigações ou por cometerem outros crimes.*

*(...) The first stage is a suspended prison sentence [when the crime is serious]. (...). If during the suspended period the kids default and commit the same crimes again, there is no margin, otherwise the penal measures are totally devalued. (...) This is in average crime. (...) Then we have the crimes of rape, kidnapping, robbery, murder. In these cases, there is no chance. The penal system provides for a specially attenuated sentence, but there are cases in which there is no chance. (...) in the eight years that I have been in a criminal court, I have never applied an actual prison sentence to any young person. (...) This is not to say that these sentences were not later revoked for non-compliance with obligations or for committing other crimes (Judge, Portugal).*

Furthermore, the interviewees underline that prison sentences can also be substituted with a sentence of home detention or community service.

*A privação da liberdade é sempre uma medida de último recurso, quer para os jovens, quer para os adultos, aí não há distinção. (...) Há muitas soluções alternativas. Há crimes que admitem (...) pena de multa. (...) Num crime de condução sem carta, aquelas imaturidades próprias dos jovens, até se pode ponderar uma admoestação. (...) a pena de prisão pode ser substituída por multa, pode ser substituída por trabalho a favor da comunidade (...). Só em último rácio é que se aplica prisão efetiva. Normalmente quando chegamos à prisão efetiva já estamos a falar de um jovem que tem um percurso gigantesco.*

*Deprivation of liberty is always a measure of last resort, whether for children or adults, there is no distinction. (...) There are many alternative solutions. For some crimes it is possible to apply (...) fines. (...) In the crime of driving without a licence, those immaturities typical of young people, one can even consider a warning. (...)*



*a prison sentence can be replaced by a fine, it can be replaced by community service (...). Only in the last resort is actual imprisonment applied. Normally, when we arrive at the prison sentence, we are talking about a young person who has made a significant journey (Judge, Portugal).*

As regards the Young Adult's Special Penal Regime mentioned above, one of the specialists points out that the lack of amendment to this special regime for children and young adults from 16 to 21 years old is a major default in the Portuguese legal system when dealing with children over 16 that are accused of perpetrating a crime. This regime applies to children and young adults who, at the time of the crime, were over 16 and under 21 years of age. It allows for the application of reduced sentences and of corrective measures, as an alternative to an up to two-year prison sentence, such as a warning, imposition of obligations, fine and detention in a detention centre. According to a specialist, the law is outdated and the consequence is that it is not applied. Therefore, children either fall under the Educational Guardianship Law (when they are under 16) or under the full penal substantive system (when they are 16 or more).

*Q: Nós temos o aquele regime penal dos jovens adultos...*

*A: Eu conheço bastante. Há juízes que aplicam. Mas a grande maioria, acha que face à gravidade dos factos e à natureza dos mesmos, não é de aplicar a atenuação especial que resulta da aplicação desse regime. A atenuação especial poderia conduzir a penas completamente diferentes e em muitos casos acionar a suspensão da execução da pena de prisão.*

*Q: We have that young adult penal regime...*

*A: I know it quite well. There are judges who apply it. But the overwhelming majority of them think that, given the seriousness of the facts and the nature of the facts, the special mitigation that results from the application of that regime should not be applied. The special mitigation of the sentence could lead to completely different sentences and in many cases trigger the suspension of the execution of the prison sentence. (Lawyer, Portugal)*

*(...) a dita lei dos jovens adultos nunca foi trabalhada. Ainda temos aquela consagração dos centros de detenção, ainda temos algumas medidas residuais e eu nunca mais vi uma sentença a falar desta lei. Quando se fez a alteração da Lei Tutela Educativa, falou-se na reforma do regime especial de jovens adultos, mas ficámos na mesma. Hoje, os jovens ou caem no tutelar educativo ou caem no penal. Invoca-se a idade nas sentenças, mas em termos de impacto de um tratamento mais especializado, mais educativo, mais protetor, temos muita dificuldade. A única expressão que ainda hoje se vê é nos planos de reinserção social que existem na suspensão da execução da pena de prisão. Mas também aqui é uma questão automática. Não é em função das necessidades criminógenas que os jovens apresentam ou em função do crime praticado.*

*(...) the so-called young adult law has never been worked on. We still have that consecration of detention centres, we still have some residual measures, but I am not seeing sentences talking about this law. When the amendment was made to the Educational Guardianship Law, there was talk of reforming the special regime for young adults, but we stayed the same. Today, young people either fall under*

*the educational guardianship law or they fall under the penal regime. Age is invoked in sentencing, but in terms of the impact of a more specialised, more educational, more protective treatment, we have great difficulty. The only evidence we still see today is in the social rehabilitation plans that exist in the suspension of the execution of the prison sentence. But here too it is automatic. It is not in function of the criminogenic needs that young people present or in function of the crime committed (Non-legal specialist, Portugal).*

Finally, most interviewees do not identify any specific situation of a child or of a particular group of children that might influence a decision about deprivation of liberty. But two of the lawyers interviewed report that there is a tendency to treat differently and be less lenient with children belonging to an ethnic minority, such as Roma people, children with African descendants and in low income groups.

*A mão é mais pesada com pessoas de etnia cigana, com as pessoas de etnia africana e com os pobres. Não tenha dúvida. Quer na opção pela não suspensão da pena de prisão, quer no quantum das penas. Há juízes que são exceções. (...)*

*The hand of justice is heavier with Roma, with Africans and with the poor. There's no doubt about it. Both in the option not to suspend prison sentences and in the range of the sentences. There are judges who are exceptions (Lawyer, Portugal).*

Additionally, one of them mentions that they ask their clients to present themselves to the court properly dressed, to not wear torn trousers or use braids. This lawyer believes that it is important for the defence strategy that the child fits within a “clean” model with a “presentable” hairstyle.

## b. Medical examination

### i. Legal overview

The Code on Enforcement of Prison Sentences or Measures involving the deprivation of liberty guarantees the right to access health care under good conditions to any person deprived of their liberty just like any other citizen<sup>80</sup>. The General Rules on Prison Establishments<sup>81</sup> establish that a person deprived of their liberty, when entering the prison facility, has the right to immediate medical care<sup>82</sup> and to be examined by a nurse within 24 hours, and to undergo a medical examination within 72 hours that must be performed by a medical doctor<sup>83</sup>. There are no special rules on the invasive or non-invasive nature of the medical examination. Underage defendants deprived of their liberty or underage inmates have the same health care rights as adults.

### ii. The medical examination in practice

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<sup>80</sup> Portugal, [Código da Execução das Penas e Medidas Privativas da Liberdade](#) (Code of Enforcement of Prison Sentences or Measures involving the deprivation of liberty), 12 October 2009. Last amended by Law 27/2019, 28 March.. Article 32(1).

<sup>81</sup> Portugal, [Regulamento Geral dos Estabelecimentos Prisionais](#) (General Rules on Prison Establishments), approved by Decree-Law 51/2011, 11 April 2011. Last amended by Decree-Law 70/2019, 24 May 2019..

<sup>82</sup> Portugal, [Regulamento Geral dos Estabelecimentos Prisionais](#) (General Rules on Prison Establishments), approved by Decree-Law 51/2011, 11 April 2011. Last amended by Decree-Law 70/2019, 24 May 2019. Article 10.

<sup>83</sup> Portugal, [Regulamento Geral dos Estabelecimentos Prisionais](#) (General Rules on Prison Establishments), approved by Decree-Law 51/2011, 11 April 2011. Last amended by Decree-Law 70/2019, 24 May 2019. Article 53.

The medical examination is conducted on entering the prison facility, when it is obligatory, and, afterwards, whenever required by the child, the lawyer or the holder of parental responsibility.

As regards, specifically, the special prison for young offenders (known by Prison-School of Leiria), a specialist reports that there are daily medical services with a doctor and a nurse, and external medical specialities or hospital treatment are required if needed.

*A: (...) Há médicos todos os dias da semana, há psiquiatria uma vez por semana. O advogado ou o próprio recluso e a família poderão indicar (...) que ele deverá ser visto pelo médico. Ele próprio pode pedir para ir ao médico. (...) Já houve uma situação que foi despoletada pela mãe, em que o recluso tinha alguma vergonha de falar (...).*

*(...) There are doctors every day of the week and psychiatry once a week. The lawyer or the detainee themselves and their family can tell (...) that they should be seen by the doctor. They can ask to see the doctor. (...) There was also a situation that was triggered by the mother because the detainee was embarrassed to speak (...) (Non-legal specialist, Portugal).*

Usually, the medical examination to the physical as well as mental condition is conducted on the same day of the request.

- iii. How and for what purposes are the results of the medical examination used by national authorities in practice?

The results of the medical examination are taken into account for the individual rehabilitation plan mandatory for inmates under 21, namely when there is any information of addictive behaviour or when there is a report of need for mental health support. Furthermore, one specialist mentions that, if the child has some kind of mental illness, sometimes the judge asks for a medical report to assess the measures imposed.

### c. Special treatment in detention

#### i. Legal overview

The Code on Enforcement of Prison Sentences or Measures has a few provisions on the execution of prison sentences to persons under 21. Prisons shall be made up of one or more units, differentiated according to the following factors: penal situation, sex, age, physical and mental health and other factors that tend to require specialised or individualized prison treatment for inmates; security requirements; available programmes; sentencing regimes. Nevertheless, Portuguese law establishes that there should be prisons or units specially dedicated to the execution of sentences and custodial measures applied to pretrial detainees; inmates serving a prison sentence for the first time; young people up to 21 years old or, whenever it proves beneficial for their prison treatment, up to 25 years old; women; and inmates in need of special protection<sup>84</sup>. The assignment of an inmate to a facility considers the organization of prisons and the evaluation of the inmate, and also: the legal situation, sex, age and state of health of the inmate, previous prison sentences, the nature of the crime committed and the duration of the sentence to be served; order and security requirements; the regime for carrying out the sentence; proximity to their family, social, school and professional

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<sup>84</sup> Portugal, [Código da Execução das Penas e Medidas Privativas da Liberdade](#) (Code of Enforcement of Prison Sentences or Measures involving the deprivation of liberty), 12 October 2009. Last amended by Law 27/2019, 28 March. Article 9.

environment, the advantages of encouraging it and the demands of approaching a free life; the need to participate in certain programmes and activities, including educational ones; and the need for special protection or the satisfaction of specific needs<sup>85</sup>. The Young Adult's Special Penal Regime also foresees that the prison sentence of young adults shall be carried out in facilities dedicated to inmates under 21<sup>86</sup>. At Leiria, a "School-Prison" was built to house offenders from 16 to 21 years of age. Nonetheless, according to the report on Prison Conditions in Portugal, carried out in September 2019, "in the other penitentiaries there may also be youths as young as 16" and "the statutes do not pronounce on this point, and, as it happens, there is no separation between youths and adult prisoners"<sup>87</sup>.

The Code on Enforcement of Prison Sentences or Measures states that in these cases, the execution of sentences should especially encourage social reintegration and foster a sense of responsibility through specific activities and programmes in education, professional guidance and training, the acquisition of personal and social skills and in the prevention and treatment of addictive behaviours<sup>88</sup>. Accordingly, regardless of the length of the sentence, an individual rehabilitation plan is mandatory for inmates under 21, and it should be periodically reviewed and updated<sup>89</sup>.

The prison sentences can be executed in three different regimes, according to evaluation of the inmate and their evolution throughout the execution. The execution of prison sentences under a common regime shall be characterised by the development of activities in areas of common life within the establishment or prison unit and contacts with the outside world that are permitted under the terms of the law. The open regime favours contact with the outside and closeness to the community and allows for two modalities: (a) the internal open regime, which is characterised by the development of activities in the perimeter of the prison establishment or its surroundings, with attenuated surveillance; b) external open regime, which is characterised by the development of educational activities, vocational training, work or programmes in a free environment, without direct surveillance. The security regime limits common life and contact with the outside world, while allowing activities compatible with the particular needs of maintaining order and the security of personal and property assets<sup>90</sup>. The execution of prison sentences under this security regime is mandatorily reassessed within a maximum period of six months, or three months in the case of inmates under 21, and may be re-evaluated at any time if circumstances change<sup>91</sup>.

## ii. The special treatment in practice

With regard to police custody, police officers claim that children are always held separately from adults. One police officer argues that in the police station each defendant has an individual detention room/cell, regardless of whether they are adults or not. According to the interviewee, they have four

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<sup>85</sup> Portugal, [Código da Execução das Penas e Medidas Privativas da Liberdade](#) (Code of Enforcement of Prison Sentences or Measures involving the deprivation of liberty), 12 October 2009. Last amended by Law 27/2019, 28 March. Article 20.

<sup>86</sup> Portugal, [Regime aplicável em matéria penal aos jovens com idade compreendida entre os 16 e os 21 anos](#) (Young Adult's Special Penal Regime), approved by Decree-Law 401/82, 23 September 1982 Article 12.

<sup>87</sup> Dores, A. P., Pontes, N., and Loureiro, R. (2019), *Prison Conditions in Portugal*, Rome: Antigone Edizioni.

<sup>88</sup> Portugal, [Código da Execução das Penas e Medidas Privativas da Liberdade](#) (Code of Enforcement of Prison Sentences or Measures involving the deprivation of liberty), 12 October 2009. Last amended by Law 27/2019, 28 March. Article 4(1).

<sup>89</sup> Portugal, [Código da Execução das Penas e Medidas Privativas da Liberdade](#) (Code of Enforcement of Prison Sentences or Measures involving the deprivation of liberty), 12 October 2009. Last amended by Law 27/2019, 28 March. Article 21.

<sup>90</sup> Portugal, [Código da Execução das Penas e Medidas Privativas da Liberdade](#) (Code of Enforcement of Prison Sentences or Measures involving the deprivation of liberty), 12 October 2009. Last amended by Law 27/2019, 28 March. Article 12.

<sup>91</sup> Portugal, [Código da Execução das Penas e Medidas Privativas da Liberdade](#) (Code of Enforcement of Prison Sentences or Measures involving the deprivation of liberty), 12 October 2009. Last amended by Law 27/2019, 28 March. Article 15(5).

detention rooms and when they are all occupied, they resort to nearby police stations. The interviewee gave the example of one time when they resorted to National Republican Guard (GNR) building and had defendants detained in a nearby city.

*A: Sim, cada um tem o seu quarto de detenção, independentemente de serem crianças ou adultos. (...) Nós temos quatro. Já aconteceu termos os quatro ocupados e termos que recorrer à GNR. (...) Mais que um no quarto não pode ficar. Só fica um.*

*A: Yes, everyone has their own detention room, regardless of whether they are children or adults. (...) We have four. We have already had the four occupied and have to resort to GNR. (...) More than one in the room cannot stay. Only one (Police officer, Portugal).*

The scenario is, nonetheless, different when it comes to pre-trial detention or the execution of a prison sentence. Most interviewees point out that the law establishes that children must be held separately from adults and that, in Portugal, there is a Prison-School built to house offenders from 16 to 21 years of age. However, the interviewees argue that there are a few young people under 21 in pre-trial detention and post-trial detention held in other prisons with adults.

A lawyer mentions that in Lisbon, child defendants are held in pre-trial detention in the same prison as adults.

*(...) Em Portugal, nós temos uma prisão específica em Leiria, que é chamada Prisão Escola Leiria. Mas em Lisboa os preventivos vão todos para o EPL e a partir dos dezasseis ficam onde estão os adultos.*

*In Portugal, we have a specific prison in Leiria, which is called Prisão Escola Leiria. But in Lisbon, all the pre-trial detainees go to the EPL [Lisbon Prison Establishment] and above sixteen years old they stay where the adults are (Lawyer, Portugal).*

A judge argues that in regional prisons, cells are for a group of inmates, and it is very difficult to guarantee that children are held separately. According to this interviewee, the reason to place a child in another prison other than the School-Prison of Leiria has to do with the proximity to the residence area of the inmate, in order to facilitate family visits.

In the Prison-School, children are held separately in individual detention cells in seven different pavilions, according to their age, whether they are detainees serving a final sentence or pre-trial detainees. Additionally, the Prison-School has also facilities for children at risk of suicide, where they are accompanied. A specialist interviewed stresses that children of 16 years of age, , are held separately from older detainees.

*(...) os mais jovens estão só num pavilhão. Tenta-se dividir os preventivos dos condenados. Normalmente os que têm dezasseis anos (...) ainda estão numa fase inicial do processo e ficam no pavilhão de entrada. Tenta-se não os colocar nos pavilhões onde estão os mais velhos, mas os mais velhos também não são muito mais velhos, têm dezassete, dezoito. (...)*

*(...) the younger ones are in one block. One tries to divide the pre-trial detainees from the convicted offenders. Usually, those who are sixteen (...) are still at an early stage of the process and stay in the entrance block. One tries not to put them in the*

*blocks where the oldest ones are, but the oldest aren't much older either, they're seventeen, eighteen (Non-legal specialist, Portugal).*

However, if the child asks to be moved to another block and the prison staff considers this relocation safe, the child can be held in another block. The specialist gives the example of children that come from the same neighbour, who ask to be held with each other.

Currently, since the number of pre-trial detainees exceeds the prison capacity (100 to 50 cells), the pre-trial detainees are held in the same block as the convicted offenders.

*(...) Neste momento há cem preventivos e não se consegue pô-los todos num pavilhão porque o pavilhão só alberga cinquenta e poucos reclusos. Há uma vantagem, que é o facto de todos os alojamentos serem individuais. As celas são individuais e eles só estão com os outros quando vêm para o pátio, à escola, às atividades. (...)*

*(...) At the moment there are one hundred pre-trial detainees and it is not possible put them all in one block, because the block only holds fifty or so prisoners. There is an advantage, which is the fact that all our accommodations are individual. The cells are individual and they are with others only when they come to the courtyard, to school, to activities (Non-legal specialist, Portugal).*

Nevertheless, a lawyer claims that, although usually defendants under 21 are assigned to the Leiria's Prison-School, the current situation of this prison is terrible, since, according to the interviewee there is a problem of safety among inmates which the interviewee attributes to the lack of prison guards.

When asked whether children deprived of their liberty have appropriate access to health care services, physical and mental development measures, education and training, as well as programmes that foster their personal development and reintegration into society, most interviewees mention that children have access to these care aspects, but they are not sure if its level is appropriate and responds to children needs in every aspect.

*(...) Eu sei que existem muitos detidos que trabalham e estudam nos estabelecimentos prisionais e isso é-lhes facultado, se satisfaz a necessidade de todos os reclusos, isso é que eu já não lhe sei dizer.*

*(...) I know that many detainees work and study in prisons and this is provided to them, but I cannot tell you if it meets the needs of all detainees (Judge, Portugal).*

With regard to health care services, as mentioned above, and according to a non-legal specialist, the Prison-School has daily medical services with a physician and a nurse, and if needed, external medical specialities are required.

Furthermore, a specialist has the impression that detained children have the right to continue previous medical treatments while detained.

*Q: De acordo com a sua experiência, quando as crianças são privadas da liberdade, elas têm acesso a serviços de saúde?*

*A: (...) Penso que sim. Se estavam a fazer tratamentos dentários, continuam a efetuá-los, tenho essa impressão.*

*Q: In your experience, when children are deprived of liberty, do they have access to health care services?*

*A: (...) I think so. If they were undergoing dental treatments, they continue to do them. I have that impression (Non-legal specialist, Portugal).*

With regard to physical development, a specialist mentions that the Prison-School has a sports coach and a sports hall and holds championships of various sports (football, five-a-side, ping-pong), especially during the holidays. The interviewee gives the example of an inter-prison championship. According to the interviewee, physical activity is very important to detained children, since it helps them to acquire healthy habits and be mentally balanced. Regarding mental development, the same interviewee mentions that the prison has psycho-social assistance from mental health professionals. Nonetheless, this assistance is not available for all the detained children; it is offered depending on the needs and vulnerabilities identified, such as the approach of a hearing or judgment or the loss of a family member.

*As medidas de desenvolvimento físico passam por um bom técnico de desporto para desenvolver. (...) Normalmente fazem-se campeonatos desportivos (...). Há um pátio que era de terra batida e que agora é um ringue de futsal e gostávamos de o cobrir, porque é uma área que sabemos que ajuda ao equilíbrio nos jovens e que lhes permite que tenham também, no futuro, hábitos saudáveis de exercício físico. (...) Depois, emocionalmente, há também os serviços de psicologia que fazem um acompanhamento próximo naqueles que mais necessitam (...).*

*Physical development measures require a good sports coach. (...) There are sports championships (...). There is a courtyard that used to be clay and is now a five-a-side court and we'd like to cover it because it's an area that we know helps provide balance in children and allows them to have healthy exercise habits in the future as well. (...) Then, emotionally, there is also the psychology services that provide close follow-up to those who need it most (...) (Non-legal specialists, Portugal).*

Another specialist also mentions the lack of mental health professionals in prisons to ensure an appropriate level of psycho-social assistance to detainees.

*Q: E medidas de desenvolvimento físico e mental?*

*A: Pois, essas já não tenho a certeza se têm. (...) Se for numa penitenciária há um psicólogo para não sei quantos reclusos (...) mas quero acreditar que há.*

*Q: What about physical and mental development measures?*

*A: I'm not sure. If it is in a prison, there's one psychologist for countless prisoners (...) but I want to believe that they do (Non-legal specialist, Portugal).*

In terms of education and training, a difference is, once again, made between the Prison-School and other prisons. A specialist highlights the wide educational possibilities, with vocational training programmes with dual certification (school degree and professional certification), available at the Prison-School. There are cooking and waiting and bartender courses, which are equivalent to the 9th year of basic schooling, and courses in multimedia and installation of photovoltaic panels, which are equivalent to secondary education. Additionally, the Prison-School offers other smaller professional courses/programmes, such as gardening and bricklaying. These professional courses are meant for

children in institutions, who have difficulty concentrating in a traditional classroom and need practical activities.

*Nós devemos ser dos estabelecimentos que maior oferta educativa tem. Nós temos cursos de formação profissional de dupla certificação, que dão equivalência a um grau de escolaridade e a uma certificação profissional. (...) Por exemplo, temos os cursos de multimédia, de instalação de painéis fotovoltaicos, de redes informáticas e de técnico de informática que dão equivalência ao secundário. Depois, temos outros que são pequenos cursos mais práticos, que são feitos por módulos, como o de jardinagem e pedreiro. (...) Já me consciencializei que, às vezes, alguns têm mesmo que ir para uma área mais prática e que depois desenvolvem realmente boas competências e que os ajudam a encontrar emprego. (...)*

*We must be one of the establishments with the greatest educational offer. We have dual certification vocational training courses, which provide a school degree and a professional certification. (...) For example, we have courses in multimedia, installation of photovoltaic panels, computer networks and computer technicians that are equivalent to secondary education. Then, there are others that are smaller and more practical courses, which are done in modules, such as gardening and bricklaying. (...) I've become aware that sometimes some children have to go to a more practical area to develop really good skills that will help them to find a job (Non-legal specialist, Portugal).*

However, one judge argues that, although there are abundant training activities, the vocational training on offer is not adequate for what young people will need in the future. Most of the work provision in this prison is in agriculture and most of the young people are from urban areas and it is not credible that they will enter this professional area after release.

*Eles têm mais atividades formativas. Só há uma coisa neste estabelecimento prisional de negativo (...): em termos do que lhes é oferecido para trabalharem, não está nada atualizado. Aquilo era uma grande quinta e o que eles têm para trabalho são as brigadas agrícolas. Aqueles miúdos quando saírem, não vão ter um vaso para plantar (...). Vão viver numa selva urbana. (...) Não vejo aquilo como uma ferramenta para o futuro.*

*They have more training activities. There is only one thing negative about this prison (...): in terms of what is offered to them to work, it is not up to date at all. The School-Prison was previously a big farm and what they offer for work are the agricultural brigades. Those kids, when they get out, they won't have a pot to plant (...). They will be living in an urban jungle. (...) I don't see it as a tool for the future (Judge, Portugal).*

Furthermore, a lawyer claims that the reason why inmates enrol in school classes or in training is not because they want to invest in their personal development, but because it is a precondition to benefit from early release from prison.

Finally, one specialist mentions the project *Ópera na Prisão* (Opera in Prison) as one of the programmes that foster their development and reintegration into society. Since 2003, this project has been run, in the Prison-School, in 3-year cycles, involving the detainees, the prison management, the specialists, the guards, an orchestra and professional opera singers. The interviewee states that



children create empathy with each other, develop different skills (oral expression, musical) and understand the value of effort and work. Additionally, the interviewee mentions some programmes offered by volunteers from the community outside, such as painting, English, group dynamics of self-knowledge and self-esteem promotion or discussion (on current affairs newspapers) workshops.

*O projeto da Ópera envolve muitos reclusos porque também ele é todo muito completo. É um projeto de três anos que desenvolve várias competências artísticas, performativas. (...) Muitas vezes não é só saírem dali artistas, mas é o facto de crescerem como pessoas (...). (...) Cá dentro vão todos ao espetáculo, mas só vai ao espetáculo na Gulbenkian quem não tem infrações há seis meses. (...) Isto cria a necessidade de melhoria contínua, aumenta a responsabilidade e melhora a expressão verbal. (...)*

*(...) Com a pandemia os nossos projetos de voluntariado foram suspensos e foram agora retomados. Temos algumas voluntárias que são licenciadas em psicologia e serviço social e que desenvolvem dinâmicas de grupo de autoconhecimento, promoção de autoestima (...). (...) Temos um outro voluntário, que traz jornais para pô-los a falar sobre problemáticas atuais da sociedade. (...)*

*The Opera project involves many prisoners because it is also very complete. It is a three-year project that develops various artistic and performative skills. (...) They develop artistic skills, but they also grow as people (...). (...) Inside, everyone goes to the show, but only those who have not had infractions for six months go to the show at the Gulbenkian. (...) This creates the need for continuous improvement, increases responsibility and improves verbal expression. (...)*

*(...) With the pandemic, our volunteer projects were suspended and have now been resumed. We have some volunteers with degrees in psychology and social work who develop group dynamics in self-knowledge and self-esteem promotion (...). (...) We have another volunteer, who brings newspapers to get them talking about current issues in society (Non-legal specialist, Portugal).*

#### d. Contact with family members during deprivation of liberty

The interviewees argue that the right to contact and meet their family members is guaranteed by law and in practice, including when in police custody, pre-trial detention and post-trial detention. However, judges, public prosecutors and lawyers identify some challenges faced by the families of detained children to fulfil the right to contact.

While in police custody, the police officers mention that children have the right to one phone call to the family during the 48 hours that they may be detained. One police officer says that it is in the police interest that they make that call to their relatives, since they have to mention it in the detention report that is submitted to the court.

*Q: Os arquivados quando são detidos têm direito a um telefonema?*

*A: Nós insistimos que o façam, porque também é do nosso interesse, para colocar no expediente. Não é só o facto de terem direito ao telefonema porque está previsto na lei. Nós insistimos, porque temos que pôr a informação no expediente.*

*Q: Are the defendants entitled to a phone call when they are arrested?*

*A: We insist that they do, because it is also in our interest, to put that information in the file. It's not just that they have the right to a phone call because it's in the law. We insist that they make the phone call because we have to put the information in the file (Police officer, Portugal).*

With regard to the child's contact with family members during deprivation of liberty in pre-trial or post-trial detention, interviewees report that all defendants deprived of their liberty have the right to make one phone call right after the detention and up to 3 phone calls per day (with a total time limit of 15 minutes), and receive regular visits in person from family members. In the Prison-School, a specialist states that children contact their families by telephone on the first day of admission to the prison and have the right to make three calls a day to their family members. The phone calls are prepaid.

*(...) No primeiro dia que o jovem entra é sempre feito o contacto com o familiar apontado pelo jovem (...) e é sempre ele que fala com o familiar. (...) Eles podem fazer três chamadas por dia para a família (...).*

*(...) On the first day of admission, contact is always made with the family member appointed by the child (...) and it is always the child who speaks to the family member. (...) They can make three calls a day to the family (...) (Non-legal specialist, Portugal).*

In the Prison-School, there's a big visiting room, where children can meet with their family members. Nonetheless, currently, due to the COVID-19 pandemic, the number of visitors allowed is reduced and there are acrylic divisions in the visiting room to separate detainees from their family members (family members do not have physical contact, just visual, with the detainee). Additionally, visits must be booked in advance by the detainees.

*Nós temos jovens de todo o país, desde o Norte ao Algarve, e por serem de muito longe há jovens que não são visitados habitualmente. Há jovens que são visitados regularmente todas as semanas e há outros que o são esporadicamente. (...) Nós temos uma grande sala de visitas presencial. Até à pandemia o recluso estava numa mesa com os seus familiares e a sala é tão grande que nós não precisávamos de marcar visita. (...) com a pandemia, nós tivemos que criar umas divisórias acrílicas e em que o familiar não tem contacto físico, só visual. (...) os reclusos pedem a visita ao técnico e o técnico marca até termos os guichets todos ocupados.*

*We have children from all over the country, from the North to the Algarve, and because they are from far away some children are not usually visited. Some young people are visited regularly and others are visited sporadically. (...) We have a large visiting room. Until the pandemic, the detainee was at a table with their family and the room is so big that we didn't need to make an appointment. (...) with the pandemic, we had to create acrylic divisions and the family member has no physical contact with the detainee, only visual contact. (...) the detainees ask for a visit to the specialist and the specialist makes appointments until we have all the counters occupied (Non-legal specialist, Portugal).*

As is noticeable in the previous quote, there are practical constraints to contact with family members during deprivation of liberty, besides the limitations imposed by the COVID-19 pandemic. As one

public prosecutor argues, when the defendant is placed in a prison far away from their family, it makes it harder to guarantee visits:

*Idealmente (...) os jovens devem cumprir pena em prisão mais próxima das suas áreas de residência e isso criou até problemas em Portugal ao nível da justiça juvenil com o centro educativo da Madeira em que estavam lá jovens que não eram da Madeira e para terem visitas era quase impossível. Estamos a falar de famílias que não têm dinheiro... Já no continente não é fácil, muito menos na ilha. (...) Não sei se Leiria recebe jovens de Lisboa ou Faro, mas é pesado... Isso é um problema grave porque há esse direito a visitas, mas depois a questão é saber se a prisão é adequada ou não.*

*Ideally (...) young people should serve their sentence in a prison closer to their areas of residence and this has even created problems in Portugal at the level of juvenile justice with the educational centre in Madeira where there were young people who were not from Madeira and to have visits was almost impossible. We're talking about families that don't have money... It's not easy on the mainland, much less on the island. (...) I don't know if Leiria receives young people from Lisbon or Faro, but it is heavy... This is a serious problem because there is this right to visits, but then the question is whether the prison is adequate or not (Public prosecutor, Portugal).*

Actually, a specialist reports that some children held in the Prison-School are regularly visited (every week), but about a quarter of the detainees do not have visitors, because their families are from far away.

#### e. Discussion of findings

The vast majority of the different professionals interviewed stress that deprivation of liberty is used as a last resort measure for children. Police custody, pre-trial detention and post-trial detention are only applied after all the other alternatives are previously analysed and deemed insufficient or inadequate, according to the criteria foreseen by law (e.g. the crimes involved). In fact, most of the interviewees do not have experience with detained children. Therefore, some of them, involved mostly in the pre-trial stage, have limited knowledge on prison conditions.

The application of pre-trial detention or effective prison sentence to children is rare and applied as a last resort. Lawyers, public prosecutors and judges argue that the most common measures applied to children are: statement of identity and residence and suspension of the proceedings, through the imposition of injunctions and rules of conduct, as coercive measures; and a warning and fines, as criminal sanctions. Furthermore, the public prosecutors and judges interviewed highlight that, when considering a pre-trial or post-trial detention, home detention is always preferred to imprisonment to avoid the harmful effect it has on children.

When asked about whether, how, when and for what purposes a medical examination is conducted, the interviewees report that, when entering the prison facility, a medical examination is obligatory. The results of this medical examination are considered mandatory for the individual rehabilitation plan for inmates under 21, namely when there is any information of addictive behaviour or when there is a report of need of mental health support.

In the special prison for young offenders (known as the Prison-School of Leiria), the right to access health care for children deprived of liberty is ensured through the offer of daily medical services (from

a doctor and a nurse), and the request of external medical specialities or hospital treatment, when needed. A medical examination of their physical as well as mental condition is carried out upon request of the child, the lawyer or the holder of parental responsibility and usually is conducted on the same day as the request.

Although the law establishes that prisons shall be made up of one or more units, differentiated according to factors such as the penal situation and age, the interviewees claim that a few young people under 21 in pre-trial detention and post-trial detention are held in the same prison as adults. While in the special prison (known as the Prison-School of Leiria) built to house offenders from 16 to 21 years of age, children are held separately in individual detention cells in three different blocks, according to their age and if they are detainees serving a final sentence or pre-trial detainees. In the other prisons, cells are for a group of inmates and it is very difficult to guarantee that children are held separately from adults. Nonetheless, one specialist argues that, since the number of pre-trial detainees exceeds the Prison-School capacity (100 to 50 cells), the pre-trial detainees are now held in the same block as the convicted offenders. In police stations, there are individual detention rooms/cells and children are always held separately from adults.

Regarding the access of children deprived of their liberty to care, the interviewees mention that the Prison-School offers a variety of physical, mental, cultural and educational activities and services. However, the interviewees have doubts about the activity's adequacy and sufficiency to children needs, mentioning the lack of human resources and the kind of vocational training offered. First, although the prison provides psycho-social assistance from mental health professionals, the psycho-social assistance is not available for all the detained children. Secondly, the vocational training on offer is not always adequate for what young people will need in the future. Furthermore, it is pointed out that most of the work provision in this prison is in agriculture and most of the young people are from urban areas and it is not credible that they will enter this professional area after release.

Finally, as regards the right to contact and meet their family members, although this right is guaranteed by law and generally fulfilled in practice through phone calls and visits, the interviewees identify some practical constraints related to the COVID-19 pandemic, and also to the geographical distance of the family from the prison. In the Prison-School, now, due to the COVID-19 pandemic, visits must be booked in advance by the detainees, the number of visitors allowed in the visiting room is reduced and there are acrylic divisions to separate detainees from their family members. As one public prosecutor argues, when the defendant is placed in a prison far away from their family, it makes it harder to guarantee visits.

## **C.7 The rights to effectively participate in and be accompanied during the trial**

### **a. Legal overview**

The general rules of the Code of Criminal Procedure apply to defendants under 18 in this regard. That is, as with the case of adults, when a suspect under 18 formally becomes a defendant in a criminal case, they have to make a statement about their identity and residence<sup>92</sup>. From then on notifications, namely the notification to attend the trial, are made by simple postal delivery<sup>93</sup>: the court clerk draws up a note in the file indicating the date of dispatch of the notification and the address to which it was

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<sup>92</sup> Portugal, [Código de Processo Penal](#) (Code of Criminal Procedure), approved by Decree-Law 78/87, 17 February 1987. Last amended by Law 57/2021, 16 August. Article 61(6)(c).

<sup>93</sup> Portugal, [Código de Processo Penal](#) (Code of Criminal Procedure), approved by Decree-Law 78/87, 17 February 1987. Last amended by Law 57/2021, 16 August. Article 196(2), 113(1)(c), 313(3).

sent and the postal delivery worker deposits the notification in the defendant's mailbox, draws up a statement indicating the date, confirming the exact location of the deposit and sends it immediately to the court. The notification is considered to be effective on the fifth day after the date indicated in the postal delivery worker's statement<sup>94</sup>.

If the defendant is notified of the date of the trial at the address given in the statement of identity and residence, the defendant is presumed to be aware of the trial and the trial can be conducted in their absence, unless their presence is absolutely necessary to the discovery of the truth<sup>95</sup>. The defendant can refute that presumption and if the trial was held in their absence it is considered irremediably null<sup>96</sup>.

The defendant tried in absentia must be personally notified of the sentence, either immediately after their detention or upon their voluntary appearance in court, and the period for filing the appeal is counted from that date<sup>97</sup>. Current criminal procedure does not provide for a remedy for the trial in absentia that resembles a retrial. The sentence may be appealed, both in terms of fact and in terms of law<sup>98</sup>, but new evidence cannot be presented. The appeal may result in the annulment of the initial trial and a request for a new trial, if the defendant was unlawfully tried in absentia.

There is a debate, among scholars, whether this regime meets the minimum standards of Directive 2016/343. First of all, some scholars argue that the notification regime associated with the statement of identity and residence does not ensure with absolute certainty that the accused has effective knowledge of the trial. Bárbara Churro (2018: 85-86) states that "this conclusion is reinforced by the Dworzecki case-law, in which it was held that the method of service must make it possible to show unequivocally that the person concerned has actually received information regarding the time and place of his trial and, where appropriate, the precise time at which this information was received". Furthermore, the author points out that there is no control whatsoever by the judicial authorities during the procedure, in particular there is no confirmation that the residence indicated at the time is the current one (Churro, 2018: 86). Bárbara Churro emphasises that the Portuguese system "views the accused's presence from the point of view of the duty to appear. (...) The duty to be present is constructed and materialises in the obligation to fulfil the obligations laid down in the statement of identity and residence. It is not a preventive measure, which encourages attendance, but rather a coercive measure, which transforms the trial in absentia into a penalty for failure to comply with the obligation assumed when providing the statement of identity and residence to keep an address updated for the purpose of being notified. In essence, what we have is a sanction trial, which the ECtHR has already said is inadmissible" (2018: 87)<sup>99</sup>.

Other scholars believe that the Portuguese system complies with minimum standards of Directive 2016/343. Alexandre Oliveira (2019:159-160), for example, argues that "the sentence of the defendant tried in absentia will always have to be served personally to the defendant and the defence

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<sup>94</sup> Portugal, [Código de Processo Penal](#) (Code of Criminal Procedure), approved by Decree-Law 78/87, 17 February 1987. Last amended by Law 57/2021, 16 August. Article 113(3).

<sup>95</sup> Portugal, [Código de Processo Penal](#) (Code of Criminal Procedure), approved by Decree-Law 78/87, 17 February 1987. Last amended by Law 57/2021, 16 August. Article 333(1).

<sup>96</sup> Portugal, [Código de Processo Penal](#) (Code of Criminal Procedure), approved by Decree-Law 78/87, 17 February 1987. Last amended by Law 57/2021, 16 August. Article 119(c).

<sup>97</sup> Portugal, [Código de Processo Penal](#) (Code of Criminal Procedure), approved by Decree-Law 78/87, 17 February 1987. Last amended by Law 57/2021, 16 August. Article 333(5).

<sup>98</sup> Portugal, [Código de Processo Penal](#) (Code of Criminal Procedure), approved by Decree-Law 78/87, 17 February 1987. Last amended by Law 57/2021, 16 August. Article 428 and 431.

<sup>99</sup> Churro, B. (2017), *A compatibilidade do julgamento na ausência previsto no Código de Processo Penal com as regras mínimas definidas na Diretiva (EU) 2016/343*, Lisboa, Dissertação com vista à obtenção do grau de Mestre em Direito, Faculdade de Direito da Universidade Nova de Lisboa.

lawyer, thus ensuring the effective power to invoke an irreparable nullity of the trial (art. 119/c, of the Portuguese Criminal Procedure Code), for example, by defect in the notification by simple means not attributable to the defendant, implying the repetition of the trial. In these terms, it can be concluded that in the Portuguese system a legal remedy is assured for cases where the accused did not appear at his trial and the conditions provided for in article 8/2 of the Directive have not been met”<sup>100</sup>. The defendant has the right to attend all procedural acts that directly affect them and the right to be heard by the court. At the beginning of the trial, the judge must inform the defendant of the right to make statements at any time during the trial, as long as they refer to the subject of the proceedings, without, however, being obliged to do so, and that if they choose to remain silent, it will not be held against them<sup>101</sup>.

The transposition of Directive (EU) 2016/800 through Law 33/2019 introduced two new provisions on the right to privacy for defendants under 18. Firstly, Law 33/2019 stated that interrogations, statements and other procedural acts in which a defendant under 18 takes part may not be consulted by a third party<sup>102</sup>. On the other hand, as a rule, any procedural act declared public by law, namely trials and hearings, can be attended by anyone. Ex officio or at the request of the public prosecutor, the defendant or the victim, the judge may decide to limit the attendance of the public or exclude it being open to the public<sup>103</sup>. Law 33/2019 established that when the case involves a defendant under 18, however, procedural acts should be as a rule conducted without being made public<sup>104</sup>. In fact, Article 87 of the Code of Criminal Procedure establishes that any person can attend any proceeding that is declared to be public, namely court hearings. From 2007 onwards, as a rule, court hearings involving trafficking in human beings or crimes against sexual freedom or self-determination have been conducted away from the public. Law 33/2019, complying with Directive 2016/800, added to this list the court hearings involving children who are the accused in criminal proceedings. Nonetheless, a subsequent law – Law 102/2019, of 6 September, that has amendments from the Council of Europe Convention against Trafficking in Human Organs – amended Article 87(3) once again. This law included in the list of court hearings to be conducted away from the public the ones involving trafficking in human organs, but it has left out court hearings involving children who are the accused in criminal proceedings. Nevertheless, the Code of Criminal Procedure allows for the judge to conduct the hearing away from the public because they need to protect the dignity of a person, public morality or the normal course of the proceedings<sup>105</sup>.

On the right to be accompanied by the holder of parental responsibilities or a support person, Law 33/2019 introduced three new provisions:

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<sup>100</sup> Oliveira, A. (2019), “As Diretivas de garantias processuais da União Europeia, em especial a Diretiva (EU) 2016/343 do Parlamento Europeu e do Conselho de 9 de março de 2016, relativa ao reforço de certos aspetos da presunção de inocência e do direito de comparecer em julgamento em processo penal”, *Revistas de Estudos Europeos*, Nº extraordinario monográfico, 1-2019, 144-163.

<sup>101</sup> Portugal, [Código de Processo Penal](#) (Code of Criminal Procedure), approved by Decree-Law 78/87, 17 February 1987. Last amended by Law 57/2021, 16 August. Article 343 (1).

<sup>102</sup> Portugal, [Código de Processo Penal](#) (Code of Criminal Procedure), approved by Decree-Law 78/87, 17 February 1987. Last amended by Law 57/2021, 16 August. Article 90(2).

<sup>103</sup> Portugal, [Código de Processo Penal](#) (Code of Criminal Procedure), approved by Decree-Law 78/87, 17 February 1987. Last amended by Law 57/2021, 16 August. Article 87(1).

<sup>104</sup> Portugal, [Código de Processo Penal](#) (Code of Criminal Procedure), approved by Decree-Law 78/87, 17 February 1987. Last amended by Law 57/2021, 16 August. Article 87(3).

<sup>105</sup> Portugal, [Código de Processo Penal](#) (Code of Criminal Procedure), approved by Decree-Law 78/87, 17 February 1987. Last amended by Law 57/2021, 16 August. Article 87(1) and (2).

- When a child suspect formally becomes a defendant, this act is immediately communicated to the holders of parental responsibilities, their legal representative or the person who has *de facto* custody of them<sup>106</sup>;
- A defendant under 18 has the right to be accompanied during the procedural acts in which they take part by the holders of parental responsibilities, by the legal representative or by a person who has *de facto* custody of them or, when it is not possible to contact these people, or when there are special circumstances based on their interest or where the needs of the proceedings apply, and only as long as those circumstances persist, by another suitable person indicated by the defendant and accepted by the competent judicial authority<sup>107</sup>
- When a coercive or patrimonial guarantee measure (other than the statement of identity and residence) is imposed on a child defendant, the decision is immediately communicated to the holders of parental responsibilities, their legal representative or the person who has *de facto* custody of them<sup>108</sup>.

b. Right to effective participation in practice

i. Enabling the child's effective participations - Modifications of settings and conduct

Interviewees claim that there are no changes to the layout and conduct of the proceedings to make it possible for the child to effectively participate in the trial. The hearing rooms are the same for adults and children and the room's layout is formal.

*Não acredito que haja qualquer preparação quando os arguidos são crianças. (...) Genericamente, as salas têm um sítio central onde está o juiz, de lado está uma mesa com o Ministério Público, do outro lado uma mesa onde está sentado o defensor do arguido e em frente ao juiz está o arguido ou a vítima e ao lado o psicólogo se ele existir ou quem o tenha de acompanhar. Estamos mais ou menos ao mesmo nível, mas acaba por ser muito formal.*

*I do not believe that there is any preparation when the defendants are children. (...) Generally, the hearing rooms have a central place where the judge is, on one side is a table with the Public Prosecutor, on the other side a table where the defendant's lawyers are seated and in front of the judge is the accused or the victim and beside them the psychologist or who has to accompany them. We are more or less at the same level, but it turns out to be very formal (Public prosecutor, Portugal).*

A judge argues that the underage defendant is not perceived as a child and that the law does not distinguish, in this matter, between adults and children.

*Nós não olhamos para ele como uma criança. Não se pode pedir ao juiz para distinguir uma coisa, que a lei não distinguiu. (...) Ele não é uma criança, para todos os efeitos, apesar de alguns deles serem menores de idade.*

<sup>106</sup> Portugal, [Código de Processo Penal](#) (Code of Criminal Procedure), approved by Decree-Law 78/87, 17 February 1987. Last amended by Law 57/2021, 16 August. Article 58(7).

<sup>107</sup> Portugal, [Código de Processo Penal](#) (Code of Criminal Procedure), approved by Decree-Law 78/87, 17 February 1987. Last amended by Law 57/2021, 16 August. Article 61(1)(i).

<sup>108</sup> Portugal, [Código de Processo Penal](#) (Code of Criminal Procedure), approved by Decree-Law 78/87, 17 February 1987. Last amended by Law 57/2021, 16 August. Article 194(11).

*We don't look at that person as a child. You cannot ask the judge to distinguish something, which the law has not distinguished. (...) They are not a child, for all intents and purposes, although some of them are minors (Judge, Portugal).*

This judge, however, points out that whenever there is a more vulnerable defendant, for whatever reason, the judge is obliged to try and explain better what is happening in the hearing and tailor their speech to the interlocutor. This is done regardless of age, taking into account only the special vulnerability, which may occur in a person aged 70 years as well.

*Se eu vir que uma pessoa de 70 anos está especialmente frágil, especialmente perdida no meio do julgamento, eu tenho a obrigação de tentar que ela perceba o que está a acontecer. Se eu me aperceber que uma criança de 17 anos está especialmente atarantada e que não está a perceber o que está a acontecer, eu faço um esforço para que ele perceba. Mas é isto. Se eu perceber que uma pessoa ouve mal, vou fazer um esforço por falar mais alto. É esta a lógica.*

*If I see that a 70-year-old person is especially frail, especially lost in the middle of the trial, I have an obligation to try to make that person understand what is happening. If I realise that a 17-year-old is especially confused and that they are not understanding what is happening, I make an effort to make them understand. But that's it. If I realise that a person has difficulty hearing, I will make an effort to speak up. That is the thinking behind it (Judge, Portugal).*

Another judge believes that there is no need for modifications, since defendants have the right to be present at procedural acts, including trial hearings, as a safeguard in criminal proceedings.

*O processo penal é exatamente igual para a criança, sendo certo que, quer o arguido adulto, quer a criança podem participar amplamente no julgamento, inclusivamente têm o direito de prestar declarações a qualquer momento. Eu penso que nem sequer há necessidade de ser diferente, porque ao arguido adulto já é concedido (...) o direito a estar presente e o direito a participar efetivamente no julgamento.*

*The criminal procedure is exactly the same for the child. Both the adult and the child defendant can fully participate in the trial. They even have the right to make statements at any time. I do not think there is even a need to be different, because the right to be present and the right to effectively participate in the trial is already granted to the adult defendant (...) (Judge, Portugal).*

The interviewed lawyers confirm that there is no change in the conduct of the trial when the defendants are minors. One lawyer even states that judges usually ask them to explain to the defendant what is happening in court, particularly when it comes to the sentence. According to this lawyer, judges usually tell the defendant, after reading the sentence, that the lawyer will later explain better what was said.

As mentioned, Law 33/2019, complying with Directive 2016/800, established that court hearings involving children who are the accused in criminal proceedings should, as a rule, be conducted away from the public. Notwithstanding, the subsequent amendment to the same article of the Code of Criminal Procedure (Law 102/2019, of 6 September) left out court hearings involving children who are the accused in criminal proceedings.



Some interviewees are not even aware of this latest legislative change which removed cases involving child defendants from the list of cases that must be tried without an audience, attributing this change to a legislative mistake and arguing that the Code of Criminal Procedure still allows for the judge to conduct the hearing away from the public whenever there is the need to protect the dignity of a person, public morality or the normal course of the proceedings.

*A: A transposição da Diretiva veio introduzir uma alteração. Mas era uma coisa que já fazíamos. (...) Que é a questão da publicidade, para proteção da imagem.*

*Q: (...) Mas depois houve uma outra alteração da lei, a seguir, onde isso foi tirado. (...)*

*A: Tiraram? Não me apercebi. Mas isso, de facto, é erro.*

*(...)*

*A: Nós já fazíamos isso. (...) A ideia é evitar o estigma para a vida. (...)*

*A: The transposition of the Directive introduced a change. But it was something we were already did. (...) Which is the question of publicity, for the protection of the image.*

*Q: (...) But then there was another amendment to the law, afterwards, where this was taken out. (...)*

*A: Taken away? I didn't realise. But that, in fact, is a mistake.*

*(...)*

*A: We were already doing that. (...) The idea is to avoid stigma for life. (...) (Judge, Portugal)*

ii. How are children heard and their views taken into account?

As regards the way children are heard during court hearings, interviewees also claim that there is no difference between adult and child defendants.

*Q. a forma como estes arguidos são ouvidos durante o julgamento é diferente?*

*A. é igual.*

*Q. não há nenhuma medida específica?*

*A. não.*

*Q. is the way these defendants are heard during the trial different?*

*A. it is the same.*

*Q. is there no specific measure?*

*A. no (Public prosecutor, Portugal).*

The formality and solemnity of the trial are underlined by the interviewees. A professional working with child defendants stresses the absence of any difference between a criminal trial of adults and a criminal trial of children:

*Q: Pode-nos descrever como é que as crianças são ouvidas?*

*A: Da mesma forma que são ouvidos os adultos. Em frente ao juiz, com um microfone à frente, onde o jovem está todo a tremer. Os juízes com aquelas capas pretas, os advogados com aquelas capas pretas. Aquilo intimida.*

*Q: Can you describe how children are questioned?*

*A: The same way that adults are questioned. In front of the judge, with a microphone in front of them, where the child is all shaking. The judges with those black robes, the lawyers with those black robes. It's intimidating (Non-legal specialist, Portugal).*

A lawyer states that the way children are heard during hearings depends on the judge that is conducting the trial. As the interviewee puts it: "there are good and bad people everywhere".

#### c. The right to be accompanied by the holder of parental responsibility

Interviewees are unanimous in reporting that defendants, regardless of their age, can freely confer with their lawyers. At any time, the lawyer may interrupt the child to talk with them and the child can also ask to talk with their lawyer. As one lawyer describes, the lawyer agrees with the child that "if there is anything, raise your finger and I ask for an interruption of the hearing".

Furthermore, the holder of parental responsibility is notified to be present at the trial and can attend and confer with the defendant.

#### d. Discussion of findings

According to the interviewees, the only difference between a trial of child defendants and adult defendants is the presence of the holder of the responsibilities or of a person designated for that purpose. Interviewees note that there is no change in the layout of the trial room or the way the accused is heard, which can be intimidating and distressing for children in practice. However, they also note that special care is taken to adapt the language used when dealing with vulnerable defendants regardless of their age.

Defendants, regardless of their age, are free to confer with their lawyers at any time.

## **PART D. GENERAL ASSESSMENT**

### **D.1 Challenges**

Generally speaking, the interviewees point out three main challenges in relation to procedural safeguards of children who are suspected or accused of crime: 1) the training of the professionals dealing with children or accused of a crime; 2) the individual assessment; 3) the Young Adult's Special Penal Regime. All of them (except the first one) focused on issues addressed previously in the interview.

For five interviewees (one lawyer, three specialists and one police officer) one of the major challenges has to do with the training of the different legal professionals that work with these children. One lawyer stated that to prevent abuses by the police officers, who usually make the first contact, there has to be training at various levels and awareness of the importance of the presumption of innocence and discrimination and differences in treatment with Roma people and people with African descendants. A police officer reinforces this idea stating that there is the lack of knowledge of the law, namely Directive 2016/800 and the amendments to the Code of Criminal Procedure. The interviewee argues that it is important to implement specific training for police officers, who usually make the first contact with children who are suspected or accused of crime.

Two specialists argue that judges and lawyers lack the necessary sensitivity to deal with cases of child defendants. According to the interviewees, judges and lawyers should receive specific training and be specialised in these procedures. Another specialist mentions that all national authorities and institutions involved in the criminal proceedings against children (law enforcement authorities, public prosecutors, judges, DGRSP) must be trained and prepared to properly communicate the rights and procedural safeguards for children and the procedural stages so that children feel safe.

Generally, it is judges and public prosecutors who request and use the individual assessments, and specialists, who conduct individual assessments, who highlight that one of the major challenges is to ensure that the child's needs and vulnerabilities are taken into consideration in the proceedings and measures are applied to effectively promote the child's social reintegration. The adequate preparation of individual assessments and their effective use is considered crucial towards finding proportionate and appropriate responses in the community and in prison to the needs of child defendants. However, in the previous section about the right to an individual assessment, the interviewees identified challenges related with when, how and for what purposes the individual assessment is conducted and used. Furthermore, one specialist reports that there is some resistance to the implementation of the provision of the Code of Criminal Procedure on the individual assessment, which transposed Directive (EU) 2016/800. The provision establishes that in the bill of indictment produced at the end of an investigation against a defendant under 18, the public prosecution must attach a social report or information on the defendant produced by the social rehabilitation services. However, a specialist believes that there must be cases in which the individual assessment is not conducted since it is a recent change to the law, or the magistrates may think that the crime committed does not justify the intervention of DGRSP.

A third challenge identified almost unanimously by the interviews is the review and enforcement of the Young Adult's Special Penal Regime. As mentioned in sections C.1 and C.6, the Young Adult's Special Penal Regime applies to children and young adults who, at the time of the crime, were over 16 and under 21 years of age, and allows for the application of the educational measures of the

Educational Guardianship Law to children and young adults between 16 and 21 years old. However, as mentioned by one of the lawyers interviewed, its application is very rare.

According to a public prosecutor, the measures foreseen in the Young Adult's Special Penal Regime are good and should not be optional. Therefore, another public prosecutor and a judge argue that this special penal regime should be updated and adapted to Directive 2016/800.

## **D.2 Improvements**

The improvements since the implementation of Directive (EU) 2016/800 mentioned by the professionals are restricted to the provisions on individual assessments, although one judge also mentioned the dispositions that foresee the participation of the holders of parental responsibilities in the criminal proceedings. One should bear in mind, as mentioned in section C1, that most of the provisions of Directive (EU) 2016/800 were considered to have already been implemented under the Portuguese legal framework prior to the approval of the Directive.

Most of the professionals interviewed and especially the specialists, judges and public prosecutors welcomed the introduction of the provisions on individual assessment of defendants under the age of 18 operated by the transposition of Directive (EU) 2016/800 into the Portuguese legal framework. One judge highlights the consecration of the need to provide for the social report at an early stage of the procedure. Similarly, one specialist argues that the preparation of the individual assessment, which is mandatory, according to Law 33/2019, when the child is indicted, is essential for the magistrate to get to know the defendant and to determine the sentence/sanction. Two non-legal specialists report that, after the amendment to the Code of Criminal Procedure that transposed the Directive (EU) 2016/800, the central services at the DGRSP sent guidelines regarding the preparation of the assessment reports of children who are suspected or accused of crime (mentioned in Article 283) and an adapted report model. The guidelines were focused on guaranteeing that a child is formally a defendant and is informed about the DGRSP intervention and in ensuring the child's right to be accompanied by the holder of parental responsibility.

As regards the right to have the holder of parental responsibility informed and to accompany the child in criminal proceedings, although the interviews conducted with the children indicate that children value the involvement of the holders of parental responsibilities, most professionals interviewed do not list this as an improvement. One should remember that previously many parents already closely accompanied the young suspects or defendants, although they were not allowed to accompany the child during questioning.

Nevertheless, one judge argues that, although the assistance of a defence lawyer, even during the investigation phase, is compulsory in every procedural act for defendants under 21, this is not enough to ensure that children are well informed. Therefore, they welcome the transposition of the Directive (EU) 2016/800 into the Portuguese legal framework in May 2019, through an amendment to the Code of Criminal Procedure, particularly the dispositions that foresee the participation of the holders of parental responsibilities, the legal representative or the person who has the defendant in *de facto* custody and the disposition that highlights that those people have the right to be informed of the defendant's rights every time they appear before a judicial authority or the police.

### D.3 Promising practices

The professionals interviewed gave very diverse answers regarding promising practices, based on their professional practice and stage of the criminal proceeding in which they are mostly involved, typically relating to the right to information, sanctions, social reintegration and crime prevention.

One lawyer, one public prosecutor and two police officers highlighted promising practices related to the communication of rights and duties by the legal professionals (police officers, lawyers, public prosecutors and judges). One lawyer points to the most promising practices as being the legal assistance provided by lawyers, who informs children about their rights and duties in a language they can understand. Similarly, one public prosecutor argues that the most promising practice is the informality adopted in proceedings against children. According to this interviewee, it is fundamental to explain children's rights and duties and the reason for the proceedings in the simplest way, for them to understand why they are there and what happened. One police officer underlines that information procedure helps to calm down the children who are suspected or accused of crime and their family, and to feel less anxious about the consequences of the criminal proceedings for the future of that person. Regarding the right to information, one lawyer mentions a translation project of the TIR (*Termo de Identidade e Residência* - Statement of Identity and Residence) to accessible language that involves magistrates, lawyers, to simplify the language. The statement of identity and residence encompasses mandatory delivery of documents, containing information in terms of rights and duties on criminal procedural law attributes to the defendant. These documents must be signed by the defendant and state that the defendant understood what these implied.

As regards sanctions, one public prosecutor argues that the most promising practice is the application of the provisional suspension measures of criminal proceedings, through the imposition of injunctions and rules of conduct. The interviewee believes this is an appropriate way to deal with children between the ages of 16 and 18 who have committed crimes, and with the petty crime that is common at these ages. They argue that it is important to apply the measures as soon as possible to make them understand the errors of their acts. They also claim that the provisional suspension measures of criminal proceedings benefit children, since this is an alternative solution that does not involve getting a criminal record.

Another two specialists stress the social reintegration work with child defendants and ex-detainees made by some non-governmental associations, such as *Associação Academia do Johnson*, *O Companheiro*, *Humanidades*, and *Aproximar*, and the Faculty of Human Kinetics of the University of Lisbon under a protocol with the DGRSP. The programme promoted by the Faculty of Human Kinetics of the University of Lisbon under a protocol with the DGRSP is aimed at children with community measures, on probation or with their process suspended followed/accompanied by the DGRSP. It is based on group dynamics to discuss issues such as stereotypes and beliefs. According to the interviewee, the programme did not take place last year and will not happen this year either, due to the COVID-19 pandemic.

Two police officers mention proximity policing work, with programmes such as Safe School Programme – a national programme from the Internal Affairs and the Education Ministries that aims to ensure the safety of the school environment and its surroundings, preventing risky behaviours and reducing unsafe acts in schools. Under this programme, the police forces should ensure the safety of the surrounding areas of schools; promote awareness and prevention actions in schools in partnership with the respective administrative and management bodies and the local community; collaborate with the directors of schools in the scope of training on the theme of school safety to be developed, annually, in schools; promote the implementation, within the scope of Municipal Safety Councils, of

the Programme's priority goals; and pursue the other objectives within the scope of the Programme.<sup>109</sup> The interviewees argue that nowadays police officers are better equipped to deal with children.

#### **D.4 Suggestions**

The suggestions to further implement and protect the procedural rights and safeguards of children who are suspects or accused persons in criminal proceedings given by the professionals interviewed are closely related with the challenges identified.

First, interviewees repeatedly mentioned training and specialisation of legal professionals or specialists. Secondly, one specialist highlights the need for courts to apply the Code of Criminal Procedure provision, transposing Directive (EU) 2016/800, that establishes that a social report or information on the defendant produced by the social rehabilitation services must be attached in the bill of indictment produced at the end of an investigation against a defendant under 18. They believe that, as the DGRSP receives more and more requests from the courts under this proposition, specialised teams will be created for working with child defendants. Thirdly, the interviewees almost unanimously point out the revision and enforcement of the Young Adult's Special Penal Regime.

Additionally, one specialist and one judge mention that the settings of the trials should be adapted to children. The specialist advocates that these trials should be carried out in smaller courtrooms, in the absence of the symbols of criminal justice (such as the judges and lawyers' robes). The judge mentions the courts' lack of physical conditions to respond to a child's needs. According to this interviewee, Family Courts are beginning to create these conditions, by conducting hearings in smaller, less solemn or informal rooms. But criminal courts also need to be prepared and adapt to this section of the population.

#### **D.5 Additions**

Most interviewees do not add anything else in relation to the practical implementation of the procedural safeguards for children, highlighting instead some issues mentioned previously such as training of professionals or the amendment of the Young Adult's Special Penal Regime. Nevertheless, three lawyers add issues that were not mentioned during the interview. One lawyer mentions the fact that proceedings that involve defendants under 18 are now considered urgent and are therefore not suspended during judicial holidays. Another lawyer highlights that since the amendment of the Code of Criminal Procedure, that transposed Directive 2016/800, the Educational Guardianship Law enforcement faces challenges, especially in police practice. According to the interviewee, children under 16 are being held in custody by the police contrary to what the law demands. A third lawyer mentions the time lag between the crime, the first questioning, the hearing and the application of the measure in criminal proceedings against children.

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<sup>109</sup> Portugal. [Despacho n.º 8927/2017, de 10 de Outubro, que aprova o Regulamento do Programa da Escola Segura](#) (Regulation of the School Safety Programme), 10 October 2017.

## PART E. CONCLUSIONS

Although, in Portugal, the age of majority for civil purposes is now 18, the age of criminal responsibility is 16. Children between the ages of 12 and 16 who commit an act legally qualified as a crime may be subjected to a youth justice measure, under the Educational Guardianship Law, but are not subjected to a criminal proceeding. The amendment to the Code of Criminal Procedure operated by Law 33/2019, transposing Directive (EU) 2016/800, provided for special provisions in the procedural regime applicable to those **underage who are suspected of commit a criminal offence while they are between the ages of 16 and 18 and become the suspect of a crime, or are accused of one, prior to attaining 18 years of age**. The scope of the Directive's application is, thus, limited.

**Most of the interviewees find it difficult to focus exclusively on criminal cases involving child defendants.** This difficulty is mainly due to four factors. Firstly, the fact that the number of cases concerned is relatively small in relation to the total number of criminal cases. The scope of application of the Directive is limited, addressing only defendants between the ages of 16 and 18. Secondly, there is no specialisation in relation to these cases. There is no specific department within the police or prosecutor's office in charge of investigating crimes committed by children. Similarly, defendants suspected of committing a crime between the ages of 16 and 18 are tried in ordinary criminal courts - the same courts that try adult cases. Thirdly, the Portuguese legal tradition already provided specific legal rules for defendants or persons convicted in criminal proceedings under the age of 21. Thus, for the interviewees, the differentiation of age categories within criminal proceedings is much more rooted in this division between defendants aged up to 21 and defendants over 21. Finally, the transposition of the Directive implied surgical changes to the criminal procedure, since it was assumed that most of the provisions of the Directive were already enshrined in the Portuguese legal system, precisely because of the special protection given to defendants under 21.

The transposition of the Directive into the Portuguese legal framework operated by Law 33/2019 introduced **changes in three key areas**: in the right to privacy for defendants under 18; in the individual assessment of defendants under the age of 18; and to include the participation of the holder of parental responsibilities when the defendant has not reached the age of 18.

The **participation of the holder of parental responsibilities** in the criminal process was the legislative change, subsequent to the transposition of the Directive, that gave rise to major changes in the judicial routine and of the professionals involved in the criminal process. All interviewees who have experience mainly in the investigation phase of the criminal procedure state that the contact with the holder of parental responsibilities, mainly at the time of the application of coercive measures, and the provision to them of information on the rights of the defendants became a practice. Similarly, after such an act, notification to the holders of parental responsibilities to be present at questionings and trial became the rule.

In the interviews conducted with child defendants, the level of participation of the holder of parental responsibilities seems to have a direct relationship with their perceptions of the criminal process. There are different levels of participation of the holder of parental responsibilities, however, according to the professionals interviewed. On the one hand, according to the professionals interviewed, the involvement of the holders of parental responsibilities is dependent on their own will. Although they are informed and notified to attend questionings and trials, it appears that some are present and interested in the development and outcome of the process and others are not, which will depend more on the family dynamics at stake than on judicial practice. On the other hand, the quality of the information provided to the holders of parental responsibilities is, according to the interviewees,

similar to that provided to the child defendants themselves, which presents challenges in terms of its comprehensibility. Investment in the use of clear and simple language, both in written and oral information, seems to be a necessity.

The second most significant change was **the individual assessment of the underage defendant**. However, there seems to be an established practice of leaving this assessment to the trial stage. In fact, although the law establishes that in the bill of indictment produced at the end of an investigation against a defendant under 18, the public prosecution must attach a social report or information on the defendant produced by the social rehabilitation services, most of the interviewees report that this is not a common practice. The absence of such a report attached to the bill of indictment is allowed by law when these documents are not yet prepared and it is considered to be unnecessary according to the best interests of the child. This, apparently, in practice, is considered the rule and not the exception.

Similarly, interviewees report that it is not common to request an individual assessment of the child defendant with a view to applying a provisional suspension of proceedings. In crimes punishable with a term of imprisonment of not more than five years, the public prosecutor (with the agreement of the defendant and the approval of a pre-trial judge) may offer the possibility of suspending the criminal case for a certain period of time, subject to the imposition of one or more obligations on the defendant (to pay compensation to the victim, to donate a certain sum of money either to the State or to private charities, to provide a community-interest service, not to live in particular areas, or not to contact specific people, etc). If the defendant complies with these obligations during the suspension period, then the case is closed and there are no criminal charges against the defendant. If the defendant does not comply with these obligations, the criminal case will carry on and a bill of indictment will be produced. According to the interviewees, although sometimes the public prosecutor requests a social report to the DGRSP, in order to evaluate if a provisional suspension of proceedings is the adequate solution or to evaluate which obligations should be imposed, it is not a rule. In practice, the rule is that the individual assessment of children is only conducted during the trial phase and is usually used for sentencing.

**The remaining legislative amendments seem to have little significance in judicial practice, either because they refer to situations that occur very rarely or because the legislative solutions reflect previous practices.** This is the case of the amendment to the Code of Criminal Procedure following the approval of the Directive that introduced a provision that states that where, after all steps have been taken to identify the defendant and it is still uncertain whether they have reached the age of 18, the defendant shall be presumed to be under 18. The different professionals interviewed under the current project highlight the **rarity of situations of uncertainty related to the age of a suspect or an accused person**. In those rare cases, the age of a person is assessed and determined in practice, during the investigation phase, by the police or by the public prosecutor, and, when in doubt, the defendant shall, in practice, be presumed to be under 18.

The other example has to do with the **right to privacy of the child defendant**. Law 33/2019 stated that interrogations, statements and other procedural acts in which a defendant under 18 is involved may not be consulted by a third party. In fact, Article 87 of the Code of Criminal Procedure establishes that any person can attend any proceeding that is declared to be public, namely court hearings. From 2007 onwards, as a rule, court hearings involving trafficking in human beings or crimes against sexual freedom or self-determination have been conducted away from the public. Law 33/2019, complying with Directive 2016/800, added to this list court hearings involving children who are the accused in criminal proceedings. Nonetheless, a subsequent law – Law 102/2019, of 6 September, that has amendments from the Council of Europe Convention against Trafficking in Human Organs – amended,



once again, Article 87(3). This law included in the list of court hearings to be conducted away from the public ones involving trafficking in human organs, but, it has left out court hearings involving children who are the accused in criminal proceedings. Some interviewees are not even aware of this latest legislative change which removed cases involving child defendants from the list of cases that must be tried without an audience, attributing this change to a legislative mistake and arguing that the Code of Criminal Procedure still allows for the judge to conduct the hearing away from the public whenever there is the need to protect the dignity of a person, public morality or the normal course of the proceedings. In fact, the Code of Criminal Procedure allows this last solution.

**The two procedural safeguards most commonly addressed throughout the interviews conducted with professionals were the right to information and the right to be assisted by a lawyer. In practice, the study demonstrates that these are two inseparable realities.** Defendants under 21 cannot waive their right to be assisted by a lawyer in every procedural act. If the lawyer is not present, the procedural act shall be null. Therefore, whenever the defendant under 21 does not choose their lawyer, an *ex officio* lawyer is mandatorily appointed. This special rule for defendants under 21 is seen, by the interviewees, as the fundamental guarantee that all other procedural rights and safeguards of defendants are correctly secured. When answering questions regarding the provision of information to the defendant and whether the defendant understood it, judges, prosecutors and police mention that the lawyer of the child defendant is always present and, if there is any doubt, they will then explain to the defendant what happened. Similarly, the lawyers interviewed not only state that it was a concern of theirs to explain the rights of the defendant and the general conduct of the proceedings, but also gave several examples of this task being left to the lawyers by the other professionals.

**This is especially relevant in two concrete circumstances.** Firstly, at the time when the person becomes a defendant and the information about their procedural rights is provided. Whenever a suspect becomes a defendant, the authority that presides over the act (the police, the public prosecutor or the judge) must indicate and, if necessary, explain the procedural rights and duties of a defendant. In practice, a document is handed to the defendant specifying their rights and duties, by transcribing Article 61 of the Code of Criminal Procedure. The professionals interviewed state that the presiding authority frequently hands out the paper regarding the rights of the defendant, collects their signature (as proof that they have been informed) and leaves the part of the explanation of its contents to the lawyer. On the other hand, this statement with the rights of the defendant is, as a rule, delivered together with other documents: the statement of identity and residence and the questionnaire for the provisional granting of legal aid. None of these documents, according to the interviewees, are written in clear language, and are delivered at a time when the defendant is particularly tense: the moment when the defendant is, for the first time, confronted with the fact that there is a criminal case against them. This set of circumstances may explain the perceptions presented by the children interviewed who claim not to have received written information.

Furthermore, the professionals interviewed state that in this initial particularly tense and stressful time, children find it difficult to receive more information than is relevant at the immediate moment. The child's concern is only to know what is going to happen to them at that very moment - if they will go home or if they will be detained or under pre-trial detention – and they do not pay attention to information on the future development of the case. This finding may suggest the need for renewed information on the rights of the defendant and, especially, on the general conduct of the proceedings throughout the criminal process. This need is also reflected in the suggestions of the children interviewed who experience some confusion about the development of the criminal process in which they are involved and that claim the need to be more closely accompanied by their lawyers outside of the key stages of the process - the questioning and the trial.

The second occasion when the right to information proves to be urgent is when a measure or a penal sanction is applied. The reports of situations in which it is found that child defendants have not correctly understood the information transmitted to them are frequent, mainly by the professionals interviewed, who come into contact with defendants at a more advanced stage of the criminal process. Some professionals refer to the difficulty for children in understanding, for example, the consequences of a provisional suspension of the proceedings or of a suspended prison sentence, which challenges the very purposes of the sentences. This finding is confirmed by the interviews conducted with children who could not clearly explain the sentences they were given or, for example, in one case, why they did not go to trial.

The right of a defendant under the age of 21 to be accompanied by a defence lawyer in all procedural acts, their effective participation throughout the criminal proceedings, and the defendants' right to confidential and private consultations and meetings with their lawyer were uncontested by all interviewees and all reported that those rights are widely safeguarded in practice. However, **the effectiveness of the right to be assisted by a lawyer is questioned by the interviewees in two specific aspects**. Firstly, lawyers report situations in which the police have informal conversations with defendants prior to questioning and without the presence of the lawyer. These conversations have no legal validity, but they undermine the right to remain silent that must be guaranteed to defendants. Secondly, there are reports of inadequate defences, attributed either to an intimidating attitude of some public prosecutors and judges and the unwillingness of lawyers to confront them, or to a lack of knowledge and experience of these lawyers.

Furthermore, **the mandatory appointment of a lawyer does not entail, per se, the right to free legal aid**. Free legal aid is contingent on the application for free legal aid and on the assessment of the financial means of the defendant and of their family. All defendants, adults or children, are currently subject to questioning on their financial means in order to make a first assessment of the possibility to be granted free legal aid. According to one lawyer, children often don't even know how to answer most of the questions (like, the net income of their family, or the value of their home). Moreover, they seldom have their parents' help, since they often come from dysfunctional families. Nonetheless, the police or the court clerk that conducts such questioning does not inform them on how to apply for legal aid. Moreover, the interviewee points out that underage defendants have no ability to take care of the paperwork necessary to request free legal aid. This difficulty is highlighted in the interviews conducted with child defendants who mistake the *ex officio* appointment of a defence lawyer for exemption from payment of court costs and fees.

Although underage defendants express that they were able to actively participate in their trials, the professionals interviewed state that **there is no difference between a trial of an underage defendant and an adult defendant, apart from the fact that in the first case there is the presence of the holder of the responsibilities or of a person designated for that purpose**. Interviewees note that there is no change in the layout of the trial room or the way the defendant is heard. However, they also note that special care is taken to adapt the language used when dealing with vulnerable defendants regardless of their age.

The vast majority of the different professionals interviewed (and also the children interviewed) stress that **deprivation of liberty is used as a last resort measure for children**. Police custody, pre-trial detention and post-trial detention are only applied after all the other alternatives are previously analysed and deemed insufficient or inadequate, according to the criteria foreseen by law (e.g. the crimes involved).

In the special prison (known as the Prison-School of Leiria) built to house offenders from 16 to 21 years of age, children are held separately in individual detention cells in three different blocks, according to their age and whether they are detainees serving a final sentence or pre-trial detainees. Nevertheless, there are a few young people under 21 in pre-trial detention and post-trial detention at other prisons and, especially in these ones, it seems to be very difficult to guarantee that children are held separately from adults.

When a person under 21 is convicted and given a prison sentence, a medical examination is conducted and this is considered mandatory for the individual rehabilitation plan for inmates under 21, namely when there is information of addictive behaviour or when there is a report of need of mental health support. The adequacy and sufficiency of educational activities and services for children deprived of their liberty are contested by the interviewees, mentioning the lack of human resources and the kind of vocational training offered that might not be what young people will need in the future.

Finally, as regards the right to contact and meet their family members, although this right is guaranteed by law and generally fulfilled in practice through phone calls and visits, the interviewees identify some practical constraints related to the current context of COVID-19 pandemic, but also to the geographical distance of the family from the prison.

The research also points to the **need for improvements in two main areas**. Firstly, almost all interviewees, at some point, stress the idea that is necessary to invest in **professional training** of the different legal professionals that work with child suspects and defendants. Professional training should focus not only on the Directives of the Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings (and, among them Directive 2016/800), but also on mechanisms and procedures to profitably communicate with underage defendants. Secondly, the need to **review and amend the Young Adult's Special Penal Regime** – a special regime that applies to children and young adults who, at the time of the crime, were over 16 and under 21 years of age, and allows for the application of the educational measures of the Educational Guardianship Law to children and young adults between 16 and 21 years old. The Young Adult's Special Penal Regime is considered to be a neglected piece of legislation that never underwent the necessary regulation required to enter effectively into force and, thus, is currently underused.

## ANNEX – Overview of national organisations working with children who are suspects or accused persons in criminal proceedings

The mission of the **General Directorate of Rehabilitation and Prison Services (DGRSP)** is to develop policies for criminal prevention, execute criminal sentences and develop social reintegration programmes. It guarantees coordinated and complementary management of the educational guardianship and prison systems, ensuring conditions compatible with human dignity and contributing to the defence of order and social peace. It provides technical advice to courts, in criminal and educational guardianship proceedings, as support to decision-making; executes sentences and deprivation of liberty measures, aiming at the reintegration of the offender, preparing the offender to conduct life in a socially responsible manner, without committing further crimes; executes criminal sentences and measures in the community; carries out educational guardianship measures, applied to young offenders, promoting their education for the law and reintegration, in a dignified and responsible way, into community life; manages the national prison system; manages the national electronic surveillance system; and manages the national network of juvenile detention centres.

DGRSP may interact with other public institutions that have contact with the child suspected or accused of a crime, such as schools, health care services, social welfare services or the Commissions for the Protection of Children and Young People at Risk. The **social welfare services** aim to guarantee essential citizenship rights, eradicating poverty and exclusion and providing special protection for vulnerable groups such as children and young people. The **Commissions for the Protection of Children and Young People** (Comissões de Proteção de Crianças e Jovens, CPCJ) are official non-judicial institutions with functional autonomy that aim to promote the rights of children and young people and to prevent or end situations that may affect their safety, health, training, education or integral development.

Children’s support services can also be provided through non-governmental organisations and private social welfare institutions<sup>110</sup>. Mostly, these private organisations or institutions do not have the sole goal of working with children suspected or accused of a crime.

One can find NGOs that mainly focus on the reintegration of ex-inmates in the community, such as:

Organisation	Focus	(Publicly available) Contact details
Associação Integarar	provides for support to disadvantaged populations, namely at-risk children, ex-inmates and persons complying with criminal enforcement measures in the community	<a href="https://www.integarar.org/">https://www.integarar.org/</a>

<sup>110</sup> Private social welfare institutions are non-profit legal persons, created exclusively by private initiative, with the purpose of giving an organised expression to the moral duty of justice and solidarity, contributing to the realisation of citizens’ social rights, provided that they are not administered by the State or by another public body (Article 1 of the Statute of the Private Social Welfare Institutions. Portugal, [Decree-Law 119/83, that approves the Statute of the Private Social Welfare Institutions](#) (Decreto-Lei n.º 199/83, de 25 de fevereiro, que aprova o Estatuto das Instituições Particulares de Solidariedade Social), 25 February 1983. Last amended by Law 76/2015 of 28 July. Their goals may be achieved through the distribution of goods, provision of services and other initiatives to promote the well-being and quality of life of people, families and communities, particularly in the area of support for children and youth, including children and young people in danger; support for social and community integration (Article 2 of the Statute of the Private Social Welfare Institutions).

Associação Remar	carries out programmes for supporting inmates, during their prison sentence, holds shelter centres for ex-inmates and develops social reintegration programs	<a href="https://remar.pt/">https://remar.pt/</a>
O Companheiro	promotes the social reintegration of inmates and ex-inmates	<a href="https://www.companheiro.org/">https://www.companheiro.org/</a>
A.P.A.R. – Associação Portuguesa de Apoio ao Recluso	provides for support to all inmates detained in Portuguese prisons and from all Portuguese citizens imprisoned in foreign prisons	<a href="http://apar.pt/">http://apar.pt/</a>
Norte Vida – Associação para a Promoção da Saúde	has a street team directly working with children at serious social risk	<a href="https://www.nortevida.org/">https://www.nortevida.org/</a>
Obra Vicentina de Auxílio aos Reclusos (OVAR)	dedicated to visiting and coordinating support of inmates and their families in the geographic area of the Parish of Porto: prison of the Criminal Police, Custóias, Paços de Ferreira, Vale do Sousa and Santa Cruz do Bispo (male and female)	<a href="https://ovarpriso.es.wixsite.com/ovar">https://ovarpriso.es.wixsite.com/ovar</a>

There are also several NGOs and private social welfare institutions that provide for shelter to children and young adults in need, such as, among many others, for example:

Organisation	Focus	(Publicly available) Contact details
Associação de Solidariedade Académico de Leiria	private social welfare institution that aims to develop activities with children, young people and the elderly, promoting equal opportunities, ensuring basic needs and psychosocial support to individuals in situations of homelessness and / or without family support	<a href="https://www.academicoleiria.pt/">https://www.academicoleiria.pt/</a>
Cáritas Diocesana de Aveiro	private social welfare institution that combats social exclusion, and provides temporary housing to homeless	<a href="https://www.caritasaveiro.pt/">https://www.caritasaveiro.pt/</a>
Associação Desenvolvimento Regional D' Entre Tejo e Guadiana	private social welfare institution that shelters homeless people in a situation of serious economic deprivation and social fragility, promoting their rehabilitation and social reintegration	<a href="https://teguaipss.wixsite.com/tegua">https://teguaipss.wixsite.com/tegua</a>

Comunidade Juvenil Francisco de Assis	private social welfare institution that provides for support to children and young people and shelters children and parents victims of domestic violence or deprived of financial means	<a href="https://cjfa.pt/">https://cjfa.pt/</a>
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