

PORTUGAL



COUNTRY STATISTICS

Portugal has a population of 11 million. According to the 2018 data reported by the Portuguese Ministry of Health, the estimated number of PLHIV is 38,901, 91.7% of whom is diagnosed (35,709). 31,000 people are on treatment (86.8%) and 28,007 (90.3%) have an undetectable viral load.

Epidemiological trends in HIV and AIDS epidemic in Portugal reveals that in the last decade there has been a 40% decrease in the number of new diagnoses of HIV infection and 60% in new diagnoses of AIDS. (1,068 cases have been reported, corresponding to a rate of 10.4 new cases per 100,000 inhabitants).

Although Portugal continues to present the highest rates of new diagnoses of HIV infection and the incidence of AIDS registered in the European Union (EU), these rates show a decreasing trend, which, in a comparative analysis of the number of cases diagnosed in 2007 and 2016, was 40% in cases of HIV infection and 60% in new cases of AIDS. In cases of HIV infection, however, this decrease is more marked in female (50%) than in male (35%), with the opposite situation in cases of AIDS (61% in the male and 51% female).

The data obtained for the same years showed that the number of cases of heterosexual transmission and PWID fell by respectively 45% and 90%.

Conversely, there was a 29% increase in the number of cases in gay men and other men MSM, which have been higher in number since 2015 than in heterosexual men, the authors of the report stress.¹⁰ In the last five years, it was found that in the new diagnoses, in men aged between 15 and 29 years, 79.8% were MSM.

Recent trends also show an increase in the proportion of male cases, as well as the median age at diagnosis, except for MSM cases, which occur more frequently in young people. There is also a high percentage of late diagnoses, particularly in heterosexuals. The percentage of late diagnoses remains higher than in the EU, with particular relevance in heterosexual cases. Thus, the increase in the number of cases of MSM of young ages, as well as the high percentage of late diagnoses, in particular in heterosexuals, were, in the most recent years, the most urgent situations of intervention.



RELEVANT LEGISLATION USED IN CASES OF HIV-CRIMINALIZATION

Non-disclosure of HIV-status or the exposure to HIV is not criminalized in Portugal.

Transmission of HIV

HIV transmission could lead to prosecution if it falls within the scope of article 283 of the Portuguese criminal code, which mentions the penalties for spreading contagious/infectious diseases.

However, in order to be prosecuted for that, it must be proved that

- (i) the defendant knew he/she was HIV+;
- (ii) the defendant has the malicious intention of infecting the victim;
- (iii) that the virus was actually transmitted to the victim by the defendant.

Less likely to happen but still possible in the Portuguese criminal legal framework is to prosecute someone for transmitting HIV on the basis of article 143 of the Portuguese criminal code, regarding the crime of offences against someone's physical integrity. Since the scope of this article is, by its nature, much wider than the aforementioned, it is easier for HIV transmission to fall within the scope of this article. Nonetheless, it must be proven that it was the defendant that infected the victim.

These provisions of the law are not HIV-specific and can be applied to other infectious diseases.



CASES OF HIV-CRIMINALIZATION

Court decisions and trials are public in Portugal, so everyone could attend a criminal trial and understand who is being prosecuted and what for. Furthermore, judicial decisions are published in a public website from the Attorney General's Office and everyone could search and read those decisions.

However, only decisions by higher courts are published on that website (Courts of Appeal, Supreme Court of Justice and Constitutional Court). That leaves aside most judicial decisions, judged by all the courts of first instance who receive all the judicial proceedings in first place. Only in case of appeal or in very specific and rare legal cases can a judicial proceeding be judged by superior courts. This means that there is only access to HIV-criminalization decisions if those decisions come from superior courts.

There have been two HIV-criminalization cases judged in Portugal; one is quite old while the second one is still pending for the Court of Appeal decision, since the case is very recent (August 2019).

The first one happened in 1998, the first time an HIV-criminalization case was judged by a superior court in Portugal. In that case, it was considered proven that the defendant (i) was aware of his HIV status, (ii) intentionally wanted to transmit the virus to others and that (iii) he succeeded in transmitting HIV to some of his partners. In this case, the Court of Appeal confirmed the first instance court decision that all the requirements of article 283 of the Portuguese criminal code, which mentions the penalties for spreading contagious/infectious diseases, were fulfilled and the defendant was considered guilty and sentenced to three and half years in jail. (process no. 989/00 from 03/10/2000).

The second case started its proceedings in 2019, in a first instance court in the south of Portugal (usually known for being quite conservative when it comes to decide on controversial matters).

The Public Prosecutor accused the defendant for spreading contagious/infectious diseases, namely, HIV.

The only data mentioned in the decision regarding both parties is that defendant is a heterosexual man and the assistant/victim is a heterosexual woman. No more information is given regarding their ethnicity or migration status but, considering their full names, they are both native Portuguese.

The court decision considered proven the following facts:

a) defendant was diagnosed with HIV in 2005 and he immediately started ART, becoming undetectable a few months later;

b) in 2007, defendant and his previous partner, who was also living with HIV, had two children who were born HIV negative;

c) from 2015 until present times, the defendant did not attend some of the routine medical appointments with his infectologist doctor and, therefore, he could not have access to ART for those periods;

d) from 2016 to 2017 he dated the assistant, who was HIV- before she met him;

e) the defendant and assistant were monogamous in their relationship;

f) some months after they broke up, she felt very sick and went to the hospital, where she was diagnosed with HIV.

During trial, the assistant claimed there were some times when condom was not used, although defendant claims that condom was used every time they had sex.

After the judging was over, the court decided to convict the defendant but not for the crime of spreading contagious/infectious diseases. The court considered that there was wilful misconduct by the defendant, since he knew he was HIV positive and did not attend the medical appointments nor took the ART on a daily basis, which are necessary to keep an undetectable viral load. That said, the first instance court convicted the defendant of the crime of serious offence to physical integrity.

The defendant has appealed the decision and the decision of the Court of Appeal is still pending. The first instance court decision is not public so there is no further information about the details of the process.

Investigation process in Portugal is under judicial secrecy thus all sensitive personal data of involved parties are secret and only judicial authorities and the police may have access to them.

Criminal procedure in Portugal is only under judicial secrecy during the investigation phase. That is to say that reached the trial stage, criminal procedure happens on open doors in a public trial. This is one of the most important Portuguese criminal procedure principles where only in very specific situations the judge might decide to subject the trial stage under judicial secrecy.

Therefore, there is no general rule regarding HIV criminalization, it might or might not be subjected to judicial secrecy depending on the case.



GUIDELINES AND TRAINING ON HIV-CRIMINALIZATION

There are no guidelines or training provided to professionals involved in HIV-criminalization in Portugal.



THE ROLE OF MEDIA

Media is usually respectful and data conscious while reporting HIV criminalization cases as well as reporting HIV scientific and medical findings. Although HIV criminalization cases rarely end on media reports, whenever it happens, identification data is usually omitted.

Nevertheless, some tabloids are not so respectful and data conscious and frequently violate special personal data of targeted people.



INFORMATION ON HIV-CRIMINALIZATION TO PEOPLE LIVING WITH HIV

Information is available if PLHIV seeks for it from organizations that work with HIV and with PLHIV. There is no online or public information regarding their rights and legal responsibilities in relation to HIV-criminalization.

KEY POPULATIONS MOST AFFECTED BY HIV-CRIMINALIZATION AND OTHER DISCRIMINATING LEGISLATION AND POLICIES

Key populations are not criminalized nor disproportionately affected by HIV-criminalization.

However, drug possession and consumption is only legal in Portugal if the drug user has the quantity considered by law as a daily dose. If a drug user has more quantity than permitted by law, the possession and consumption are criminalized.