



Ludwig Boltzmann Institute  
Human Rights

# Dignity at Trial

ENHANCING PROCEDURAL  
SAFEGUARDS FOR SUSPECTS  
WITH INTELLECTUAL AND  
PSYCHOSOCIAL DISABILITIES





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# **Dignity at Trial**

## **Enhancing Procedural Safeguards for Suspects with Intellectual and Psychosocial Disabilities**

### **Handbook**

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## ABBREVIATIONS

AL	Accommodation Law
AT	Austria
BG	Bulgaria
Cz Rep	Czech Republic
CC	Criminal Code
CPC	Criminal Procedure Code
CPA	Criminal Procedure Act
CRPD	Convention on the Rights of Persons with Disabilities
ECHR	European Convention on Human Rights
LT	Lithuania
NPM	National Preventive Mechanism
SC	Supreme Court
SIAC	Sicherheitsakademie (Austrian Akademie for Security)
SL	Slovenia
⊗	no
✓	yes





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## GLOSSARY

### A

#### **Accused person**

a person formally charged with a crime by the competent authority

#### **Appropriate adult**

a relative or a person who has a social relationship with the vulnerable person who is likely to interact with the authorities and helps to enable the vulnerable person to exercise his or her procedural rights

#### **Arrest**

the act of apprehending a person for the alleged commission of an offence by the action of the authority

### B

#### **Beneficiary**

for the purpose of this project: persons with intellectual and/or psychosocial disabilities who are suspected or accused in criminal proceedings; they are ultimately the ones who should benefit from the project outcomes which contribute to enhancing their procedural rights

### C

#### **Compulsory medical treatment**

deprivation of liberty including compulsory treatment as a final decision of the criminal proceedings based on the perceived dangerousness of a person with disabilities

#### **Criminal Proceedings**

procedure to implement the substantive criminal laws and give a final decision on criminal charges

### D

#### **Deprivation of liberty**

any form of detention, imprisonment or placement of a person in a public or private custodial setting by order of any judicial, administrative or other authority; the person deprived of liberty is not permitted to leave at will



### **Disability**

the social effect of the interaction between the individual impairment and the social and material environment; “persons with disabilities include those who have long term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others” (Art. 1 CRPD); for intellectual and psychosocial disabilities see Methodology

### **E**

#### **Effective Participation**

active and informed involvement in the proceedings; it does not only cover the right to be present, but also the right to hear and follow the proceedings

### **F**

#### **Fitness to stand trial**

the person concerned must be able to follow the proceedings, this is not the case if the person has a severe illness or mental disability that hinders participation at the proceedings

### **G**

#### **Guardianship**

a legal relationship established through a civil court or administrative process between a person who is deemed to lack the requisite legal capacity (either partially or completely) to make personal decisions and a person appointed to make decisions on his or her behalf

### **I**

#### **Involuntary commitment**

deprivation of liberty on the basis of a perceived threat from the person with disabilities towards the himself/herself or others under civil law

### **L**

#### **Legal representative**

a person who represents the interests and oversees the legal affairs of a vulnerable person, for example a court appointed guardian



**M****Medical assessment**

medical expert opinion on the health condition as well as the perceived dangerousness of a person (e.g. at the time of the offence) requested by the police or the judiciary during criminal proceedings

**P****Police custody**

the phase from the moment of the arrest by the police until the person is released or brought under the custody of the judiciary

**Pre-trial phase**

the phase between the moment a person is made aware of being suspected to have committed a crime or offence until the formal accusation by the competent authority; it includes the proceedings before the police, prosecutor and/or investigative judges

**Pre-trial detention**

any form of custody or confinement by law enforcement authorities from the time of the arrest through police custody, during transfers, before and after judicial review of the decision to detain, and until the person has formally been tried by a court and convicted or acquitted and released; in the Handbook the term is used for detention ordered by the judiciary

**Preventive detention for the purpose of forensic medical assessment**

preliminary deprivation of liberty under criminal law, which is not based on a final judgement, on the basis of a perceived threat from a person with disabilities for the purpose of medical examinations or treatments

**Q****Questioning**

questioning is used to refer to the request for information about an offence by the police, prosecutor and/or investigative judges; "interview" and "interrogation" are used synonymously



### S

#### **Suspect**

a person suspected of having committed a crime

### T

#### **Trial Phase**

is the phase between the formal accusation of a person and the final judgement, including the final decision on appeals

### V

#### **Vulnerable person**

within the framework of this Handbook a suspect is considered as vulnerable if two conditions are fulfilled:

- the person has an intellectual/psychosocial disability, and
- due to this disability the person is not capable of effectively participating in the criminal proceedings

The mere diagnosis of a mental disorder or disability does not automatically imply that the person concerned cannot participate effectively.





## EXECUTIVE SUMMARY OF MAIN FINDINGS

Criminal proceedings against persons with intellectual and/or psychosocial disabilities pose a range of challenges for all involved stakeholders and bear a particularly high risk of human rights violations for a suspect with disabilities. This is primarily due to two facts:

First, the suspect's vulnerability due to his/her intellectual and/or psychosocial disability is frequently not identified. The person is therefore not granted the necessary support, in particular medical assistance, accessible information and legal support, and may undergo a criminal procedure without being able to effectively participate in the proceedings. This unequal balance of power undermines the right to a fair trial.

Second, even if the vulnerability is identified criminal law often does not adequately respond to the needs of a vulnerable suspect. It has traditionally approached disabilities, especially psychosocial ones, from a risk prevention perspective and not from a human rights perspective that aims to ensure equality and non-discrimination. National laws often provide a "one fits all" approach which does not take account of the individual situation of the suspect.

Timely identification by independent experts and adequate procedural safeguards which allow for active participation, are therefore essential to ensure a fair trial for persons with intellectual and/or psychosocial disabilities. The following key findings outline the main gaps identified when assessing the implementation of the Recommendation on procedural safeguards for vulnerable persons in all five partner countries.

### General:

#### 1. National criminal laws have not yet been adapted in the light of the Recommendation

All participating countries provide certain procedural safeguards for persons with intellectual and/or psychosocial disabilities (e.g. mandatory legal representation). However, the research has shown that they do not live up to the variety of the requirements set out in the Recommendation. The already existing safeguards are not sufficient to consistently ensure ef-





fective participation and a fair trial. Furthermore they are not always systematically implemented. So far none of the five countries have adapted its national laws to ensure all safeguards required by the Recommendation.

### **2. The concept of 'vulnerable suspect' as set out in the Recommendation is not reflected**

None of the participating countries provide a legal definition of 'vulnerable suspects'. If laws use the term 'vulnerable persons' they refer primarily to victims. With regard to suspects, criminal laws tend to refer to individual aspects causing vulnerability which include also psychosocial and for intellectual disabilities. The concept of vulnerable suspects or accused persons as set out in the Recommendation is therefore not yet consistently reflected in the national laws of the participating countries.

### **3. Inadequate definition of the concept of 'disability'**

National criminal laws widely lack a definition of the concept "disability". When referring to persons with disabilities they often use out-dated, discriminatory and stigmatising terminology. The scope of the safeguards for persons with disabilities under criminal law is primarily limited to persons with psychosocial disabilities putting aside persons with intellectual disabilities. The latter consequently do not benefit from particular procedural safeguards, unless their impairment is so severe that they are not able to understand the proceedings. This is not in line with the concept of disabilities as set out in the CRPD.

### **4. Lack of institutionalised cooperation between different stakeholders**

Research has shown that the quality of cooperation between professional stakeholders (e.g. judges, prosecutors, and penitentiary staff) depends primarily on the personal commitment and connections of the involved representatives of the authorities. Cooperation is rarely institutionalised and usually happens on a case by case basis.





## **5. Lack of trainings for police, judges, prosecutors, attorneys and medical staff**

There exists a huge lack of trainings of professionals on intellectual and psychosocial disabilities. According to the research only two of five countries, Austria and Slovenia, provide specific police trainings. None of the countries offers trainings for judges, prosecutors and attorneys, in particular public defenders. Also medical staff conducting the initial medical assessment of the suspect often seems to lack adequate knowledge to identify intellectual and/or psychosocial disabilities.

### **Assessment:**

## **6. There exist no standardised assessment mechanisms or procedures to identify the suspect's vulnerability**

None of the countries have established institutionalised assessment mechanisms to identify a suspect's vulnerability during the pre-trial proceedings. The identification depends widely on the knowledge and sensitivity of the individual representative of the authority who perceives signs of potential disabilities and takes steps to have the suspect examined by medical experts. Yet, under criminal law medical assessments are primarily done to assess the criminal liability of the suspects and his/her ability to stand a trial but not to assess his/her needs for support to have a fair trial.

## **7. Practical challenges in identifying intellectual and/or psychosocial disabilities in a timely manner**

The identification of intellectual and/or psychosocial disabilities often causes challenges for the authorities involved. Thus, frequently only apparent signs are detected while less obvious indications remain undiscovered. This may lead to persons with not immediately visible intellectual and/or psychosocial disabilities not being ensured the necessary procedural safeguards.



## **8. Challenges and shortcomings in the context of expert opinions**

Expert opinions play a crucial role and can have a decisive influence on the procedure. During the research numerous challenges and shortcomings were identified. In all countries empirical research indicated a frequently poor quality of expert opinions. In many cases the expert based his/her assessment on an extremely short exchange with the suspect (often not longer than 10-20 minutes). Assessment reports were often composed of text blocks from other reports. In none of the countries does there exist a quality control mechanism for expert opinions. Moreover, challenging an expert opinion proved to be difficult. In some countries the number of psychiatric experts is low which results in an extended waiting period for the expert opinion in the procedure.

### **Pre-Trial Phase:**

## **9. The suspect is often not informed about his/her rights in an accessible format**

None of the countries provides standardised forms of providing information on procedural rights in accessible formats, e.g. easy language, braille, etc. There exist no special formats of summons, letters or rights, court decisions, protocols, etc. It depends on the individual representative of the authorities to explain the information in a way that is understandable to the suspect.

## **10. Appropriate adults, legal representatives or lawyers are rarely present during police interrogations and the decision on pre-trial detention**

Research has shown that third persons are seldom present during interrogations in police custody or during the decision on pre-trial detention. In some countries police protocols are used as substantial evidence throughout the whole proceedings, even if they were recorded without the presence of a third person. This is particularly problematic for persons with intellectual and/or psychosocial disabilities who may not fully under-







stand the questions or the meaning of their statements. Alike, appropriate adults or legal representatives are often not immediately notified about the deprivation of liberty.

**11. Interrogations and hearings are not audio-visually recorded**

None of the countries ensures consistent audio-visual recordings of police questionings and court hearings throughout the proceedings. The crucial importance of audio-visual recordings as a means to prevent abuse of power and to provide a neutral documentation of the interviews and hearings was confirmed by numerous experts in all countries.

**12. Lack of adequate accommodation for suspected and accused persons with intellectual and/or psychosocial disabilities**

Research has revealed a lack of adequate accommodation for persons with intellectual and/or psychosocial disabilities in police stations but also in pre-trial detention facilities. Forensic wards do often not have enough capacities to host all suspects with psychosocial disabilities. Particular problems have been identified with regard to sufficient capacities for women. There exists also a lack of adequate capacities of alternative care, e.g. day care centres, for persons with intellectual disabilities. Due to these shortcomings persons with intellectual and/or psychosocial disabilities are often detained in ordinary prisons where they lack adequate support and medical care.

**13. Insufficient medical assistance during deprivation of liberty**

Detention facilities rarely offer adequate psychological and psychiatric assistance, in particular constant support by psychiatrists, psychotherapists, social workers, pedagogues, etc. The sometimes inadequate identification of mental and intellectual disorders may also entail inadequate medication and treatment.



### **Trial Phase:**

#### **14. Effective participation is not always ensured for the persons with intellectual and/or psychosocial disabilities**

Many interviewees with intellectual and/or psychosocial disabilities reported that they had difficulties in understanding the proceedings and following the trial. This was partly related to the disability, the legal language, the velocity of speaking, and the challenging situation for the person. Some of them had also not understood the meaning of the court decision. As in the previous phase, the quality of explanation lies again in the hands of the individual judge in charge and the (legal aid) defence attorney.

#### **15. Poor quality of legal representation, especially if it comes to legal aid**

Research revealed considerable gaps with regard to the quality of legal defence for persons with intellectual and/or psychosocial disabilities. If they do not have a private lawyer they may be represented by a public defender. Often they tend to benefit of legal aid. Interviews indicated that the legal representatives did not spend sufficient time with the defendant to prepare the case. Sometimes they got the case file only shortly before the trial, or had a short exchange with the accused person before the trial. In some countries legal aid defenders are not even required to have criminal law expertise. None of the countries provide trainings on intellectual and psychosocial disabilities for attorneys. Accordingly there tend to be many challenges that may undermine a competent and effective legal defence of a suspect with intellectual and/or psychosocial disabilities.

### **Remedies:**

#### **16. Remedies are not always effective and adequate**

Particular difficulties have been identified when challenging a medical expert assessment. Those include e.g. the fact that court appointed experts may know each other, in some countries the second expert opinion has to be paid on private expenses or is not considered as evidence on an equal footing with the first medical assessment ordered by the court.





## INTRODUCTION

Persons with intellectual and/or psychosocial disabilities are among the most vulnerable groups of suspects in criminal proceedings.

*“A common feature of people suffering from a mental disorder or disability is that they may suffer from permanent or temporary reduced mental capacity. Hence, they are more likely than others to be confused and entangled, especially when additional stress factors, such as police questioning, arrest, trial and detention, come into play. People suffering from emotional problems (e.g. depression, psychosis or post-traumatic stress) and/or behavioral problems (e.g. autism, attention deficit hyperactive disorder, and maybe also individuals suffering from drug and/or alcohol related problems, such as severe withdrawal symptoms) are at risk of not being able to grasp the weight and consequences of the proceedings fully. Some of these individuals are likely to have difficulties in understanding and veraciously responding to questions, since they may have difficulties in recalling and processing information. They are also more likely to make damaging assertions, including false confessions, since they may be acquiescent and suggestible and, under pressure, may try to appease other people or incriminate themselves.”<sup>1</sup>*

Due to the different forms and shapes disabilities may take these persons are the ones who are frequently most difficult to identify as being potentially vulnerable suspects. Therefore they are at a disproportionately higher risk of not being granted adequate procedural safeguards ensuring a fair trial. There exists a range of pitfalls during the course of criminal proceedings which may be summarised by a general lack of understanding on both sides, the side of the suspect but also the side of the authorities involved in criminal proceedings. This may be coupled with a lack of professional diligence and sometimes also good will. Major pitfalls include the lack of identification of the disability by the police, the doctor conducting the initial assessment, the prison doctor, the penitentiary staff or the judge. As well as the suspect's inability to communicate with the authorities and the medical staff in a way that he/she is listened and understood. In the worst case these procedural pitfalls and deviations may result in the fact that persons who would need psychiatric support and therapy end up in ordinary prisons without any adequate medical care and persons with



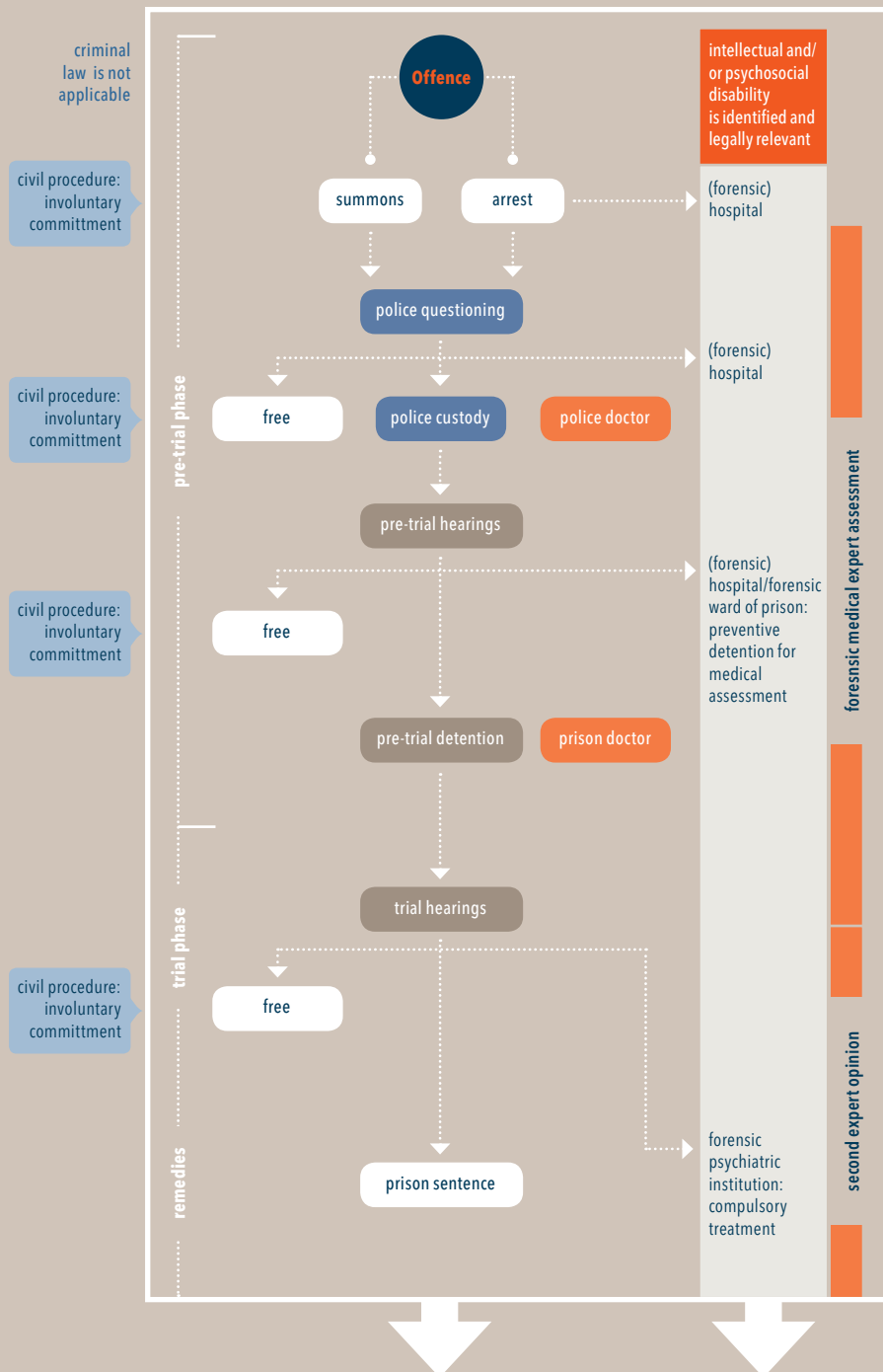
intellectual disabilities are subjected to life-long compulsory treatment. Inappropriate treatment can be particularly detrimental for the psychological well-being of persons with intellectual and/or psychosocial disabilities and may not only lead to a severe deterioration of their mental health condition but also to self-harm, and in the worst case even death.

It has been well documented that persons with disabilities are at a higher risk of degrading and ill-treatment in detention facilities. The former UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, for example, explicitly highlighted the particular vulnerability of persons with intellectual and/or psychosocial disabilities noting that:

*"[They] are often segregated from society in institutions, including prisons, social care centers, orphanages and mental health institutions. They are deprived of their liberty for long periods of time including what may amount to a lifelong experience, either against their will or without their free and informed consent. Inside these institutions, persons with disabilities are frequently subjected to unspeakable indignities, neglect, severe forms of restraint and seclusion, as well as physical, mental and sexual violence. The lack of reasonable accommodation in detention facilities may increase the risk of exposure to neglect, violence, abuse, torture and ill-treatment."*<sup>2</sup>

The first and foremost entry point to prevent this situation lies in a fair criminal procedure for persons with intellectual and/or psychosocial disabilities and the provision of alternatives to criminal detention. A fair trial must include an appropriate identification of the suspect's vulnerability due to his/her intellectual and/or psychosocial disability and adequate procedural safeguards taking into account his/her particular needs to be able to understand and to effectively participate in the trial. The following graph illustrates the procedural pathways a suspect with intellectual and/or psychosocial disabilities is likely to go through. Thereby it is particularly relevant whether the suspect's vulnerability due to his/her disability is identified during the proceedings or not. If this is not the case he/she undergoes the ordinary criminal procedure without benefiting of any particular safeguards or support.







If the criminal proceeding is dismissed, the person with intellectual and/or psychosocial disabilities may still be subjected to involuntary commitment according to the civil procedure. Yet, since this Handbook focuses on criminal proceedings, civil involuntary commitment will not be addressed. Nevertheless it should be mentioned as a possible procedural pathway outside the criminal system which may also result in life-long segregation and institutionalization.

### The purpose of this Handbook and the underlying research project

The European Union has addressed the situation of suspects with intellectual and/or psychosocial disabilities in a specific **Recommendation on safeguards for vulnerable persons suspected or accused in criminal proceedings (C(2013) 8178/2)**.<sup>3</sup> The overall aim of the Recommendation is to “strengthen the procedural rights of all suspects or accused persons who are **not able to understand and to effectively participate** in criminal proceedings due to age, their mental or physical conditions or disabilities (‘vulnerable persons’).”<sup>4</sup> It applies from the moment a person is suspected of having committed a crime until the conclusion of the proceedings and includes recommendations with regard to the identification of a suspect’s vulnerability as well as his/her specific procedural rights, in particular the right to information, the right of access to a lawyer, the right to medical assistance, recording of questionings, deprivation of liberty and privacy (see annex IV). The underlying goal of the Recommendation is to ensure the procedural rights of vulnerable suspects as a prerequisite for effective participation. This is a safeguard to protect their fundamental rights and hinder ill-treatment as well as discrimination due to their disabilities.

**This Handbook** is the result of a two year interdisciplinary research project implemented by the Ludwig Boltzmann Institute of Human Rights (BIM), the Bulgarian Helsinki Committee (BHC), the League of Human Rights (LIGA) in the Czech Republic, the Organisation Mental Health Perspectives (MHP) in Lithuania, and the Peace Institute (PI) in Slovenia. The project had two overall goals:

1. to assess the implementation of the EC Recommendation in all five countries, to identify good-practices, gaps and shortcomings





- of each national criminal justice system (see Part I comparative report), and to elaborate recommendations (see Part III) as well as
2. to improve vulnerable suspects' procedural rights through capacity building of the professional stakeholders involved in criminal proceedings which include in particular the police, judges, prosecutors, attorneys, penitentiary staff and medical personnel.

The research focused on **vulnerable adult persons with intellectual and/or psychosocial disabilities** who are **not able to fully understand and to effectively participate in criminal proceedings** due to their disabilities.<sup>5</sup> It is important to note that for the purpose of this project both aspects needed to be fulfilled; the mere existence of an intellectual and/or psychosocial disability is not enough to be considered as a vulnerable suspect.

The **principle of effective participation** has been firmly established by the European Court of Human Rights (ECtHR).<sup>6</sup> It does not only cover the right to be present, but also the right to hear and follow the proceedings. The mere representation of a suspect cannot be assumed to make up the limitation of effective participation which has to be understood as an active involvement.<sup>7</sup> Although the defendant must have a broad understanding of the proceeding and the possible consequences for him/her (including the penalty), this does not mean that he/she has to understand every legal aspect or evidence detail. However, he/she must be in the position – with the help of lawyers, social workers, relatives, etc. – to follow what is said, to explain his/her own version of the events and to take effective steps necessary for his/her defence (e.g. demand additional witnesses, put forward relevant facts etc.).<sup>8</sup> Ensuring effective participation of persons with intellectual and/or psychosocial disabilities is of crucial importance. Due to their lack of capacity to fully understand and participate these persons tend to run a higher risk of not being granted the necessary safeguards, being deprived of their fundamental rights and suffering from discrimination or ill-treatment.<sup>9</sup>

The concept of **disability** is approached from a human rights perspective. Accordingly persons with disabilities are „those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.“<sup>10</sup>



The terminology for persons with **intellectual disabilities** has changed over time and varies from country to country. It should be underlined that not all intellectual areas of human life may be impaired. The People First Organisation, for example, prefers to use the term “persons with learning difficulties” as it shows that these are persons who need longer time for cognitive activities, who are learning differently and who need various individual supports.<sup>11</sup>

Also the classification of psychiatric disorders and impairments differed for a long time from country to country, depending on different medical and psychological schools and partly on the views of the society on what is “normal” and “impaired”. There exists no simple definition of psychiatric disorders and impairments that is universally satisfactory. Until today, some aspects of classifications which have attempted to bring some order to the enormous diversity of mental symptoms, syndromes, and illnesses are controversially discussed. In line with the social model of disability incorporated in the CRPD, this Handbook refers to the term “**psychosocial disabilities**”. It takes into account the fact that disability “is an evolving concept [which] results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others”.<sup>12</sup> According to the World Network of Users and Survivors of Psychiatry persons with psychosocial disabilities include “users or consumers of mental health services; survivors of psychiatry; people who experience mood swings, fear, voices or visions; mad; people experiencing mental health problems, issues or crises.”<sup>13</sup> More generally the term “psychosocial disability” is meant to express the following:

- A social rather than medical model of conditions and experiences labelled as ‘mental illness’.
- A recognition that both internal and external factors in a person’s life situation can affect a person’s need for support or accommodation beyond the ordinary.
- A recognition that punitive, pathologising and paternalistic responses to a wide range of social, emotional, mental and spiritual conditions and experiences, not necessarily experienced as impairments, are disabling.







- A recognition that forced hospitalization or institutionalization, forced drugging, electroshock and psychosurgery, restraints, strait-jackets, isolation, degrading practices such as forced nakedness or wearing of institutional clothing, are forms of violence and discrimination based on disability, and also cause physical and psychic injury resulting in secondary disability.
- Inclusion of persons who do not identify as persons with disability but have been treated as such, e.g. by being labelled as mentally ill or with any specific psychiatric diagnosis.”<sup>14</sup>

For the purpose of this project both, persons with intellectual and psychosocial disabilities, have been taken together under one group due to their potential vulnerability in criminal proceedings. They should be the ultimate beneficiaries of this project benefitting of enhanced awareness and capacities of professional stakeholders in understanding their situation and often complex barriers. However, the researchers are fully aware of the fact that it is impossible to apply a one-fits-all approach and that this heterogeneous group of vulnerable suspects needs tailor-made support for each individual case.

This **Handbook is the main outcome** of this project which pools not only the expertise of the researchers but also of the members of the National Advisory Groups, the persons with disabilities who have undergone criminal procedures and the participating stakeholders at the National Roundtables and the European Expert Workshop (see Methodology). As the first one to assess the practical implementation of the Recommendation it has been a pilot project. The **particular value** of the Handbook lies in the fact that it draws on a broad stakeholder involvement in all five countries which allowed the researchers to include all perspectives, to detect systematic problems and to include first-hand experiences and recommendations of persons with intellectual and/or psychosocial disabilities. As a project team we hope that it will be a good starting point of practical value which enhances the awareness on the challenges faced by persons with intellectual and/or psychosocial disabilities undergoing a criminal procedure and provides some useful recommendations and tools. However, to comprehensively address the complex topic of suspected and accused persons with intellectual and/or psychosocial disabilities it



will certainly need more continuous efforts, in particular regular trainings and capacity building measures for all professionals, initiatives to enhance inter-institutional cooperation and multi stakeholder exchanges, more financial and personnel resources for medical assessments, forensic hospitals and wards in prisons, as well as a solid political commitment to adopt the necessary legal and policy measures.

The Handbook is structured in three parts. **Part I**, the Comparative Report, gives an overview on the situation of persons with intellectual and/or psychosocial disabilities in criminal proceedings in Austria, Bulgaria, the Czech Republic, Lithuania and Slovenia. It includes experiences and cases of persons who have undergone criminal proceedings, identifies gaps and challenges and highlights promising practices. **Part II** of the Handbook lists criteria for the identification of good practices. **Part III** comprises practical recommendations for the police, judges, prosecutors, attorneys, penitentiary staff and medical personnel. They are structured according to the procedural phases. Furthermore it contains legal and policy recommendations to EU Member States as well as to the European Union. The **Annexes** include practical tools designed to facilitate the initial identification of a suspect's vulnerability (Annex I) and the provision of information on procedural rights during police and court proceedings (Annex II and Annex III).

### Methodology

This topic has been approached from an interdisciplinary human rights perspective with a strong focus on stakeholder participation.

To begin with each of the five project partners elaborated a National Baseline Study assessing the implementation of the EC Recommendation and the key challenges in the national context. The five studies are based on desk research of legal resources, jurisprudence, literature and reports as well as empirical data. To this end the researchers conducted five semi-structured expert interviews with different professional stakeholders involved in the criminal proceedings and, depending on the availability, up to 15 semi-structured interviews with persons with intellectual and/or psychosocial disabilities who were subjected to criminal proceedings and





willing to share their experiences (Annex V). The data was enriched by the insights gained and recommendations elaborated during the National Roundtables which gathered up to 20 key representatives of professionals and persons with disabilities per country. In addition all project partners established National Advisory Groups composed of up to six representatives of relevant stakeholders, in particular judges, attorneys, police, medical experts, and persons with disabilities. They accompanied and supported the researchers throughout the whole project by providing feedback, and giving important directions and recommendations.

This Handbook builds on the findings of all five countries as well as on the results of the Expert Workshop held in May 2017 in Vilnius which gathered researchers and members of the Advisory Groups of all five countries. It served to discuss national findings, jointly elaborate key recommendations and identify criteria of good practice.

## SETTING THE SCENE

This section gives the floor to those persons who have undergone criminal proceedings and who were willing to share their experiences for this research. They speak for numerous persons with intellectual and/or psychosocial disabilities who are entangled in criminal proceedings in many countries of this world. The research team is deeply grateful and indebted to all interviewees who participated in this project and allowed us to better understand their situation by sharing very personal stories and experiences and by providing recommendations for improvements.

### How did you feel during the police questioning?

- "I couldn't understand... they were asking me... they were even scaring me. They said, 'Talk about it, talk about it'. And I said, 'What can I say when I didn't do these thefts'. Things like that." (Bulgaria, beneficiary interview 6)
- "I felt ignored... that my rights were not observed. It's just that they threatened me that if I didn't confess, they would beat me... Things like that... the police officers who interrogated me." (Bulgaria, beneficiary interview 7)
- "Everything happened too fast. They did beat me at the police station... It wasn't bad. But they did beat me as hard as they could, but carefully. [...] They know how to do it [...]. They are smart. (not leaving any bruises)." (Slovenia, beneficiary interview 2)
- "Yes [in the end] I told them what they wanted to hear". (Austria, beneficiary interview 6)

### Could you make use of your right to get a lawyer?

- "I'm sure they told me that I could ask for a lawyer, but in this situation I was not in the condition to say something like that. I was mentally ill." (Austria, beneficiary interview 7)

- “Yes, I was informed but they did not give me the possibility to find my own legal representative.” (Lithuania, beneficiary interview 11)
- “Yes, they informed me about my right to contact a lawyer. That’s something the police told me. But at that time I couldn’t make use of this right because everything happened at 11pm and at that time the police said there was no lawyer available.” (Austria, beneficiary interview 8)
- “No, I simply didn’t ask for a lawyer. They assigned him to me but the lawyer was on their side, do you know what I mean? I told you earlier, didn’t I? He attacked me. I can really not believe this thing.” (Bulgaria, beneficiary interview 5)

### **Did the police explain you your rights and did you understand the information?**

- “They just announced the articles of the Code, but did not explain them.” (Lithuania, beneficiary interview 2)
- Information provided by a person of trust when asked about the experience of the suspect: “He felt wrongly accused, tricked. Not knowing the future, and what will happen. Powerlessness, because neither the mother nor he had all the information and did not know how to behave.” (Lithuania, beneficiary interview 8)
- “They didn’t tell me anything. You may know or not know the rights, they do their own thing, [...]” (Bulgaria, beneficiary interview 7).

### **Did you get any medical support during pre-trial detention?**

- “I felt very bad there, I had a panic attack, I was trembling all over, and they took away all my medication.” (Lithuania, beneficiary interview 4)
- “Nobody asked me if I needed something. Nobody cared about



me. No doctor informed me about the possibility of an examination. Nobody said anything [...]. I have to take drugs every day but nobody asked anything about that." (Austria, beneficiary interview 5).

- "Well, they don't tell me anything. I go to \*TELK (medical assessment commission) and they don't tell me anything again. I never understood why I'm getting this pension." (Bulgaria, beneficiary interview 16)
- "'I do [take medicines], but they give them to me when I provoke myself to do some stupid things. Then they give me. They don't give them exactly on time. For example, they need to ask me, 'How are you, are you ok?' I mean, 'Are you not well? Here, take this pill.'" (Bulgaria, beneficiary interview 5)

### Could you inform somebody after being arrested?

- "No I was not allowed to do anything. They didn't let me contact anybody. I had to do it all by myself. [...] I would have liked to call somebody. I would have needed some support. So the pressure is not only on me, because someone else would have helped me to face this situation." (Austria, beneficiary interview 5)
- Information provided by a person of trust when asked about the proceedings against his client: „Mr. S. suddenly disappeared. I called him, I visited him, and I climbed through a window into his apartment because I thought that he might have committed suicide. Nothing. I called his legal guardian but he said that he does not have any information, so we informed the police. After two and a half weeks, a judge called, asking if we support Mr. S. [...]. Then she informed me that Mr. S has been in jail for two and a half weeks." (Austrian expert interview 4)
- "They didn't tell me anything. They only questioned me." (Bulgaria, beneficiary interview 7).



### How did you feel during the preventive detention for the purpose of medical/forensic assessment?

- “I explained to Dr. H. that I couldn’t sleep. This was already the third day, I had not slept for 72 hours, I was only twisting and turning. I had fallen into a very big depression. He said to wait for the other doctor who was going to come in two days but he came in four. And in fact during those seven days I could not sleep at all because I had no pills. I was constantly in a depression, I constantly remembered this case and I couldn’t sleep, so I was in a very deep depression and then I was recovering from this depression for a very long time.” (Bulgaria, beneficiary interview 12)

### How was the contact with the medical expert for the medical assessment?

- “He waited for me [in a cafe place], we talked for five or ten minutes, and then he left again. He only explained to me that he is a psychologist and why he does that. He did not ask me how I feel. In five or ten minutes, you cannot start a real conversation. If he is a medical expert, who is paid by the court, why didn’t we get a room at the court building, where it is less crowded? From my perspective, he is not a real medical expert, when he talks to me for five or ten minutes in a crowded place.” (Austria, beneficiary interview 12)
- “Correct. Completely sedated. I’m sure I remembered my name and my birthday, for sure, but explaining or saying anything else was exhausting. Of course for the judgement, when I came back to the psychiatric hospital, the expert opinion was decisive. It said that I would be dangerous.” (Austria, beneficiary interview 7)

### How did you feel at court?

- “I felt like stressed, like, in danger. [...] I even started crying when I was already inside the court, I cried inside.” (Bulgaria beneficiary interview 5)



### How was the contact with your lawyer?

- "I saw my legal counsel for the first time only at court." (Lithuania, beneficiary interview 1)
- "Sometimes he attacked me, sometimes he defended me. Things like that, they do whatever they want in the judicial system." (Bulgaria, beneficiary interview 3)
- "But the lawyer seemed stressed. She did not take much time for me. She wanted to see me once. Afterwards I did not see her again. [...] . The conversation took only 15 minutes. I would have needed more time with my lawyer to prepare everything for the trial to know more about what is going to happen. Everything was new to me." (Austria, beneficiary interview 9)

### How was the communication during the trial?

- "I didn't understand anything [...]." (Bulgaria, beneficiary interview 6)
- "Of course I did, I told them everything, at the police too and everywhere, I told them that I was in Polje (psychiatric hospital), all that I went through but nobody cares. Nobody. What is important is, that you are a criminal, you are that and that's it, it's your fault [...] You are a zero, a loser, mentally sick person, like you should already be written off. [...] I didn't completely understand (the questions), but I did answer, sort of forcefully, I was completely under... I get these episodes, fear, paranoia and aggression [...]. And I got so afraid then and my mouth got dry and I can't speak so I just speak nonsense. I don't know what to say, I can't use my head to think. Well, I don't know how to communicate with people." (Slovenia, beneficiary interview 11).







*Part I:*

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# Comparative Report





## 1 LEGAL FRAMEWORK AND POLICIES

### *Recital 1:*

*The aim of this Recommendation is to encourage Member States to strengthen the procedural rights of all suspects or accused persons who are not able to understand and to effectively participate in criminal proceedings due to age, their mental or physical condition or disabilities ('vulnerable persons').*

The Recommendation is applicable from the moment a person is suspected of having committed a crime until the final judgement including appeal. All five countries do provide certain procedural safeguards for persons with intellectual and psychosocial disabilities.<sup>15</sup>

However, the analysis has revealed that the provisions and safeguards granted are not sufficient or are not systematically enforced to ensure understanding and effective participation of persons with intellectual and/or psychosocial disabilities in criminal proceedings. **So far none of the five participating countries has adopted additional provisions on a national level to implement the Recommendation.**

A particularity of Bulgarian law is that it does not refer to the term "suspect", but only to the term "detainee". The latter is defined as a person held at the police department against his/her will on an arrest order which is valid for 24 hours. The police have the right to detain a person if there is information that he/she has been involved in the commission of an offence, knowingly obstructs law enforcement authorities from performing their duties, shows signs of a serious psychiatric disorder and his/her behavior disturbs the public peace, or puts his/her own life or the life of others in danger.<sup>16</sup> Only the first option qualifies a detained person as a "suspect" who benefits from all of the procedural rights set out in the Recommendation and the EU Directives of the Roadmap – directives which have yet to be transposed into the Bulgarian legislation.<sup>17</sup>





## 1.1 Definitions of vulnerability and disability

There exists no overarching legal definition of vulnerable adult persons on the international or European level.<sup>18</sup> Alike, none of the five participating countries defines the notion of vulnerable suspected or accused persons in their criminal laws. If laws use the term “vulnerable persons” they refer primarily to victims. *Czech* legislation, for example, establishes “vulnerable victims” amongst others as persons who suffer from physical, intellectual or mental disability or sensory impairments that, in interaction with various barriers, hinder their full and effective participation in society on an equal basis with others.<sup>19</sup> Also *Austrian* legislation refers to “vulnerable victims”.<sup>20</sup> *Bulgarian*, *Slovenian* and *Lithuanian* legislation on the contrary does not refer to the term “vulnerable persons” in criminal proceedings at all.<sup>21</sup>

Instead criminal laws do refer to individual aspects causing vulnerability which include also psychosocial and intellectual disabilities. The *Lithuanian* Criminal Procedure Code mentions, for example, persons who cannot independently defend themselves due to physical or mental disabilities.<sup>22</sup> Also the *Bulgarian* Criminal Procedure Code refers to persons with physical or mental disabilities which impede them from legally defending themselves and stipulates that they shall be appointed mandatory legal assistance.<sup>23</sup> The *Austrian* Criminal Procedure Code selectively refers to safeguards relating to specific vulnerabilities (e.g. speaking and hearing impaired people) or to ‘personal needs’ without further elaboration of the notion.<sup>24</sup> **The concept of vulnerable suspects or accused persons as set out in the Recommendation is therefore not yet consistently reflected in the national laws of the participating countries.**

National criminal laws also widely lack a definition of the concept of “disability”. Only the *Czech Republic* offers the above mentioned description which is almost identical to the definition of disability in the preamble of the Convention on Persons with Disabilities (CRPD).<sup>25</sup> The other national criminal legislations use out-dated, discriminatory and stigmatising terminology when describing persons with intellectual and/or psychosocial disabilities. The *Austrian* Criminal Code for example stipulates that “per-



sons with a higher degree of mental abnormality” should be transferred to institutions for “mentally abnormal criminals.”<sup>26</sup> The *Bulgarian* Criminal Code uses the term “mental retardation” to describe a prerequisite for lack of mental competence.<sup>27</sup> The *Slovenian* Criminal Procedure Act uses for intellectual disabilities the term “mental underdevelopment” and for psychosocial disabilities, mental disorder „or any other permanent or severe mental disturbance”.<sup>28</sup> In sum, this shows that **in four out of five countries criminal laws have not yet been streamlined with the definition of disability as set out in the CRPD.**<sup>29</sup>

This **lack of coherence** in the definition of persons with disabilities results in the fact that not all persons entitled to procedural safeguards under international human rights law (UN Convention on the Rights of Persons with Disabilities, CRPD) and under the Recommendation are de facto guaranteed these. Safeguards in national criminal law are often more restrictive in scope. This discrepancy in protection is primarily because criminal law has traditionally approached disabilities, especially psychosocial ones, from a risk prevention perspective and not from a human rights perspective that aims to ensure equality, non-discrimination and the right to a fair trial. At the same time, national laws and systems often do not adequately respond to the needs of the persons involved but rather provide a “one fits all” approach. In *Austria* for example, one of the major shortcomings lies in how persons with intellectual disabilities are dealt with in the criminal system. Not only is tailored support lacking, but also the expert opinion to determine the mental competence is widely limited to psychiatric assessments. According to an interviewed expert, these assessments are, however, not suitable for persons with intellectual disabilities. Pedagogical or psychological assessments would be favourable and could lead to fewer cases of deprivation of liberty.<sup>30</sup>

### 1.2 Policies and programmes

**Policies or programmes targeting procedural rights of suspects with intellectual and psychosocial disabilities are rare.** Out of the five participating countries, only *Austria* and *Slovenia* offer training programmes for the police and prison officers which cover the assessment of intellectual and psychosocial disabilities.





Austria's basic education programme for police officers includes awareness training and operational training on how to adequately act and react with regards to cases in which persons with intellectual and/or psychosocial disabilities are involved. Advanced training courses offered by the Austrian Academy for Security include seminars on how to deal with people with psychiatric diagnoses or dementia.<sup>31</sup> In Slovenia the police officer curriculum includes a mandatory 3-year psychology course. Additional trainings may be offered after the completion of the basic programme. For example, in 2014, after several cases of suicides in police custody, all police officers received training on recognising the risk of suicide and symptoms of psychosocial disabilities.<sup>32</sup>

**In none of the countries do judges, prosecutors or other court personnel receive any specific mandatory trainings.**<sup>33</sup> In Austria capacity building of judges is achieved primarily through exchange with colleagues and with direct interaction with the suspect or accused. The interviewed professional stakeholders underlined a strong need to strengthen competences and empathy when dealing with persons with psychosocial and/or intellectual disabilities.<sup>34</sup>



## 2 ASSESSMENT MECHANISMS

### *Recommendation 4:*

*Vulnerable persons should be promptly identified and recognised as such. Member States should ensure that all competent authorities may have recourse to a medical examination by an independent expert to identify vulnerable persons, and to determine the degree of their vulnerability and their specific needs.*

*This expert may give a reasoned opinion on the appropriateness of the measures taken or envisaged against the vulnerable person.*

The identification and recognition of the suspect's vulnerability caused by his/her intellectual and/or psychosocial disabilities is essential as it frequently sets the tone for the subsequent course of the following procedure. Therefore, it is of utmost importance that all competent authorities involved in criminal proceedings (police officers, judges, attorneys, prosecutors, penitentiary staff and medical staff) are sensitive towards possible indicators and have recourse to medical examinations by independent medical experts. Identification should be done at the very beginning of the proceedings, because being recognised as a vulnerable suspect entitles the individual to specific rights. According to the Recommendation they concern in particular receiving information in an accessible format, the presence of a legal representative or appropriate adult during police questionings and court hearings, mandatory legal representation, medical assistance and reasonable accommodation taking account of the particular needs. Also national laws provide for specific safeguards e.g. mandatory legal representation, medical assistance, etc.<sup>35</sup> Further, the identification may also lead to a suspension of the criminal prosecution or proceeding. In this case a protective measure may still be imposed.<sup>36</sup>

The following sub-sections will take a look at the assessment methods and mechanisms used by the police, the judiciary, penitentiary staff, health and psychological support workers as well as at medical expert opinions.





## 2.1 Assessment by the police

Country	Guidelines for identification	Identification based on	Medical assessment
Austria	standardised questionnaire	visible signs, information provided by suspect, previous criminal record	needs to be required by the police
Bulgaria	✗	information provided by suspect, previous criminal record	✗
Czech Republic	indicators for identification of vulnerability	visible signs, information provided by suspect or family, previous criminal record	needs to be required by the police
Lithuania	✗	visible signs, information provided by suspect, medical data	needs to be required by the police
Slovenia	handbook for police custody	visible signs, information provided by suspect	needs to be required by the police

The police are usually the first to come in contact with the suspect and the first to do an initial assessment of potential intellectual and/or psychosocial disabilities. Often the police has to make an arrest decision on the spot with little background knowledge about the person's disabilities or medical history. In some countries suspects have to be brought directly to the hospital in case of acute danger. In *Austria* for example, if the police perceive acute danger for the suspect or for others, before securing the criminal proceedings, they must take the suspect directly to hospital.<sup>37</sup>

**So far, none of the five participating countries have yet established a standardised mechanism or procedure for the police to systematically assess the vulnerability of suspects.** Research has shown that the current identification practice of the police relies primarily on apparent signs such as appearance, communication and behaviour of the suspect, on informa-



tion by the latter or his relatives as well as on a sensitised perception of the individual police officer. This bears a high risk that invisible or not immediately appearing disabilities may not be identified. These persons are consequently not referred to medical assessment and do not benefit from adequate procedural safeguards. Non-identified disabilities may translate into difficult situations during the interrogations and the police may at times feel provoked by the behaviour of the suspect.

In four out of five countries, *Austria*, *Slovenia*, *Lithuania* and the *Czech Republic*, the police is the first authority to decide whether or not a doctor needs to be involved. The decision is done on a case by case basis and depends on the individual officer handling the case. Only in a few cases, in particular in case of deprivation of liberty or an explicit request by the suspect, are medical examinations mandatory.<sup>38</sup> *Bulgarian* legislation requires a medical assessment only after indictment of the suspect when there is evidence that the accused person may be incompetent or when the accused person's physical and/or mental condition prevents him/her from comprehending factual information pertaining to the case or from providing a reasonable explanation of facts relating to the case.<sup>39</sup> The police are not required to do any initial medical assessment at the police station, even if the person is taken in police custody. In practice this means that all procedural steps before the indictment in particular arrest, police questioning, and police custody are done without taking into account a person's eventual intellectual and/or psychosocial disabilities and without providing adequate safeguards.<sup>40</sup>

If the vulnerability is not recognised during the initial contact with the police and they decide that an arrest is necessary, the vulnerability may still be identified on the basis of former criminal files if available or with information provided by the suspect or his/her family members. The identification of the suspect's vulnerability is also of utmost importance for deciding whether a person can remain in custody as well as for triggering further safeguards for vulnerable persons during custody.

In *Lithuania* if the police assume potential disabilities they start collecting data on the medical history of the suspect. If the disability is confirmed,







they must apply to the state forensic psychiatry service to get a professional opinion on the need for psychiatric expertise.<sup>41</sup> Yet, since the complete medical data is not always immediately accessible the complete information on the suspect's state of health may only be available at a later stage of the proceedings. This means that the person may not benefit from adequate support from the beginning.

Three of five countries have already taken some steps towards standardising the assessment procedure at the police station. As already mentioned above, Austria and Slovenia do equally provide special police trainings.

In *Austria*, if the person is arrested and in police custody, The suspect has to fill out a standardised questionnaire on his/her health condition, including mental health condition and medication. If he/she mentions mental illnesses in the police questionnaire or shows visible signs of psychosocial and/or intellectual disabilities the police must ensure a medical examination by the police doctor, if required also by a psychiatrist, or they must organise the transfer to a psychiatric hospital.<sup>42</sup> In any case, police doctors need to examine every arrestee with regard to his/her physical and mental fitness for custody within 24 hours after the arrest.<sup>43</sup> The police must take into consideration the prison doctor's opinion when deciding if the person can remain in police custody.<sup>44</sup>



#### PROMISING PRACTICE: CZECH REPUBLIC

*The Czech Republic has issued recommendations for the assessment procedure of the police by specifying assessment indicators. Those include e.g. the suspect's previous involuntary commitment in a psychiatric hospital, the care by an ambulant psychiatrist, the assessment of his/her mental health in other proceedings, his/her actual medication or his/her compulsory medical treatment in previous proceedings. The police are also advised to hear the family of the person or refer to his/her other criminal files. In case they assume a mental disability they are required to refer the suspect to a psychiatrist.<sup>45</sup>*



#### PROMISING PRACTICE: SLOVENIA

*Slovenia provides the police with a Handbook on the Implementation of Police Custody which includes guidance for assessing the person's health condition before police custody.<sup>46</sup> Accordingly, the investigating officer must attempt to obtain as much information as possible from the person concerned. The Handbook also underlines the importance of possible psychosocial disabilities that may affect methods of supervision of the person while in police custody.*

If medical assistance is necessary, the police officer must take into consideration the doctor's opinion on whether the detainee is capable of remaining in police custody; however, the final decision to suspend police custody lies in the hands of the police officer.<sup>47</sup> Despite this guidance the vulnerability is not always identified.

#### Case: Slovenia

*"They treated me as a healthy man, although I have been receiving medical treatment in psychiatric hospitals for 15 years. The police acted as if I was healthy, in reality I could barely talk to the police" <sup>48</sup>*

## 2.2 Assessment by the judiciary

Country	Specific trainings for judges	Binding character of expert opinion for the court
Austria	×	×
Bulgaria	×	×
Czech Republic	×	×
Lithuania	×	×
Slovenia	×	×





In *all five countries* the judges must ex officio examine if the accused person is capable of participating in the criminal proceeding as this is one of the procedural preconditions.<sup>49</sup> The overall aim of the examination is to assess whether the person concerned can stand trial and effectively participate.<sup>50</sup>

Distinct from the question of being able to stand a trial, is the assessment of the criminal responsibility of a person. For the final judgement on the merits it can be of crucial importance whether the accused person was criminally responsible at the time of the offence. *In all five countries* judges may require a medical expert opinion by a psychiatric or psychological expert if the accused person's behaviour or appearance during the pre-trial hearings indicates potential psychosocial and/or intellectual disabilities. However, as with the police, the identification of the accused person's potential vulnerability due to his/her disability depends on the knowledge, sensitivity and commitment of the individual judge. This way, not easily visible disabilities (e.g. intellectual ones) which were not identified by the police risk remaining unidentified during the proceedings. **None of the five countries retains mandatory trainings for judges to support them in the identification of psychosocial and intellectual disabilities.**



#### PROMISING PRACTICE: CASE EXAMPLE SLOVENIA

*S. was prosecuted for robbery. The case was brought before a court without any of the authorities involved in the pre-trial phase (i.e. the police, the prosecutor, the investigating judge) suspecting any kind of vulnerability of the defendant. Before the court hearing took place, the defendant began to write letters to the judge that raised the suspicion of a possible psychosocial disability. The judge ordered the social work centre to visit the defendant, check his living conditions and report back to the court. The social work centre reported back that the defendant might have a serious mental illness and that application of preventive security measures might be necessary. The suspicion was further confirmed at the court hearing, as the defendant claimed he was tied up and pushed into water and then electrocuted. The judge ordered a psychiatric expert opinion that confirmed paranoid schizophrenia that was never treated. The state prosecutor responded by making a motion to the court to order a compulsory medical treatment.<sup>51</sup>*



However, there are also cases where the vulnerability remained undetected. A Slovenian psychiatric expert reported cases where the courts decided to appoint a psychiatric medical expert only at a very late stage in the proceedings. In other cases they did not require any expert opinion on the state of the suspect's mental health, even when the suspect had been in a psychiatric hospital.<sup>52</sup>

### 2.3 Assessment by penitentiary staff, health and psychological support workers

In some cases the suspect's intellectual and/or psychosocial disability may only become apparent after a longer period of interaction and observation. Austrian expert interviews, for example, revealed that penitentiary staff might play a crucial role in identifying disabilities. Also in this case, there exists no institutionalised procedure. Usually, the prison officer informs the judge in an informal manner about the assumption of a potential disability.<sup>53</sup> In other cases, the vulnerability may be identified with the help of the health and psychological support personnel. These people are often the ones who also know about the existence of a guardian.<sup>54</sup>

### 2.4 Assessment by medical experts

Country	Qualification of police doctors	Qualification of prison doctors	Qualification of expert witness
Austria	police doctors are general practitioners	general practitioners	psychiatric experts with specific specialisation
Bulgaria	no police doctors; the police calls the doctors from the local hospital or emergency unit to come and examine the detained	general practitioners	psychiatric or psychological experts
Czech Republic	police doctors are general practitioners	general practitioners	psychiatric experts
Lithuania	no police doctors; the police calls general practitioners	general practitioners	psychiatric experts with specific specialisation
Slovenia	no police doctors; the police calls the general emergency medical service	general practitioners	psychiatric experts





### 2.4.1 Police doctors

As mentioned above, it is mostly the individual police officer who decides on the involvement of a doctor. In *three out of five countries, Bulgaria, Lithuania and Slovenia*, no specific police doctors exist. If any examination or support is needed the police have to call the general emergency services, medical centres or hospitals.

#### Case: Slovenia

*A Slovenian interviewee shared his story: “I was examined by a doctor at the police station, but the doctor did not ask me, if I was taking any prescription medication”<sup>55</sup>*

In *Austria*<sup>56</sup> and the *Czech Republic* **police doctors** are usually general practitioners who **mostly lack solid expertise** on how to identify psychosocial and/or intellectual disabilities. In *Austria*, especially in rural areas the shortage of police doctors results in many individuals needing to be directly brought to the (psychiatric) hospital.<sup>57</sup>

### 2.4.2 Prison doctors

International legal standards<sup>58</sup> require that prison doctors are trained to recognise signs of psychosocial disabilities in an early stage and that detention centres provide support from psychiatrists. **In all five countries prison doctors are general practitioners.** Psychiatrists have regular consultation hours on a contractual basis. In *Slovenia*, for example prisons arrange the psychiatrists' presence 2-3 times per week. Complaints to the Ombudsman of insufficient psychiatric care are very common.<sup>59</sup> Similarly in *Austrian* prisons, psychiatric experts are only consulted in case of certain indications e.g. information provided by the arrestee, the arrest report or reports by medical experts or prison officers.<sup>60</sup>



#### PROMISING PRACTICE: AUSTRIA

*The Austrian Ministry of Justice has issued guidelines for prison doctors to contribute to an early identification of mental illnesses. It includes questions to ease identification as well as clear guidelines when to refer cases to the judiciary for further assessments (i.e. expert opinion).<sup>61</sup>*





### 2.4.3 Medical expert opinion

Judges and prosecutors may commission expert opinions by court appointed medical experts (expert witnesses). *In all five countries* judges are not bound to the expert opinion. It functions as part of the evidence that is subject to the free consideration of evidence. Although these opinions are not legally binding for the court, they are de facto frequently very influential for the judges' decisions. It is therefore particularly alarming that **expert opinions are often of poor quality and fail to comprehensively picture the situation of the suspect**. Research has shown that many of them are still composed of text blocks taken from previous assessments and fail to provide an in depth assessment of the current situation of the suspect. Interviewed stakeholders criticised the often insufficient examinations performed by court experts and noted that the interviews would sometimes last only 10-20 minutes.<sup>62</sup> The remuneration of the experts also tends to be low. The research for this project has shown that **key indicators for the quality of medical expert opinions** are the qualification and commitment of the experts, the time spent with the patient as well as the tailor made diagnosis.

In *Austria*, the court database displays expert witnesses with their specific field of expertise. Judges and prosecutors may either choose an expert from this database or, in case a specific qualification is needed which cannot be found among the experts in the pool, mandate an external expert.<sup>63</sup> Due to the limited number of forensic psychiatric experts judges may sometimes even mandate experts in familiar fields to psychiatry. This practice is however highly critical as they often lack the pertinent expertise on the topic and their opinion has nevertheless decisive influence.<sup>64</sup> According to Austrian law persons with intellectual disabilities should also be examined by psychiatric experts. However, psychiatric assessments do not provide pertinent information on intellectual disabilities.<sup>65</sup>

The **quality** of expert opinions varies. Some of them are excellent, which results in those experts becoming overburdened, while other opinions are of a fairly poor quality. Interviews with persons with intellectual and psychosocial disabilities revealed that the time court experts spent talking to them ranged between 5 to 45 minutes.<sup>66</sup>





### Cases: Austria

*“I saw the medical expert for 10 minutes and while I was talking to the expert I felt very sedated. Even though I understood the fact that the judge had to trust the expert, I felt that it was not right to get a diagnosis under these circumstances.”<sup>67</sup>*

*“I had to wait for hours to meet the medical expert, even though we set up an appointment. I suggested two different locations (my flat and the flat of a friend) for the interview but the medical expert insisted to meet in a neutral area. Finally I saw the medical expert in a Café in front of the courthouse for five or ten minutes. After the interview the medical expert wrote a very long report, even though he saw me for only a couple of minutes.”<sup>68</sup>*

In Austria, there is no professorship for forensic psychiatry. Neither does a quality control for expert opinions exist. Often they are composed of a set of adapted text blocks extracted from previous assessments. However, experts run the risk of being held legally accountable for their assessment.<sup>69</sup>

In Bulgaria forensic psychological or psychiatric assessments are often combined.<sup>70</sup> The registration and qualification requirements of court appointed medical expert witnesses are regulated by decree.<sup>71</sup> All regional and administrative courts maintain expert witness directories for their area of jurisdiction.<sup>72</sup> The Criminal Procedure Code (CPC) allows also the appointment of other forensic experts (not included in the directories) given their expertise in the respective field of science.<sup>73</sup> Practical experience shows that there are two fundamental shortcomings with regard to expert witnesses in Bulgaria: the lack of a major and detailed legislative act about their work and the current situation of low remuneration.<sup>74</sup>

In the Czech Republic, the police may, as the court, require an expert opinion by a psychiatrist in case they perceive signs of potential psychosocial and/or intellectual disabilities. However, interviews with the police revealed a general lack of forensic experts as well as a lack of their availability to provide expert opinions. The standard timeframe for getting an expert opinion has consequently extended from one month to at least two or



three months. This often poses procedural problems as the police investigations may be finished before the expert opinion is delivered.<sup>75</sup>

Judges and prosecutors can also order a psychiatric expert opinion. If the accused refuses to undergo a psychiatric evaluation, the court may order observation in a psychiatric hospital for a maximum of two months as an ultima ratio measure.<sup>76</sup> Besides court appointed psychiatric or psychological experts, other experts may also be invited to give an expert opinion provided that they have the necessary expertise.<sup>77</sup> The duration of the assessment varies upon many variables (e.g. on the capacity of the person to communicate, on the amount of information in medical documentation). Also in the Czech Republic the experts do not spend enough time with the suspects. Interviews showed that the time of assessment ranges from 5 to 60 minutes. Further, there is a shortage of experts.<sup>78</sup> Additionally, most experts cannot invest their full capacity in working as experts as they have other employments.

There exists no independent system of periodical assessment of the work of experts. However, if the expert does not work consistently with the law (e.g. in case she/he does not carry out her/his activity in the period set by the court, if she/he refuses to provide the expertise without serious cause) she/he commits an offence which may be fined with 50 000 to 100 000 Czech crowns.<sup>79</sup> Forensic experts and their work have lately faced public criticism resulting in a draft amendment of the law which aimed at introducing effective tools to control the quality of expert opinions and to sanction experts who do not satisfy the required standards. The underlying idea was to periodically evaluate the work of the experts by the court and the Ministry of Justice. After several discussions which included also the argument that the new provision would decrease the number of experts who would be willing to register as forensic experts, the amendment was refused in May 2017.<sup>80</sup>

In *Lithuania*, the police can gather and request the suspect's medical data from health care institutions. If they or the general practitioners to whom suspects may be referred to during the police proceedings assume a potential disability, they have to apply to the state forensic psychiatric service to obtain a professional opinion on the need of psychiatric expertise. The







same application needs to be done by the prosecutor and the judge. Getting medical data and forensic expert opinions often takes considerable time. The complete results may sometimes not be available until the middle of the proceedings.<sup>81</sup> Therefore the defendant frequently does not benefit from adequate safeguards from the beginning of the procedure.

The state forensic psychiatric service experts can provide services only after taking the exams on special knowledge and being included into the register which is controlled and supervised by the Ministry of Justice. The official forensic expert opinion is used throughout the whole proceedings if the parties or the court do not question its reliability and objectiveness. There exists no formal quality control (e.g. video, audio recording) of the examination procedure. The expert opinion cannot be appealed, only a secondary opinion may be ordered by the court, if doubts are raised about the first opinion. The main problem is that also the second examination will be performed by the same institution – the state forensic psychiatric service.<sup>82</sup>

In Slovenia, judges' resort to a directory of court appointed experts in the field of psychiatry.<sup>83</sup> However, all Slovenian court experts are listed in the directory as "general psychiatric experts"; their area of specialisation is not displayed. This poses considerable problems as it does not allow the judges to choose the most competent expert in each individual case.<sup>84</sup> Interviewed stakeholders underlined that in Slovenia all experts would know each other. Therefore when a second expert opinion is requested in a particular case, there exists often a professional connection between the court experts which raises questions of impartiality.<sup>85</sup>



### 3 PROCEDURAL SAFEGUARDS

#### 3.1 Appropriate safeguards during the pre-trial phase

##### 3.1.1 Police: Arrest, police questioning and police custody

###### 3.1.1.1 Right to information

The Recommendation states that the suspect, and if necessary his/her legal representative or an appropriate adult, should be informed about his/her rights, especially the right to information, the right to medical assistance, the right to a lawyer, the respect of privacy and, where appropriate, the rights related to pre-trial detention. It further specifies the right of a legal representative or an appropriate adult to be present at the police station and equally underlines that the information should be provided in an accessible format.<sup>86</sup>

*In all five countries* there exist considerable gaps with regard to the right to information as set out in the Recommendation. They concern in particular a **lack of accessible information and a lack of appropriate assistance**. **None of the five countries provides for special information leaflets** that take account of the situation of persons with intellectual and/or psychosocial disabilities. The manner in which the information is provided depends primarily on the sensibility and experience of the individual police officer. Interviews with persons with intellectual and/or psychosocial impairments revealed that many of them had not properly understood the legal instructions they were given. **None of the countries requires the mandatory presence of a third party**, i.e. a legal representative or an appropriate adult, from the first police questioning onwards. It is an option but not an obligation.

*In all five countries* the content of procedural rights is widely the same.<sup>89</sup> They include in particular the right to be informed on the reasons of investigation, the right to medical assistance, the right (not the obligation) to have a lawyer from the first police questioning onwards and the right to notify a third person in case of the deprivation of liberty.<sup>90</sup> Generally, there





Country	Content: Information provided to the suspect			
	Right to be informed about the reasons for the arrest	Right to inform a third party of deprivation of liberty	Right to a lawyer	Right to medical assistance
Austria	✓	✓	✓	✓
Bulgaria	✓	✓	✓	✓
Czech Republic	✓	✓	✓	✓
Lithuania	✓	✓	✓	✓
Slovenia	✓	✓	✓	✓

## Format for providing information

Country	Special format
Austria	✗
Bulgaria	✗
Czech Republic	✗
Lithuania	✗
Slovenia	✗

## Legal Representative and appropriate adult

Country	Mandatory presence of a third person (e.g. legal representative <sup>87</sup> , appropriate adult <sup>88</sup> ) present
Austria	✗
Bulgaria	✗
Czech Republic	✗
Lithuania	✗
Slovenia	✗



are two different paths for a suspect to come into contact with the police: either he/she receives the summons for police interrogation in writing or he/she is arrested and subsequently interrogated. Thus, also the obligations on how to inform differ.

### Summons

The summons for interrogation should include written information on the rights of the suspect. **So far none of the countries provides summons in a specific format for persons with intellectual and/or psychosocial disabilities.**<sup>91</sup> Research has shown that the summons is often issued without any or very little background knowledge on the medical history of the person concerned. In *Austria* for example a case was identified where the summons was not sent to a legal representative (e.g. guardian) but only to the suspect who ignored the request for a very long time. In practice, this ignorance may entail a deprivation of liberty of the suspect in order to interrogate him/her.<sup>92</sup>

### **Case: Bulgaria**

*An interviewee shared that she was told by the police to go to the police station as a witness only. They did not provide her with any information about what. After going with the police officer, she was detained.*<sup>93</sup>

### Arrest

In *all five countries*, the police need to inform the suspect about his/her procedural rights upon arrest or, in case he/she is not deprived of liberty, before the first police interrogation. The police also need to inform the suspect about the timeframe of police custody and the right to appeal against the decisions of the authorities. In case of deprivation of liberty the suspect has the right to inform legal representatives or appropriate adults. In principle, the information on procedural rights is provided in a written Letter of Rights. So far **none of the five countries provides for a special Letter of Rights** (e.g. information leaflets in accessible language). The manner in which the information is provided, e.g. by additional oral explanations, depends primarily on the individual police officer.





In *Austria* the law specifies that the legal instructions have to be provided in a comprehensive manner taking into account the „special personal needs“. It fails however to further define these „special needs“.<sup>94</sup> Currently there exists only one format of the information leaflet which is handed out to all suspects; it is not accessible in a barrier-free format.<sup>95</sup> Alike, according to the *Slovenian* Criminal Procedure Act the suspect has to be informed about his/her rights in written format and in an understandable language.<sup>96</sup> However, it does not stipulate any obligation that the information has to be provided in an accessible format to suspects with intellectual and/or psychosocial disabilities.<sup>97</sup> In practice the police use standard information forms.<sup>98</sup>

*Bulgarian* legislation on the contrary does not contain any specific provisions on the right to information nor on the manner in which it should be conveyed to persons with intellectual and/or psychosocial disabilities. In case the suspect is detained in police custody, he/she must be informed immediately upon arrest.<sup>99</sup> Arrestees have to complete a designated form<sup>100</sup> to declare their intention to exercise or waive their rights.<sup>101</sup> If the suspect is not deprived of liberty, he/she has to be informed about his/her procedural rights only after he/she is indicted.<sup>102</sup> In practice this means that until the indictment suspects with intellectual and/or psychosocial disabilities are in principle treated like any other suspect. The law only requires the police to appoint a lawyer at the time of indictment when the person has been found to have intellectual and/or psychosocial disabilities that prevent him/her from defending himself/herself in criminal proceedings.<sup>103</sup> The interviews revealed that besides those ones who were arrested at the moment of committing the crime, detainees with intellectual and/or psychosocial disabilities tended to be initially confused about the reasons for their detention.<sup>104</sup> Professional stakeholders also confirmed that there was a lack of appropriate materials and procedures to adequately inform persons with disabilities.<sup>105</sup>

**In all five countries interviews with persons with intellectual and/or psychosocial disabilities revealed that many of them had not properly understood the legal instructions they were given upon arrest.<sup>106</sup>**





### Case: Austria

*An interviewee reported that when the police arrested him, they didn't explain to him why, so he had no idea what was happening. Later at the police station he was informed why he got arrested but he didn't get any further information about his rights (e.g. right to access a lawyer). The police also didn't allow him to make any phone calls.<sup>107</sup>*

### Interrogation

Before the interrogation, the police needs to inform the suspect and, if necessary, an appropriate adult or legal representative about his/her rights. In the Czech Republic and Austria the law requires the police to provide for an interpreter for deaf or deaf-mute persons when informing them about the reasons for the interrogation and their procedural rights.<sup>108</sup> This provision should be interpreted also as a right for people with other types of disabilities (such as severe intellectual disabilities), e.g. with regard to use an interpreter for easy or augmentative language.

**In all five countries, information is frequently not provided in an accessible and understandable way.** For example, in Lithuania, officials carrying out the investigation tend to just read aloud the suspect's rights without ensuring that the rights are being understood properly.<sup>109</sup> Many interviewees with intellectual and/or psychosocial disabilities struggled to understand the information.

### Cases: Lithuania

*An interviewee mentioned that he was informed about his procedural rights at the police station, but he did not understand them. This information was not provided for him in another language or form: „Yes, they mentioned the events. They just announced the articles of the Code, but did not explain them.“<sup>110</sup>*

*Another interviewee did not understand the information provided to him, nor the charges. Therefore he agreed with everything the police was*





saying: „I felt that something was wrong, but I did not understand why and what I had done, and later on I just agreed and accepted everything the police officers were saying.“<sup>111</sup>

Alike, in Bulgaria, all interviewees shared that they did not receive information in an understandable manner. Similarly in the Czech Republic many interviewees did not understand the information provided on their rights.

### **Case: Czech Republic**

*“Information is what I lacked. Everything was solved with my parents because I was in psychosis. I did not even know what I was accused of or investigated for.”<sup>112</sup>*

Also Austrian interviewees reported that they did not understand the information.<sup>113</sup> This is particularly problematic because by signing the protocol, suspects confirm to have understood their rights.<sup>114</sup>

### **Case: Austria**

*An interviewee reported that he didn't get any information about his right to contact a lawyer. The police spoke to him in a very strict and restrictive tone. The police officers interrupted him quite often, so he couldn't finish his sentences. They told him if he confessed he could go home quickly. He explained that he felt afraid and finally he told the police officers what they wanted to hear- namely a confession- just to get back home. This police protocol was used as key evidence throughout the whole process and the beneficiary was found guilty.<sup>115</sup>*

In Slovenia, the police underlined that they would usually ask the suspect if he/she had understood the information and would provide further explanation if necessary.<sup>116</sup> Nevertheless, only a few of the interviewees reported that they were aware of all their rights and some noted that everything went too fast for them to follow.



### Case: Slovenia

*One interviewee reported that the police officer who was questioning him, did not tell him about his right to a lawyer: “He only told me: ‘You did this and this, is it true?’ and then I had to give my statement. I learned about it later, from the letter I received from the court.” The interviewee also reported that he did not receive clear information, what crime he was suspected of: “I asked what this was about, but [the police] did not tell me anything, I heard about it only in court. He told me: ‘You called M., did you call him?’ I admitted to having called him, but I called him for help. Then I asked [the police officer] what happened and he told me ‘You will learn in court’.”<sup>117</sup>*

Apart from these cases expert interviews showed some individual promising practices. Some Austrian and Czech interviewees reported that the police had made a particular effort to explain the rights in an understandable way.<sup>118</sup>

### Appropriate Adult / Legal Representative

The Recommendation specifies that, if necessary, an appropriate adult or a legal representative should be informed of the specific procedural rights referred to in the Recommendation. This person who is nominated by the suspect with intellectual and/or psychosocial disabilities or appointed by the competent authority should be present at the police station.<sup>119</sup> Yet, so far **none of the countries requires the mandatory presence of a legal representative or appropriate adult** who could support the suspect from the first police questioning onwards. It is an option but not an obligation. Research has shown that **appropriate adults or legal representatives are often not even notified and informed about the arrest.**

### Case: Lithuania

*In one case, family members found out about the arrest of the suspect, who had been living in a social care home, by the media. Staff of the social care home knew about the accident, but they did not inform them: “We found out about the arrest from the media.”<sup>120</sup>*







In *Austria*, if the suspect is brought directly to a psychiatric hospital (i.e. involuntary commitment according to the civil procedure), the police must, according to the law *ex officio* (which means that it is an obligation for the police), notify a family member.<sup>121</sup> If the person is arrested, but not brought to hospital, the suspect has the right to promptly notify or to have a relative or a person of trust as well as a lawyer notified of his/her arrest.<sup>122</sup> However, the notification is done only upon request of the suspect. In some cases the call may be done by the police. In practice, family members were informed if the suspect requested. Guardians were rarely notified, mainly because it was not known that the person has a legal representative. In those cases where an appropriate adult (e.g. social worker) was present during the police interrogation he/she could help explain the legal instructions. This improved the understanding from the part of the suspects.<sup>123</sup>

### **Case: Austria**

*One of the interviewees wanted to talk to his guardian to get support but the police didn't allow him to make any phone calls. He felt helpless and alone. The guardian received the information about the upcoming trial 15 days after the police questioning.*<sup>124</sup>

In *Bulgaria*, in case of detention a third party needs to be notified upon the suspect's request by completing a designated form. The notification of the third party is carried out by the police officer on duty, not by the suspect.<sup>125</sup> None of the interviewees reported that he/she had the possibility to call a relative, friend or close person themselves. The interviews with 16 detained persons with intellectual and/or psychosocial disabilities revealed that in four of the cases the relatives of the detainees were not notified of the detentions. In six of the cases the arrests were carried out in the presence of the relatives; and in the other six cases the relatives were notified of the arrest by police officers.<sup>126</sup>

### **Case: Bulgaria**

*In one case it was not clear who decides to inform the relatives and who exactly needs to be informed. The appropriate adults were consequently not notified, particularly not during the initial stages of the proceedings*



*which took place within the first 24 to 72 hours of being held in custody at the police departments or the detention centers.*

Also in the Czech Republic the suspect may request to contact family members or a third person in case of deprivation of liberty. The third person is not contacted ex officio. However, if requested by the suspect the family members are contacted by the official in charge. A Czech NGO representative underlined the importance of involving a legal representative or an appropriate adult and noted that suspected persons would not know their rights, or where they could find support: "If we don't get into contact with them and do not accompany them through the process, the person hardly knows what to expect. It can lead to passivity and a very unfavourable outcome of the proceedings."<sup>127</sup>

In Lithuania suspects may call third persons on their own or have them called by the police, which have a duty to inform family members or any other persons indicated by the suspect on his/her detention.<sup>128</sup> Persons detained in police custody are allowed to contact third persons by correspondence.<sup>129</sup> The accused is also allowed to use a phone.<sup>130</sup>

Slovenian law allows but does not require a third person to be present during the police questioning. A police expert explained that if the police would recognise the need to include a third person or a legal representative to facilitate the communication, they would do so. However, he noted that the police would not allow such presence, if it could hinder the investigation or if it was against the best interest of the suspect (e.g. it would intervene in a way that would deteriorate the suspect's position, or is explicitly against the will of the suspect). The main purpose is to gather information regarding the offence and to secure evidence against the suspect. The final decision on the presence of the third person would therefore lie in the discretion of the police officer handling the case.<sup>131</sup>

In case of an arrest Slovenian police are held to inform the suspect's family within twenty-four hours on the request by the suspect and to take an official note. The arrest is also reported to the competent social welfare agency in order to attend, if necessary, to children and other family members whom the arrested person supports.<sup>132</sup>





### 3.1.1.2 Right of access to a lawyer

#### *Recommendation 11*

*If a vulnerable person is unable to understand and follow the proceedings, the right to access to a lawyer in accordance with Directive 2013/48/EU should not be waived.*

Country	General mandatory presence of lawyer from first police questioning	Optional presence upon request	Possibility to waive right to a lawyer	Mandatory presence from first police questioning (if the person is not capable to represent him/herself due to disability)
Austria	✗	✓	✓	✓
Bulgaria	✗	✓	✓	✗
Czech Republic	✗	✓	✓	✓
Lithuania	✗	✓	✓	✓
Slovenia	✗	✓	✓ with reservations	✓ mandatory

The right of access to a lawyer poses, next to the identification of vulnerability and the right to information, the third biggest challenge in ensuring a fair trial for persons with intellectual and/or psychosocial disabilities. As mentioned above, **none of the five countries requires mandatory presence of a third person from the first police questioning onwards**. Given the findings of the research that appropriate adults and legal representatives are often not notified about the deprivation of liberty or are not present at the police station, the more important it seems to have a lawyer involved in the proceedings as soon as possible.



**None of the countries requires a general mandatory representation by a lawyer from the first police questioning onwards.** Further, the right of access to a lawyer can be waived. However, this might differ once the disability is identified and is hindering the suspect's effective participation and the proceeding is directed at compulsory medical treatment. The identification of the suspect's vulnerability at an early stage is thus of crucial importance as it has an impact on the proceedings. In Austria, the Czech Republic and Lithuania there is mandatory representation by lawyer once the suspect's vulnerability is identified and compulsory medical treatment might be imposed. In these cases, the right to a lawyer cannot be waived.<sup>133</sup>

Bulgaria and Slovenia have different regulations: Bulgaria has anchored the right of access to a lawyer as a fundamental right in its Constitution.<sup>134</sup> It can be exercised immediately upon arrest or after indictment. During the police proceedings, all suspects including persons with intellectual and/or psychosocial disabilities may be accompanied by a lawyer upon request. It is an option but not an obligation. Yet, there are no specific legal requirements mandating that a lawyer should be present and consulted at every stage of the criminal proceedings of a person with intellectual and/or psychosocial disabilities.

In Slovenia, there are no procedural safeguards that would prevent a suspect with intellectual and/or psychosocial disabilities to waive his/her right to a lawyer during the police proceedings. If the suspect states that he/she does not want a lawyer, an official note of his statement is made. In this case however, the police will not make a record of the interrogation which could later be used as evidence in court. They only take an official note of the suspect's statement. This is true for all waivers and not restricted to suspects with psychosocial disabilities.



### PROMISING EXAMPLE: SLOVENIA

*If a lawyer is present during questioning (if a suspect retains one or if the police appoint one in the interest of justice), this is formally called a police interrogation and a formal record will be made which can be used in court as evidence. If there is no lawyer*





*present (e.g. the right to a lawyer was waived), this will not be formally considered an interrogation and the police will make an official note of the suspect's statement. The latter cannot be used in court as evidence, however it will be kept in the court case file and therefore available to the presiding judge. The judgement will have to be based on other evidence, not this statement; however the statement may be used as a basis for investigating acts.*

**In sum, this means that if the disability is not identified or national laws allow nevertheless waiving the right to a lawyer the suspect does not benefit of the safeguard to access a lawyer;** thus the representation by a lawyer remains an option not an obligation. Research shows that **in practice the first police questioning is often conducted without the presence of a lawyer.** It equally shows that there is a clear need for mandatory presence of a lawyer from the first police questioning onwards.<sup>135</sup> In *Bulgaria* out of the 16 interviewed persons with intellectual and/or psychosocial disabilities, six persons did not have a lawyer present during the first police interrogation (no data is available about whether it was held before or after the initiation of the pre-trial proceedings), three persons did not have a lawyer at all while they were detained at the police station and the other 7 persons were appointed public defenders who were chosen by the police officers. 13 of the persons were not allowed private consultations with their attorneys while being held in police custody.<sup>136</sup> Previous research carried out on police detention in Bulgaria in 2015 came to similar conclusions.<sup>137</sup>

In *Slovenia* none of the 13 interviewees were represented by a lawyer during police interrogation.<sup>138</sup> In the *Czech Republic* on the contrary an NGO representative reported that in most cases the police would ensure that an attorney was available to the vulnerable suspect.<sup>139</sup>

According to this research the relatively low number of cases where a lawyer is present during police interrogations is strongly related to three factors:

First, the information on the suspect's procedural rights is often insufficient or inadequate.



### Case: Lithuania

*One interviewee reported that he was not informed about the possibility to talk to the legal counsel. He saw his legal counsel only in the court and did not have a chance to communicate with him: „No, I saw my legal counsel for the first time only at court.“<sup>140</sup>*

Second, the right to a lawyer was reportedly often waived in cases where mandatory representation was not (yet) established. Third, the suspect's vulnerability which justifies a mandatory lawyer needs to be identified. In *Lithuania* for example the vulnerability needs to be confirmed by an expert opinion commissioned by the judiciary. The psychiatric expertise provides the necessary legal basis for the participation of the lawyer. In practice the legal representation of persons with intellectual and psychosocial disabilities by a lawyer is therefore often only ensured mandatorily after the expert opinion has arrived.<sup>141</sup>

#### 3.1.1.3 Right to medical assistance

##### *Recommendation 12*

*Vulnerable persons should have access to systematic and regular medical assistance throughout criminal proceedings if they are deprived of liberty.*

Research has revealed **substantial inconsistencies when it comes to identifying intellectual and/or psychosocial disabilities and providing the necessary medical support during police proceedings**. In principle all countries provide for non-discriminatory access to free medical care during police custody. Suspects in police custody receive a medical examination if required by their health condition or upon request. In *Austria* and the *Czech Republic* this is primarily done by police doctors who often lack adequate qualification for identifying or treating psychosocial and/or intellectual disabilities.<sup>142</sup> If they are not able to provide the care needed, additional assistance is requested or the detainee is transferred to a specialised medical facility upon request.<sup>143</sup> In the other countries which do not provide for police doctors, external physicians are involved. However,





Country	Medical care in police custody is provided by
Austria	police doctors
Bulgaria	physicians or a private doctor at their own expense
Czech Republic	police doctors
Lithuania	emergency and specialised medical care doctors
Slovenia	emergency medical assistance by local urgent medical assistance service or by a private doctor at their own expense

**none of the five countries ensures that physicians have expertise on intellectual and/or psychosocial disabilities.**

In *Bulgaria* the examination may also be requested by a parent, guardian, lawyer or a foreign diplomat (in those cases when the detainee is a foreign citizen).<sup>144</sup> The police may decide to invite a doctor to examine a suspect while in police custody if they find it necessary even without the express wish of the person concerned. The legislation does not contain any provisions specifying which physicians are eligible to perform this service and who is responsible for the payment for non-emergency doctors' visits to police departments.<sup>145</sup> Currently, there are no regulations governing the qualifications, professional requirements or the workplace of designated medical personnel who are to provide medical assistance to detainees with intellectual and/or psychosocial disabilities held in police custody.<sup>146</sup> The interviews revealed that 14 out of the 16 persons did not have access to medical assistance during their 24-hour detentions at the police departments. Only two persons received medical care and for one of them it was actually due to a health issue requiring emergency care.

Some of the interviewees shared that up until their detention they were never made aware that they were suffering from a psychosocial or some other mental disorder and that it was during their detention in pre-trial detention facility that they received consistent therapy for the first time ever.<sup>147</sup>



In *Lithuania*, the medical assistance for detained suspects should be provided by the temporary detention or arrest body.<sup>148</sup> However, police officers often lack specific knowledge and competencies and may not know what kind of assistance is necessary for persons with intellectual and/or psychosocial disabilities. Interviews revealed that in practice suspects in police custody received only emergency medical assistance. According to some expert interviewees this is due to the fact that psychosocial and/or intellectual disabilities are often hard to identify and that the required medical assistance is hardly available.<sup>149</sup>

In *Slovenia* suspects in police custody have the right to emergency medical assistance.<sup>150</sup> It is provided by a local Urgent Medical Assistance service, organised within the national public health service network. Apart from this a detained person has, at his/her own expense, the right to be examined by a doctor of his/her choice.<sup>151</sup>



### PROMISING EXAMPLE: SLOVENIA

*According to the Police Handbook on Implementation of Police Custody, police officers must immediately ensure emergency medical assistance if the detained person's behaviour indicates a psychiatric impairment. As examples of such behaviour, the Handbook lists aggressiveness, delusions, depression and similar conditions and threats to commit suicide. Based on the information provided by the police, the doctor decides whether he/she will examine the detained person at the detention facility or whether the police should bring the detained person to a health institution.*







### 3.1.1.4 Deprivation of liberty

#### *Recommendation 14*

*Member States should take all steps to ensure that deprivation of liberty of vulnerable persons before their conviction is a measure of last resort, proportionate and taking place under conditions suited to the needs of the vulnerable person. Appropriate measures should be taken to ensure that vulnerable persons have access to reasonable accommodations taking into account their particular needs when they are deprived of liberty.*

Country	Maximum duration of police custody according to the law	Assessment of fitness for custody	Adequate accommodation at the police
Austria	48 hours	✓	✗
Bulgaria	24 hours	✗	✗
Czech Republic	48 hours	✓	✗
Lithuania	48 hours	✓	✗
Slovenia	48 hours	✓	✗

*In all five countries*, the deprivation of liberty needs to be based on legal grounds and to comply with the **principle of proportionality**. However, *Bulgarian* interviews revealed that this principle **was never followed**. All sixteen interviewees with intellectual and/or psychosocial disabilities had been subject to police custody and pre-trial detention regardless of the seriousness of the offence they were accused of.<sup>152</sup>



If police officers take the suspect into custody, it is of utmost importance that the vulnerability of the person is identified at the very beginning. Only a timely identification allows for a deprivation of liberty under conditions suited to the particular needs of the suspect. Under any circumstances the deprivation of liberty should be a measure of last resort.

In *Austria*, the *Czech Republic*, *Lithuania* and *Slovenia* police custody can be upheld for at least for 48 hours and in *Bulgaria* for 24 hours. **None of the five countries provides for police custody facilities that take into account the particular needs of suspects with psychosocial and/or intellectual disabilities.** In *Lithuania*, for example, all interviewees with psychosocial and/or intellectual disabilities noted that the current detention conditions are very poor for both healthy and disabled people.<sup>153</sup> There exist no special police custody cells taking into account the needs of suspects with intellectual and/or psychosocial disabilities. If necessary, suspects are transferred to a prison hospital. There is a special mental unit which is suited for suspects in mental distress.<sup>154</sup>

*Slovenian* law does not provide for alternatives to police custody. Only when the detained person needs **urgent medical treatment**, must the police officer take into consideration the doctor's opinion on whether the detainee is capable of remaining in police custody. The final decision, however is in the hands of the police officer.<sup>155</sup> If the police officer decides not to suspend police custody, it can also be carried out at the health institution, where the detainee can receive further medical treatment.<sup>156</sup> The police are not allowed to arrest and take a person to the police premises if the arrest could deteriorate his/her health.<sup>157</sup>

In *Austria* every detainee is examined at the latest within 24 hours after his/her admission with regard to his/her physical and mental fitness for detention by a police doctor.<sup>158</sup> If a person shows visible signs of psychosocial disabilities while being transported to the police station or in the police station, a medical examination has to be undertaken prior to arrest.<sup>159</sup> Also in the *Czech Republic* a medical assessment is mandatory for every suspect deprived of liberty.<sup>160</sup> When the person is seriously ill, the police transfer him/her to the appropriate medical facility.<sup>161</sup> In *Bulgaria* suspects undergo a medical assessment only after indictment. The police are not





required to ensure a medical assessment of the suspect's health condition if he/she is taken to police custody- even if there are indications of a disability. The suspect is only taken to a hospital instead of police custody if urgent care is needed. It is up to the police to decide.<sup>162</sup>

### 3.1.1.5 Recording of questioning

#### *Recommendation 13*

*Any questioning of vulnerable persons during the pre-trial investigation phase should be audio-visually recorded.*

Country	Mandatory audio-visual recording	Specific cases for which audio-visual recording is required
Austria	✗	Suspect does not have a lawyer and will most likely not participate in the trial
Bulgaria	✗ according to the Criminal Procedure Code, ✓ according to internal police instructions	Upon request of suspects or pre-trial authorities according to the Criminal Procedure Code
Czech Republic	✗	Up to the police to determine case by case
Lithuania	✗	Up to the police to determine case by case
Slovenia	✗	✗

**In all five countries audio-visual recordings of police questionings are allowed but generally not mandatory.** The laws require them only in specific cases which do not comprehensively cover questionings of persons with intellectual and/or psychosocial disabilities. In practice recordings are rarely done. This is also partly due to the fact that the majority of the police stations in the participating countries do not have the proper equipment.



**PROMISING EXAMPLE: AUSTRIA**

*To increase the frequency of audio-visual recordings all main provincial police stations have recently been equipped with a special room for audio-visual recording.<sup>163</sup>*

According to Austrian law audio-visual recording of police questionings should be done when the accused person does not have a lawyer and when it is expected that he/she will not be able to participate at the trial. The underlying aim is to enhance the suspect's procedural safeguards.<sup>164</sup> However, in practice recording is rarely done. 8 out of 15 interviewees reported that there hadn't been an audio recording during the police questioning.<sup>165</sup>

In Bulgaria police interrogations may be video- or audio-recorded upon request by the interrogated persons or through a motion made by the pre-trial authorities.<sup>166</sup> According to the internal police instructions the interrogation rooms in detention facilities should be equipped with audio and video equipment which must be used at all times; that is, all interrogations carried out in these premises must be recorded.<sup>167</sup> Yet, none of the interviewees with intellectual and/or psychosocial impairments reported audio or video recordings of their interrogations at the police department. The interrogations were only recorded by a written protocol. In some cases, detained persons did not know if the interrogation had been recorded at all.<sup>168</sup>

In the Czech Republic, it is up to the police to determine whether audio-visual recording is necessary.<sup>169</sup> The number of recorded questionings is growing and the police and public prosecutors agreed to increase the use of these specific rooms. None of the interviewees remembered if his/her questioning was recorded.<sup>170</sup>

Also in Lithuania, police questionings are hardly ever audio-visually recorded. There are provisions in the law, that suspects, who are not able to appear to the questioning or are being kept in the police custody, may be questioned by the means of audio-video recording through distance.<sup>171</sup> All interviewed experts noted that no video and audio recordings of pre-trial interviews with vulnerable suspects exist.<sup>172</sup> This was confirmed as none of





the interviewees with intellectual and/or psychosocial disabilities mentioned that their interrogation was recorded.<sup>173</sup>

In *Slovenia* the Criminal Procedure Act does not provide for an obligation to record the questioning of suspects with intellectual and/or psychosocial disabilities.<sup>174</sup> In practice, only around 15% of police interrogations are recorded and the majority of the police stations do not have the proper equipment to perform the recording.<sup>175</sup> Two interviewees noted that the questioning was not recorded, the others did not remember.<sup>176</sup>

### 3.1.1.6 Police violence

In some countries the interviews with persons with intellectual and/or psychosocial disabilities revealed incidents of police violence: In *Bulgaria* three out of the 16 interviewed detainees (one of these three being a 20-year old woman) shared that they were subjected to physical violence by the police officers during their arrest and later on at the police department.<sup>177</sup> Another three interviewees reported that they were subjected to intimidation and psychological abuse during the initial interrogation. It is important to note that all the people who suffered ill-treatment by police officers were mostly illiterate. They were charged with petty offences and displayed various degrees of an intellectual disability or types of personality disorders. They were in obvious need of therapy which they received only once they ended up in detention. **None of the victims filed a complaint about police ill-treatment.** Considering that four of the victims did not have a lawyer present during their first police questioning and only one person received emergency medical care, it must be noted that in these cases the police officers not only failed to ensure the provision of medical or legal assistance to the detainees, but also used physical/psychological violence on them. This was never noted down in the course of the criminal proceedings.

#### **Case: Bulgaria**

*One interviewee suffering from epilepsy was suspected to have committed thefts. He reported that the police officers came to his home and arrested him without any explanations. They forcibly put him in the*



police car's trunk while his relatives and neighbors were watching. In the middle of the distance to the police station the policemen stopped the car and told him to "confess everything" and assaulted him. At the police station, they continued to assault him while he was handcuffed sitting on a chair. The police officers never asked him about the alleged crimes. They directly insisted that he had committed them. Eventually, he lost consciousness. The policemen called a doctor. The detainee was taken to a hospital. He decided not to raise the issue of the violence he has undergone because he was afraid. Released from the hospital after treatment he went home and a month later he was summoned again to be presented with the charges and his public defender pressed him to admit all allegations. Nine days later he was arrested again and detained in a pre-trial detention facility for 15 days and was sentenced. He does not remember anyone informing him of his rights or signing any documents related to his rights.<sup>178</sup>

Also in Slovenia one interviewee shared that after his arrest, he was kept in handcuffs for 7 hours.<sup>179</sup> Furthermore three interviewees reported that the police had beaten or slapped them.<sup>180</sup>

### 3.1.1.7 Privacy

#### Recommendation 15

*Competent authorities should take appropriate measures to protect the privacy, personal integrity and personal data of vulnerable persons, including medical data, throughout the criminal proceedings.*

Country	Police has access to medical data
Austria	
Bulgaria	
Czech Republic	
Lithuania	not directly, health institutions may provide medical data upon request
Slovenia	in exceptional cases





Research has shown that in practice it is often difficult to strike a balance between the protection of personal data and the necessity to have access to information on the suspect's disabilities to ensure adequate procedural safeguards. Although the data exchange between doctors, police and the judiciary appears often challenging, from a human rights point of view it is **positive that none of the five countries has a database on persons with intellectual and/or psychosocial disabilities**. Such a database would bear a high risk for stigmatisation.<sup>181</sup> This, however, does not mean that in some countries the police do not have access to medical data of the suspect.

In *Lithuania* the police do not have direct access to the medical data of the suspect but they, as well as other judicial institutions, can request health institutions to provide medical data of the person if there are suspicions and if the medical data of the suspect is essential for the investigation. Relevant data may be acquired also from any other sources, such as information from social workers, family, and so on.<sup>182</sup> Also in the *Czech Republic* there is an exchange of data with medical institutions.<sup>183</sup> In *Slovenia*, generally the police do not access the medical data of the suspect nor the data on possible guardianship of the suspect. Only if the medical data of the suspect is essential for the investigation, would the police have a valid reason to acquire it.<sup>184</sup> This information they will usually receive by collecting information from the suspect or persons close to him. The police may also acquire information from the competent social work centre.<sup>185</sup>

In *Austria* medical data gained during the police proceedings is protected in the way that the assessment of the police doctor, is put in a sealed envelope and handed over to the police officer who accompanies the beneficiary to the assessment by the specialised physician and hands over the envelope.<sup>186</sup>

The protection of personal data is a fundamental right protected under the Constitution. However, no specific rules to protect the privacy, personal integrity and data of persons with intellectual and/or psychosocial disabilities exist. The police are generally obliged to respect and protect human rights and fundamental freedoms and should be particularly considerate in treating victims and persons who need additional attention, assistance and care, such as children, minors, the elderly, persons with disabilities, pregnant women and victims of domestic abuse.<sup>187</sup>



Also *Bulgarian* criminal legislation does not provide any special provisions regarding privacy and confidentiality or the protection of personal data of persons with intellectual and/or psychosocial disabilities apart from the provisions in the Protection of Personal Data Act. The latter provide for special protection of personal health data which can be processed only for the purpose of protection of the life and the health of the person.<sup>188</sup> In practice the lack of regulations about confidentiality in criminal legislation means that the information about all detained and accused persons is freely available without restrictions to any investigative or judicial authorities for the purposes of the criminal proceedings.<sup>189</sup>

Information gathered by the police are usually conveyed to the judiciary.<sup>190</sup> However, in the *Czech Republic* and *Austria* **judges criticised that the information provided by police was often insufficient to reconstruct indications of potential disabilities or may simply differ from the reality they encounter.** A *Czech* judge noted for example: "Often I get the feeling reading the criminal files that the person is speaking like a book and then I see them and they are not able to speak in complete sentences."<sup>191</sup>

### 3.1.2 Prosecutor

In order to ensure the procedural safeguards set out in the Recommendation, it is of crucial importance that also the prosecutor is aware of the intellectual and/or psychosocial disabilities of the suspect as this might change the proceedings, e.g. the start of an investigation, pre-trial detention, and indictment. Prosecutors will need information and evidence in order to determine whether to charge or dismiss the criminal proceedings.

In the *Czech Republic* for example, the prosecution is interrupted if the accused suffers from mental illness which became evident after the commitment of the crime and which prevents him/her from understanding the content of the prosecution.<sup>192</sup> To stop the prosecution an expert must be invited in order to determine the medical state of the suspect. If the prosecutor gets the impression that the medical state of the suspect has changed, he/she may order a review of it and reopen the prosecution again.<sup>193</sup> In *Bulgaria*, prosecutors send out inquiries to various institutions (psychia-







tric hospitals, municipalities, prisons) in order to gather information on the mental status of the suspect.<sup>194</sup> In *Slovenia*, the state prosecutor's office has the authority to request the national authorities, local self-government authorities and other public authorities to transmit the relevant data, documents, files, objects or notifications that are required for the detection or prosecution of criminal acts.<sup>195</sup> The State Prosecutor's Office usually receives the information on the personal data (such as medical condition or guardianship) from the information gathered by the police and information that was submitted by the suspect himself.<sup>196</sup>

**None of the five countries provides specific trainings to prosecutors** on safeguards for persons with intellectual and/or psychosocial disabilities.

### 3.1.3 Investigative judge: pre-trial detention

#### 3.1.3.1 Right to information

Country	Information about accusation and procedural rights before questioning	Special format for providing information	Mandatory presence of an appropriate adult or legal representative during questioning by the investigative judge
Austria	✓	✗	only mandatory for guardian
Bulgaria	✓	✗	✗
Czech Republic	✓	✗	✗
Lithuania	✓	✗	legal representative
Slovenia	✓	✗	✗

In all five countries, when deciding on pre-trial detention, the investigative judge has to inform the accused persons about the charges and their procedural rights before starting the questioning. **None of the countries**





**provides a special format for informing persons with intellectual and/or psychosocial disabilities.** It is therefore up to the investigative judge to identify potential difficulties and to adjust the way of communication accordingly.

In *Slovenia* consulted stakeholders were sceptical regarding the effectiveness of a specific format prepared in advance for persons with intellectual and/or psychosocial disabilities due to the different types of disabilities. They noted that each individual defendant would have different needs in terms of accessible formats.<sup>197</sup> The investigative judge should ensure that the accused person has understood the information otherwise he/she has to adapt the language.<sup>198</sup> If the accused person is unable to understand or effectively participate the investigative judge may also appoint a defence counsel ex officio.<sup>199</sup>

**None of countries requires a mandatory presence of an appropriate adult during the questioning.**<sup>200</sup> However, there exist some regulations with regard to guardians. In *Austria*, a guardian who is entrusted with all matters of the suspect has the right to attend all questionings.<sup>201</sup> The court can access the files indicating that the suspect has a guardian.<sup>202</sup> Yet, in practice the representation by a guardian has also showed considerable gaps, in particular when this role is taken over by law firms who may not even be in personal contact with the client.<sup>203</sup> Also in the *Czech Republic*, the guardian of a suspect whose liability is restricted is allowed to act on his/her behalf and to be present during the proceedings. If the steps are in favor of the suspect, the guardian can perform these rights even against the will of the suspect.<sup>204</sup> In *Lithuania*, the involved prosecutors and judges may refuse to allow a legal representative to participate in the proceedings if this would be contrary to the interests of the suspect. In such a case, the pre-trial investigation officer, the prosecutor or the court must ensure that another representative is involved in the proceedings.<sup>205</sup>

**In all countries accused persons hold the right to notify their family or other appropriate adults in case of pre-trial detention.** They may either call these persons on their own or the authorities call them. In practice this right is not always respected. In *Bulgaria* for example, the 16 interviewees with intellectual and/or psychosocial disabilities reported that while being





in the pre-trial detention facility they were informed of their right to a lawyer, to medical assistance and to notify a third party. However, only 6 of the interviewees said their relatives were notified and that they received visitations. It is important to note that although the detainees (in pre-trial detention facilities) are provided a telephone (albeit a paid one) and they have the right to make a call, most of them did not exercise this right of a phone call either because they had no calling card or because they were not aware on how to exercise this right.<sup>206</sup>

### 3.1.3.2 Right of access to a lawyer

Country	General possibility to waive right to a lawyer during pre-trial proceedings	Mandatory defence for persons suffering of intellectual or psychosocial disability that hinders effective participation	Access to legal aid
Austria	✓	✓	✓
Bulgaria	✓	✓	✓
Czech Republic	✓	✓	✓
Lithuania	✓	✓	✓
Slovenia	✓	✓	✓

In *all five countries*, accused persons may in principle waive their right to a lawyer. Legal defence is only mandatory in case of offences with high punishments, proceedings involving pre-trial detention, preventive detention for the purpose of medical assessment or compulsory medical treatment. Furthermore it is mandatory if an accused person suffers from a psychosocial and/or intellectual disability that prevents him/her from effectively participating in a trial and representing himself/herself. In practice, this means that **a defence lawyer is only mandatory in case of a severe offence and a severe disability**. This leaves a broad range of persons aside who are accused of smaller offences and whose disabilities are



not identified or may not reach this high threshold, but who may nevertheless need support. There are no specialized lawyers who are primarily contacted in cases of persons with intellectual and/or psychosocial disabilities. None of the countries provide any training in terms of representing persons with intellectual and/or psychosocial disabilities.

If the person meets the financial and substantive criteria, legal aid in terms of legal representation in criminal proceedings can be awarded to him/her. Although no exact statistical data were available the interviews indicated that a broad range of accused persons with intellectual and/or psychosocial disabilities benefit from legal aid. Its quality is often highly questionable and the time for preparation and interaction with the accused person is frequently very limited.

In Austria accused persons with psychosocial disabilities must be represented by a defence lawyer in case they are subject to proceedings towards compulsory medical treatment.<sup>207</sup> The lawyer must be present for the entire proceedings (from the police questionings onwards) even without the consent of the accused person.<sup>208</sup> The lawyer can file requests to the benefit of the accused person, also against his/her will.<sup>209</sup>

In the Czech Republic legal defence is mandatory for persons who are accused of an offence that is punishable by deprivation of liberty for more than five years. Persons suffering of physical and/or mental disabilities must be represented by a defence lawyer from the first stage of the pre-trial proceeding onwards. Legal representation is mandatory as soon as there are doubts about the person's capacity to defend himself/herself.<sup>210</sup> The defense lawyer must be present during all investigating operations which may be later used as evidence.<sup>211</sup> Czech interviews with persons with intellectual and/or psychosocial disabilities revealed a high degree of dissatisfaction with the quality of the representation by the lawyer due to a lack of communication, preparation and skills for persons with disabilities from the part of the lawyers.<sup>212</sup>



**Case: Czech Republic**

*An interviewed prosecutor reported a case of an attorney who was totally unconcerned: “There was a hearing regarding pre-trial detention on Saturday, the attorney came, she said a few things and left. The person then was left there alone and we had to take care of him. So, having an attorney doesn’t always mean the person has proper support.”<sup>213</sup>*

In Bulgaria legal representation is mandatory in case the prosecutor has required an order for pre-trial detention or for a preventive detention for the purpose of medical assessment in a hospital which is considered a form of pre-trial detention under Bulgarian law.<sup>214</sup> Persons with physical or mental disabilities which impede them from legally defending themselves in criminal proceedings shall be appointed mandatory legal assistance.<sup>215</sup> If the intellectual and/or psychosocial disability has not been identified, the person may nevertheless need mandatory representation if he/she has committed a serious crime that makes the presence of a lawyer obligatory.<sup>216</sup> Out of the 16 interviewed persons 12 said that they had a lawyer while held in custody, but only 6 persons met with their lawyers in private during their pre-trial detention. Only 3 interviewees shared that they were satisfied with their lawyer’s services.<sup>217</sup>

In Lithuania legal defence is mandatory if the accused person is in pre-trial detention. It is equally mandatory for persons with physical and/or mental impairments, who cannot effectively participate in the trial.<sup>218</sup> In case of suspecting an accused person’s impairment the pre-trial judge needs to require a psychiatric expert opinion which provides the basis for granting public defence. Since the elaboration of the expert opinion takes time the public defender may only get involved at a later stage of the pre-trial proceedings and not represent the accused person since the beginning, except in cases of severe crimes and other cases, when his/her representation is mandatory. Interviewees with intellectual and/or psychosocial disabilities noted that it would be important to ensure participation of the lawyer and the legal representative from the very beginning of the process. Their absence was considered one of the main challenges. Thus, they should mandatorily follow the interrogation to avoid persons with intellectual disabilities being forced to give testimonies against themselves or to confess.<sup>219</sup>



In Slovenia legal defence is mandatory if there are reasons to believe that the person is not capable of defending himself/herself successfully due to an intellectual and/or psychosocial disability. In this case, the investigative judge may order an opinion of a court expert in the field of psychiatry to determine whether the conditions for mandatory defence exist.<sup>220</sup> If the accused does not have a private lawyer, the court appoints a defence counsel ex officio for the further course of the criminal proceedings. If the accused has been sentenced to thirty years in prison and is deaf, mute or otherwise incapable of successfully defending himself, the defence counsel may be appointed for the extraordinary judicial review as well.<sup>221</sup> Interviews conducted in Slovenia revealed that the effective exercise of the right to a lawyer, particularly in cases of mandatory defence, is often hindered by the insufficient time available for client-lawyer consultation. Many times, the lawyers have as little as 10 minutes to consult with the client which is a problem as such, but in cases of vulnerable clients with particular needs it is impossible to provide proper support and prepare the client for the hearing that follows.<sup>222</sup>

### Case: Slovenia

*An interviewee reported that before the detention hearing with the investigative judge, he could only talk to his (public defense) lawyer for a few minutes, on a bench in the hallway, in the presence of a police officer.<sup>223</sup>*

#### 3.1.3.3 Deprivation of liberty<sup>224</sup>

In *all five countries* deprivation of liberty should be guided by the principle of proportionality and applied only as a measure of last resort. However, this legal requirement does not always translate into practice. In Bulgaria, for example, all sixteen interviewees with intellectual and/or psychosocial disabilities were subject to pre-trial detention, regardless of the seriousness of the offences they were accused of.<sup>225</sup>

**None of the countries provides for sufficient specific accommodation facilities for persons with intellectual and/or psychosocial disabilities during pre-trial detention** in the general prisons. If the disability is identified and leads to the decision that the person is not criminally liable, the





Country	Adequate accommodation for persons with intellectual and/or psychosocial disabilities in pre-trial detention facilities
Austria	✗
Bulgaria	✗
Czech Republic	✗
Lithuania	✗
Slovenia	no information

courts may order preventive detention for the purpose of medical assessment and subsequently compulsory medical treatment and dismiss the regular criminal proceeding. It is important to note that the criminal law perspective focuses primarily on the potential danger an accused person may pose to the society and not on the individual needs when it comes to accommodating the person.

In Austria in case of a court order, the accused person is transferred to a prison, if necessary to the forensic ward of the prison.<sup>226</sup> Vienna's biggest prison has an integrated hospital to which persons with psychiatric impairments may be transferred. Yet, its capacities are very limited and it does not have the capacities for female detainees. If the intellectual and/or psychosocial disability is not identified, the person can be held in pre-trial detention- given that there is a reasonable assumption that the person has committed a crime and pre-trial detention is necessary and the last resort. If the disability is identified during pre-trial detention and it is likely that the proceeding will be towards compulsory medical treatment the person has to be transferred to an adequate forensic institution for preventive detention for the purpose of medical assessment. This accommodation is based on the Criminal Procedure Code. Four out of 13 interviewees with intellectual and/or psychosocial disabilities were taken in pre-trial detention which lasted between a few days and four months. Two persons were waiting for their trial in a psychiatric hospital.<sup>227</sup>

In Bulgaria the first instance court may issue an order for pre-trial detention for an indicted person who can be held criminally liable.<sup>228</sup> The deci-



sion to admit a person to a psychiatric hospital for the purpose of medical assessment for a duration of up to 30 days is considered an equal form of pre-trial detention under Bulgarian law.<sup>229</sup> An accused person can be admitted to a psychiatric hospital either during pre-trial proceedings on the request of the prosecutor, during trial proceedings on the request of the parties, or on the court's own motion. The court shall promptly pronounce a ruling in a public session wherein it hears the expert witness (a psychiatrist) and the person whose admittance is sought with this procedure. The participation of a prosecutor and a defense lawyer of the person with presumed mental disability is mandatory (see above).<sup>230</sup> Bulgarian legislation does not provide for alternatives to pre-trial detention in instances of persons with intellectual and/or psychosocial issues. Otherwise, the Criminal Procedure Code does provide for lighter measures in general cases such as home arrest, daily reporting to police, or posting bail. However, the research for this project did not find that any of these measures were used in reference to the interviewed persons with intellectual and/or psychosocial impairments.<sup>231</sup> All sixteen persons interviewed for this research had been subject to pre-trial detention, regardless of the seriousness of the offences they were accused of. Unfortunately, it is unclear from the interviewees whether or not a forensic evaluation of mental competence had been ordered for each of the persons and, if so, at what stage of the proceedings it took place. It is also not clear whether or not any of the persons had been preventively detained in a psychiatric hospital for the purpose of medical assessment. This fact indicates that the accused persons were not properly informed of the procedures that they were subjected to. Moreover, the very fact that the researchers found these persons serving their sentences in prisons leads to the conclusion that apparently all of these 16 persons had been considered in court as being mentally competent persons.

In the *Czech Republic* preventive detention for the purpose of medical assessments is limited to 2 months; it may upon request of medical experts or public prosecutors be once prolonged for another month.

In *Lithuania* detention conditions are not generally adapted for people with special needs, either physical or mental. All interviewed respondents acknowledged that the current detention conditions are very poor for all detainees. Although the situation is slowly changing, however, the neces-







sary conditions for ensuring the specific needs for persons with psychosocial and/or intellectual disabilities are not yet available. For a medical assessment whether they are able to stand a trial or for treatment persons may be referred to a forensic psychiatric institution by a decision of a pre-trial investigative judge. Referring a person to preventive detention for the purpose of medical assessment is permissible only if there is sufficient evidence to show that this particular person has committed a criminal offense for which the investigation is being conducted. There is a separate chapter within the Criminal Procedure Code (CPC), establishing the procedure for applying compulsory medical treatment which is applied by the court to persons who are declared as legally incompetent.<sup>232</sup>

The *Slovenian* Criminal Procedure Act (CPA) provides for several measures which may be used to ensure the presence of the accused, to prevent re-offending and to ensure successful conduct of the criminal proceedings. They include summons, compulsory appearance or a promise by the accused not to leave his residence, prohibition on approaching a specific place or person, attendance at a police station, bail, house arrest and detention.<sup>233</sup> There are no rules or guidelines on using alternatives to detention in cases of persons with intellectual and/or psychosocial disabilities. If the judge orders detention, persons with psychosocial disabilities are usually placed in the Forensic Hospital that implements the detention and at the same time provides the necessary psychiatric treatment.<sup>234</sup>

#### 3.1.3.4 Right to medical assistance

The research has shown substantial shortcomings with regard to medical assistance for detainees with intellectual and/or psychosocial disabilities during pre-trial detention. **All five countries have insufficient capacities for accommodating them in prisons.**

In *Austria*, persons with intellectual and/or psychosocial disabilities frequently have to cope with insufficient psychiatric and psychological assistance during pre-trial detention.<sup>235</sup> Medical assistance in prisons is primarily provided by public medical service doctors (general doctors), who are usually lacking expertise on intellectual and/or psychosocial disabilities. According to the Detention Law Code general doctors are

Country	Medical care in pre-trial detention facilities	Psychiatric/psychological care in prisons
Austria	general practitioners	experts are involved if necessary
Bulgaria	paramedic, general practitioner	psychiatrists work on hourly contracts and are consulted if necessary, psychologists are employed full time
Czech Republic	general practitioners	experts are involved if necessary
Lithuania	general practitioners	permanent or visiting psychiatrists, permanent psychologists
Slovenia	first examination by doctor, infirmary	consultation hours, no permanent psychiatrist

supposed to ask for specialist's support when needed.<sup>236</sup> In smaller prisons general doctors hold at least weekly consultation hours. The frequency of psychiatric and psychological consultation hours varies from prison to prison. Larger prisons have established health departments for sick inmates, some of which are listed as hospitals in the legal sense. Only in large or special institutions, psychologists have fixed consultation hours. Inmates should be examined by the psychological service on admission. Risk prognoses are compiled and the motivation for the therapy is recorded and promoted. Psychological expertise is also obtained as part of the assessment of inmates and self-endangerment of inmates.<sup>237</sup> The capacities of health departments in Austrian prisons are generally very limited. Vienna's major prison (*Justizanstalt Josefstadt*) for example does not have the capacities for female detainees. Many accused persons with disabilities (male and female), in particular also with intellectual disabilities, may therefore pass their pre-trial detention in ordinary prisons without receiving adequate medical treatment.<sup>238</sup>



### Cases: Austria

*An NGO representative reported of a case in which an inadequate psychiatric treatment during pre-trial detention severely deteriorated the psychiatric state of the client. The caretaking organisations and the guardian were only informed two weeks after the effectuation of the pre-trial detention and could only then organise adequate medical care.<sup>239</sup>*

*One interviewee explained that he didn't get any drugs during pre-trial detention even though he would have needed them every day. He also didn't see a doctor and nobody was interested in him taking his medicine.<sup>240</sup>*

*Another interviewee had to stay in pre-trial detention in a six bed cell for more than two months. He got examined by a doctor on his first day there. He himself thought that he should be in a hospital instead of being in pre-trial detention, since he got a depot syringe every week. His caregivers and his guardian got the information about him being in pre-trial detention after one month.<sup>241</sup>*

In Bulgaria medical assistance in pre-trial detention is provided by a medical professional working at the place of detention.<sup>242</sup> There is no special regime in place to ensure the regular provision of medical care to persons with intellectual and/or psychosocial disabilities during the pre-trial proceedings. There exist 33 pre-trial detention facilities in Bulgaria out of which 6 are located in prisons, the rest are separate establishments. In two of them there is no medical professional, only in some of them the medical professional is a medical doctor, in the rest medical assistance is provided by a paramedic.<sup>243</sup> In cases when medical assistance cannot be provided in the pre-trial facility the detainee is treated in a civil hospital where he/she might be consulted by a psychiatrist or psychologist. The overall quality of medical assistance in prisons has become a growing problem over the years. The reasons are a lack of funding and a lack of sufficient medical staff.<sup>244</sup> The hospital treatment of detainees with mental disabilities is performed in medical centres at the prisons or in one specialised prison hospital in the city of Lovech (it is the only such hospital for all detainees in pre-trial detention and prisoners with mental disabilities). 15 out of the 16



interviewees were provided medical assistance while being in pre-trial detention. 8 of them were prescribed therapy, while 4 of them were admitted for compulsory medical treatment at the psychiatric hospital in the city of Lovech. Unfortunately, all 4 persons with intellectual and/or psychosocial disabilities who had experienced compulsory medical treatment reported that it was very unpleasant and were reluctant to recount details about it. At the time of the interview 5 out of the 16 interviewees knew that they were undergoing therapy but did not know any details about it. 6 persons were not undergoing therapy and only 5 knew the names of their medications.

### **Cases: Bulgaria**

*One interviewee reported, that he underwent compulsory medical treatment in a prison psychiatric hospital where he was not given any medicines for a week although he asked for some to be able to sleep or to relief at least his toothache. He described this condition as deep depression and explains that it took him a long time to recover from this depression afterwards.<sup>245</sup>*

*Another interviewee was temporarily placed in the prison psychiatric hospital. She noted that she found the place 'horrible'. Violence there was very high. She was not beaten but witnessed violence towards other people so often that she wanted to commit suicide. She did not want to return there ever again.*

In the *Czech Republic* prison doctors working at the medical centers are regular doctors. In case there is a need to examine the medical state of the suspect, an expert from the field of psychiatry is taken in. However, there exist only two hospitals in prisons; health care is mostly ambulatory.<sup>246</sup>

### **Case: Czech Republic**

*An interviewee with a psychosocial disability was put into pre-trial detention and spent a year alone in custody. During the year he spent in prison, the man has not been in contact with his psychiatrist, and the psychiatrist from the prison was giving him inappropriate medication.<sup>247</sup>*





In Lithuania, there exists no prison with an integrated hospital. Yet there is one separate institution, the Central Prison Hospital that serves the entire penitentiary system. It is a state institution for the arrest and detention of prisoners that functions as a health care and pre-trial detention facility and provides health care for arrested and convicted persons. The purpose of this facility is to provide primary and secondary level outpatient and secondary level health care services to detainees and prisoners.<sup>248</sup> The hospital has a special psychiatric unit.

### Cases: Lithuania

*One interviewee reported that he was forced to use medication despite the bad side effects that weakened him. When he tried to refuse this medicine, violence was used against him and the medications were injected while his hands were bound and he was placed against the wall: "They told me to drink. I drank but later on spitted out into the sink. And after that, they even tied up my hands as I was resisting. Then they started to violently inject the medicine." <sup>249</sup>*

*Another interviewee told the prison authorities that she is using medication, although the officials did not ask about this. She was not allowed to take the medication despite the fact that she had mentioned her needs: "Yes, I felt very bad there, I had a nervous attack, I was trembling all over, they took away all medication." <sup>250</sup>*

*A third interviewee lived in a social care home and was using anti-epileptic drugs. After detention he did not receive medicines for several days, although he had been constantly consuming them before. "The epilepsy drugs were brought by my sister only after several days." <sup>251</sup>*

*A fourth dependent detainee sought medical advice. The doctor came but refused help: "Yes, I was using drugs at that time, and then the medicine from abstinence is needed. I knew that they would not give me them, and thus did not ask." <sup>252</sup>*

In Slovenia all persons placed in pre-trial detention are examined by a doctor within 48 hours of being brought to the detention facility.<sup>253</sup> Health care



is provided by the detention facility's infirmary.<sup>254</sup> If medical treatment in another health care institution is necessary, such treatment is ordered by the competent court upon the proposal of a detention facility's doctor. In such case the director of the detention facility must immediately inform a close relative or another person previously appointed by the detainee. With the permission of the competent court, a detained person, at his/her costs, may also be examined by a doctor of his/her choosing.<sup>255</sup> In terms of accommodation standards, the authorities are obliged to treat detained persons in a humane manner and their physical and mental health must be protected.<sup>256</sup> The detention facility keeps record of the general health condition of the detained person. When placing the detainee into the accommodation space of the detention facility, the personality and health condition of the detainee must be taken into consideration.<sup>257</sup>

In practice complaints concerning accommodation conditions, health care and the way the detained persons are treated by the detention facilities' personnel are numerous.<sup>258</sup> The Slovenian Human Rights Ombudsman has frequently underlined the importance of psychiatric examinations and mental health assessments of detainees in terms of possible risk of suicide, as persons at risk are in need of constant psychiatric treatment and regular attention of a psychologist. The Ombudsman has handled cases where accommodation of detainees was inappropriate and did not provide for sufficient supervision of persons at risk of suicide, relying mostly on the supervision of other detainees. Detention facilities and prisons in general are overpopulated and adequate accommodation standards are not provided to persons with psychosocial and/or intellectual disabilities. Psychiatrists are not present in detention facilities every day and consequently the queues are long and detainees need to wait for treatment for a very long time.<sup>259</sup>

### **Case: Slovenia**

*One interviewee reported that doctors kept changing during pre-trial detention. At the end there was a female doctor from Ukraine who did not even speak Slovenian well: "You wrote on a piece of paper, what you need, and she gave it to you."<sup>260</sup>*





### 3.1.3.5 Recording of hearings

Country	Mandatory use of audiovisual recording	Recording in case of intellectual and/or psychosocial disabilities
Austria	✗	✗
Bulgaria	✗	✗
Czech Republic	✓	✗
Lithuania	✗	✗
Slovenia	✗	✗

Research has shown that during pre-trial proceedings, courts use audio-visual recordings more frequently than during interrogations at police stations. Nevertheless except from the Czech Republic **none of the countries requires mandatory audio visual recording of all interrogations**, neither in case of accused persons with intellectual and/or psychosocial impairments. In four out of five countries the decision on recording remains at the discretion of the judge or needs to be requested by the defendant. Only in the Czech Republic are the courts obliged to have audio-recordings during the hearing. However, this does not apply if the hearing is done outside of the court or a recording is not possible due to technical problems or lack of capacities.<sup>261</sup>

In Austria the law allows for audio-visual recording when a person cannot be brought to the pre-trial detention trial due to health problems.<sup>262</sup> The same holds also true for proceedings on compulsory medical treatment in case that a person is not able to take part in the court hearing due to his/her health conditions. Also in Bulgaria the interrogations may be video- or audio-recorded upon a request by the interrogated persons or through a motion made by the pre-trial authorities.<sup>263</sup> The interrogations are only



recorded into a written protocol which is an obligatory rule.<sup>264</sup> The judge might decide to allow audio- and video recordings.<sup>265</sup> Similarly, according to *Lithuanian* law written protocols should be provided for all the investigation activities.<sup>266</sup> In practice it seems that the questionings of suspected and accused persons are hardly ever audio-visually recorded during the criminal investigation. All interviewed experts recognized that during the pre-trial proceedings questionings of persons with intellectual and/or psychosocial disabilities were not audio-visually recorded. Also in *Slovenia* the investigating judge may order that the interrogation is recorded by an audio or video recording device.<sup>267</sup> However, there are no guidelines on mandatory recording of questioning of vulnerable suspects. Although the recording is quite common, the decision remains in the discretion of each investigating judge.<sup>268</sup>

### 3.1.3.6 Privacy

Country	Court access to medical data	Registry	Court access to decision on appointment of guardian
Austria	✓ upon request	✗	✓
Bulgaria	✓ upon request	✗	✓ upon request
Czech Republic	✓	✓	✓
Lithuania	✓	✓	✓
Slovenia	✓ upon request	no information	✓

**In all countries, the judicial authorities have access to medical data.** In *Austria* all judicial authorities can access upon request personal data of the suspects. Yet, due to the strict regulations on data protection judges







may at times face difficulties in getting information about medical data or the existence of a guardian. As there is no automatic notification for the authorities on whether a suspect is under guardianship, this often leads to delays in notifying the guardian.<sup>269</sup> Also in *Bulgaria*, there is no database for persons under guardianship or with mental disabilities. The judge might request the mayor of the municipality (as the body of guardianship issues) of permanent residence of the defendant with mental disability to provide information about the suspect's guardianship status. In the *Czech Republic* there is a database on the persons whose liability has been restricted and the court has access to that database.<sup>270</sup>

In *Lithuania* the court may request any information including medical data from any institution needed for investigating the case. As in the Czech Republic, there is a registry of persons declared as legally incapable or with restricted legal capacity<sup>271</sup> which includes all persons' legal capacity status and information on a guardian. It is accessible to all judicial institutions.

In *Slovenia* all personal data controllers must submit upon the request of the criminal court the personal data from the filing system - even without a personal consent of the individual.<sup>272</sup> The investigative judge therefore does have the possibility to access personal data of the suspect (e.g. medical data) but has to keep them confidential. If there are grounds to believe that the impairment of the suspect might prevent effective participation of the suspect in the proceedings, they will engage a court expert qualified to appropriately interpret medical data.<sup>273</sup> To determine personal circumstances of the suspect, the court can also rely on the competency of social work centres that can also provide information on possible guardianships.



## 4 SAFEGUARDS DURING THE TRIAL PHASE (HEARINGS, JUDGEMENT)

### 4.1. Right to information

Country	Information on the procedural rights provided
Austria	✓ by the judge
Bulgaria	✓ by the judge
Czech Republic	✓ by the attorney
Lithuania	✓ by the judge
Slovenia	✓ by the judge

In four out of five countries information on procedural rights is provided by the judge in the main trial. In the Czech Republic on the contrary courts rely on the accused person's attorneys for providing information. If the attorneys are not trained to work with persons with intellectual and/or psychosocial disabilities this may fall short. Some civil society organisations may provide interpretation and support for the accused person, however their position in criminal proceedings is not in any way regulated. Also in the other countries, there are **no special formats** to ensure that the information given by the judge is understood by persons with intellectual and/or psychosocial disabilities. It is up to the court to communicate in an understandable way. **Interviews in all countries showed that most interviewees struggled to understand the fast and highly technical legal language.** They could usually not follow (even the social workers had difficulties) and understand the proceedings so that they could not make informed decisions.

In Austria before the trial the accused person needs to be informed about his/her rights.<sup>275</sup> However, the main trial does not put much focus on the way the accused person is informed since he/she should already have been instructed about his/her rights during the investigation proceedings.





He/she is asked if he/she knows about his/her rights and understands the accusations. In cases that are held before lower regional courts where the defendant does not have to be represented by a lawyer, the judge has to “lead” the accused person in his/her best interest and make sure that everything is understood. For persons for whom a guardian has been appointed, the latter may at least appoint a lawyer if informed about the trial. According to the current legal situation, a guardian (except he/she is a lawyer) does not have representation rights in a criminal proceeding.

In *Bulgaria* the court has the obligation to inform the accused person of his/her right to legal aid and of the procedural rights during the course of the proceedings. There are no special rules or materials that are designed to specify the manner, time, environment, the amount of information and the person who should provide the information to a defendant with intellectual and/or psychosocial disabilities or to his/her relatives or legal representatives. The interviewees shared that they understood the questions by the court and responded on their own free will. However, when asked about who gave them information and in what manner it was presented, the interviewees were not able to answer.<sup>276</sup>

Also in *Slovenia* there are no special formats for informing accused persons with intellectual and/or psychosocial disabilities. After reading the information about the procedural rights, the judge asks the defendant if he/she understood the instruction. If the defendant does not understand, the judge will further explain in plain language until the defendant understands the content of the information.<sup>277</sup> The judge will therefore adapt to each individual situation.

#### 4.2. Right to access to a lawyer

**None of the five countries provides for safeguards to ensure consistent representation by a lawyer for persons with intellectual and/or psychosocial disabilities.** All countries require mandatory defence if the defendant is not capable to defend/himself/herself due to his/her physical or mental disabilities or in procedures towards compulsory medical treatment. However, huge protection gaps arise for those persons whose disabilities do not meet this threshold, who are not subjected to compulsory medical

measures and who have committed less severe offences. Gaps exist also as regards persons with intellectual disabilities. All these persons may frequently have no legal defence.

Country	Mandatory representation of a lawyer for persons with disabilities	Costs are covered by the state (e.g. public defense, legal aid)
Austria	proceedings aimed at compulsory medical commitment, when the accused is in detention, person cannot defend himself/herself	✓
Bulgaria	compulsory medical treatment or preventive detention for medical assessment, person cannot defend himself/herself	✓
Czech Republic	person cannot defend himself/herself	✓
Lithuania	person cannot defend himself/herself	✓
Slovenia	person cannot defend himself/herself	✓

Research has shown that, many of the interviewed persons were appointed a public defender. **In all countries there exist substantial shortcomings in the quality of public defense.** Public defenders tend to have no specialisation, especially not in dealing with persons with intellectual and/or psychosocial disabilities, short time for preparation, and low remuneration. Accused persons usually cannot choose their own defender. Interviewees reported a lack of communication with the lawyer and a lack of time for the preparation.

In Austria when the proceedings are not aimed at compulsory medical measures or when the crime is sanctioned with less than 3 years of imprisonment and the accused is not detained<sup>278</sup> he/she may represent himself/herself.<sup>279</sup> It is therefore possible for a person with intellectual and/or psychosocial disabilities – even if he or she is under guardianship – to be subject to a preliminary or criminal procedure without the support of a defence lawyer or even the knowledge of the guardian. An attorney can be appointed as a public defender in case of mandatory defense. If the



person is unable to cover the costs of the lawyer, the costs are taken over by the state budget (legal aid). Further, accused persons may file a request for **legal aid** also in cases where no mandatory legal defence exists if they are blind, deaf or "in some way impaired."<sup>280</sup> However, in practice chances are high that the legal aid defender has no criminal law background and cannot adequately defend the suspect.<sup>281</sup>

### Case: Austria

*One beneficiary claimed that he didn't get to talk to his lawyer for more than 10 minutes right before the trial started. He noted that the lawyer was very stressed out as if it would be the only thing that matters to have talked at least once with the beneficiary. Therefore he didn't feel well prepared for the trial.*<sup>282</sup>

In Bulgaria the law obliges the court to appoint a lawyer in case the defendant is not able to defend him/herself due to his/her disability. Public defenders are not specialised in working with persons with intellectual and/or psychosocial disabilities. The court is not obliged to seek the guardian of the defendant and to let him/her be present during the court proceedings. Beneficiaries complained about the lack of commitment by their lawyers regarding the communication. None of the 13 beneficiaries with public defenders mentioned appeal procedures or any attempt for protection of their rights done by their lawyers. Only 3 of the 16 interviewees reported satisfaction with their lawyers.

### Case: Bulgaria

*One interviewee said that he had no chance to speak with the lawyer before the trial. During the whole proceeding the lawyer has not discussed the case with his client but pushed him to confess every allegation raised by the prosecutor.*<sup>283</sup>

Also in the Czech Republic an accused person may represent himself/herself. However, if the court assumes that the accused person is not capable to defend himself/herself, legal defence is mandatory.<sup>284</sup> The public defender is appointed according to a list provided by the Czech legal



chamber. Legal aid may be granted upon request of the suspect. Research showed a general dissatisfaction with the quality of legal aid. The shortcoming that was mentioned the most during the interviews was the insufficient preparation of the public defenders to communicate with persons with intellectual and/or psychosocial disabilities.<sup>285</sup>

### **Case: Czech Republic**

*“We had an experience with an attorney office. They were still thinking that a person with mental disability cannot make a decision, he has no rights and therefore they did not ask our client about his opinion. We do not want to work with such lawyers.”<sup>289</sup>*

In Slovenia defence is also mandatory if the accused is deaf, mute or otherwise incapable of defending himself successfully. If there are reasons to believe that the person is not capable of defending himself successfully due to intellectual and/or psychosocial disabilities, the investigating judge may order an opinion of a court expert in the field of psychiatry to determine whether conditions for mandatory defense exist. Only in procedures for safety measures against persons that are not criminally liable, the CPA (Art 492) demands that the defendant's guardian is informed about the main hearing. Presence of a guardian during the trial phase is therefore mostly unregulated, but not excluded. In case of mandatory defense the president of the court will appoint a defense counsel ex officio. If there are no grounds for mandatory defense the accused may apply for legal aid with the Legal Aid Service. There are no lists of specialized lawyers who are primarily contacted in cases of persons with intellectual and/or psychosocial disabilities. The lawyers do not receive any training in terms of specifics of representing vulnerable persons and their specific needs.

Many Slovenian interviewees felt that their public defender did not show much will to do anything:

### **Case: Slovenia**

*One interviewee noted that with his diagnosis, he would need more support in a form of a lawyer who would show more effort. He has only*





*seen his lawyer twice (once before hearing and once in court). Before the hearing, the lawyer asked him about his personal information and told him about the expected sentence. He said that she was not helpful, that he then studied some of the legislation and wrote some appeals on his own.*<sup>286</sup>

Also in *Lithuania* interviewed representatives of professional stakeholders reported that they had witnessed a lack of knowledge and competence of public defenders when representing suspects with intellectual and/or psychosocial disabilities. They were mostly lawyers in their first years of legal practice with little or no practical experience. They were notified only 1-2 hours before the court hearing and were often requested to appear for specific procedural acts. Usually they had very little time to prepare the defence and to read the case file; sometimes they got to see the file only 5 minutes before the hearing. They often met the defendant for the first time during the court hearing and had only a few minutes to talk to him/her. The remuneration of public defenders is low.<sup>287</sup> Most of the interviewed persons with intellectual and/or psychosocial disabilities benefited of legal aid. There exist no specialized legal aid lawyers for persons with intellectual and/or psychosocial disabilities.<sup>288</sup>

**This research has revealed substantial weaknesses in the quality of legal representation, in particular when it is done through public defenders and/or on the basis of legal aid.**

#### **4.3. Right to medical assistance**

**All five countries provide for the presence of medical experts in proceedings directed towards compulsory medical treatment. In “ordinary” criminal proceedings the presence of medical experts is not consistently ensured.**

In *Austria*, to participate in a trial the accused person needs to be physically and psychologically able to negotiate, at all time (fitness to stand trial). If the condition of the accused is restricted due to health problems, a doctor can be present during the trial. If however, there are doubts about the capacity to participate in the trial, the court hearing cannot be held or must



be postponed until the condition of the defendant allows his/her presence.<sup>291</sup> If the condition of the person concerned does not allow participation in the main proceedings within a reasonable period of time or if such an involvement would entail a significant risk to his/her health, the main hearing shall be conducted in the absence of the person concerned. If all or part of the questioning of the person concerned is omitted, but he/she was interrogated in the preliminary proceedings, the recorded protocol or the sound or image recording of such a hearing must be presented.<sup>292</sup>

In *Bulgaria* in case of proceedings directed at compulsory medical treatment the presence of a medical expert and the defence lawyer is mandatory. Parents/guardians and the victim are also summoned for the court hearing.<sup>293</sup> The defendant should be present unless his/her health condition does not allow this presence.<sup>294</sup> In criminal proceedings where no compulsory medical treatment is discussed, no safeguards exist apart from the mandatory participation of a defence lawyer of the person with an intellectual and/or psychosocial disability.

In the *Czech Republic*, to participate in a trial, the accused needs to be aware of the content of the proceeding. If the condition of the accused is restricted due to health problems, the trial may be held in the detention premises.<sup>295</sup> This is only possible if the accused is capable to undergo interrogation. If the health conditions are not good, the trial may be postponed.<sup>296</sup> The prosecution and the trial can be also interrupted in case the health state of the accused is so bad that he/she is not capable to stand the trial. The prosecution is commenced again, once the medical state of the accused has improved.<sup>297</sup>

In *Slovenia* the rules concerning the right to medical assistance in the trial phase are identical to the ones in the pre-trial phase before the investigating judge. In case of proceedings for imposing compulsory medical treatment, psychiatrists from the institution to which the examination of mental capacity of the defendant was entrusted are summoned as experts. The defendant is summoned if his/her condition permits his/her attendance at the trial otherwise the trial takes place without his/her presence.<sup>298</sup>







The same applies for *Lithuania*. No specific or additional safeguards could be reported from these two countries.

#### 4.4. Recording of questioning

In four out of five countries the audio-visual recording of the main trial is not mandatory but can be practised upon the decision of the judge. In the *Czech Republic*, audio-visual recording is mandatory, unless the foreman of the court senate does command otherwise. He can only do so for serious reasons.<sup>299</sup>

#### 4.5. Privacy

Country	Public can be excluded from court hearings
Austria	✓
Bulgaria	✓ only in cases of compulsory medical treatment it is closed
Czech Republic	✓
Lithuania	✓
Slovenia	✓

In all countries the court hearings are in general public and the public can be excluded only in specific cases, e.g. for the protection of privacy of the suspect. In *Bulgaria*, a closed doors hearing might be performed when there is a risk of spreading delicate facts of the defendant.<sup>300</sup> Also *Slovenia* provides for a possibility to exclude the public from the main hearing to protect the privacy, personal integrity and personal data of defendants with psychosocial and/or intellectual disabilities.<sup>301</sup> However, it seems that this possibility is not used often in cases of defendants with intellectual and/or psychosocial disabilities- not even for the hearing of the court expert when providing the expert opinion concerning the mental state of the defendant.<sup>302</sup>



#### 4.6. Communication of the judgement

Country	Manner in which the judgement is presented	Written Judgement
Austria	orally	✓
Bulgaria	orally	✓
Czech Republic	orally	✓
Lithuania	orally	✓
Slovenia	orally	✓

In all countries the final judgement is communicated orally in the courtroom. The judge has to explain the findings and conclusions from the trial, the way the sentence was measured and the possibility to file an appeal. Subsequently, the judgement is issued in writing. In Austria and the Czech Republic, if both parties of the dispute agree on not needing the judgement to be explained and give up the right to appeal, the court may issue a simplified judgement without the reasoning.<sup>303</sup>

**In all countries interviewees struggled to understand the judgement. They were not communicated in a way that the accused persons understood the meaning or the reasoning behind it.** However, the right to effectively participate implicates that all involved parties must use a language that is understandable by the accused person, so that he/she can understand the procedural actions and take informed decisions in the proceeding.

In Austria the accused person is asked if he/she understood the orally communicated judgement and its consequences. The quality of this explanation lies in the hands of the judge in charge and the (legal aid) defence attorney. There are no guidelines to check or any other assessments to





ensure whether or not the accused person understood the consequences of the judgement. The decision on compulsory medical treatment forms part of the sentence.<sup>304</sup> In every case the judge has to consider extenuating and aggravating circumstances in the sentencing. Thus certain intellectual and/or psychosocial disabilities may be of influence. Interviews revealed that five out of 15 beneficiaries did not understand the meaning of the verdict and the consequences of compulsory medical measures. It was not explained to them by the judges; they were only grasping the meaning afterwards by explanations from their lawyers, social workers, doctors or other staff working in forensic units. One interviewee was not aware of the consequences of the judgement and needed the lawyer to explain. Another interviewee could not follow the judge's explanations, but felt too ashamed to ask for explanation.<sup>305</sup>

Also in *Bulgaria* judgements were not communicated in a manner understandable to the accused persons. The interviewees complained that they did not understand "anything"<sup>306</sup>, or at least not the consequences of the proceedings and the judgement. In *Slovenia* interviewees hardly understood the questions they were asked. They also had the feeling of pressure when answering or were cut off and asked to answer quickly and shortly.<sup>307</sup> Also in *Lithuania*, the interviews showed that the accused persons did often not understand the trial nor the judgement.



## 5. REMEDIES

Country	Ordinary legal remedies	Available remedies if procedural rights are violated	Impact of disability on the judgement	Complaint against the expert opinion
Austria	appeal/nullity complaint	claim (against the police); objection (against the prosecutor)	mitigating circumstance; if criminal liability is excluded, only a safety measure can be imposed	dismissal due to lack of expertise or partiality upon request of the suspect; second expert opinion
Bulgaria	appeal/nullity complaint	claim (against the police); objection (against the prosecutor)	mitigating circumstance; if criminal liability is excluded, only a safety measure can be imposed	only second expert opinion
Czech Republic	appeal, complaint, protest	complaint – against any decision of the police, court or the prosecutor	mitigating circumstance; if criminal liability is excluded, only a safety measure can be imposed	objection by defendant due to partiality, lack of expertise, questions raised; second expert opinion
Lithuania	complaint; appeal	appeal, complaint against any decision of the police, court or the prosecutor request for dismissal	mitigating circumstance; if criminal liability is excluded, only a safety measure can be imposed	dismissal due to lack of expertise or partiality upon request of the suspect; second expert opinion
Slovenia	appeal/nullity complaint	claim (against police) appeal	mitigating circumstance; if criminal liability is excluded, only a safety measure can be imposed	appeal; second expert opinion





As shown throughout the comparative report, procedural safeguards for persons with psychosocial and/or intellectual disabilities as set out in the Recommendation are not always fulfilled. Any rights provided by the national criminal codes are effective if the person concerned cannot claim his or her rights adequately. Thus, effective remedies play a crucial role in ensuring the respect of procedural safeguards. For persons with intellectual and/or psychosocial disabilities it is of particular relevance to have also a possibility to object to the medical expert assessment which usually has substantial impact on the judgement. The following outlines the possibilities to complain against procedural rights violations in the pre-trial and trial phase as well as against the medical assessment.

### Violations of procedural rights during the pre-trial phase:

In Austria claims against violations of procedural rights by the police in the investigation phase have to be filed with the first instance court. Depending on the severity, they can serve as ground for nullity or appeal if the evidence obtained is used in the judgement. Yet, according to the jurisdiction of the Austrian Supreme Court, the violation of the right to inform the suspect does not entail nullity of the judgement. It follows therefore that evidence (e.g. police protocols) which was gained without properly informing the accused about his/her rights may be used in the proceedings.<sup>308</sup>

#### Case: Austria

*In the adjudicated case the Supreme Court refused to accept the nullity of a police questioning protocol of a defendant whose severe intellectual disability was also attested by an expert opinion. The argument that he was not informed about his rights in a simple and accessible language taking into account his disabilities and that he could not understand the legal instructions being read to him and that he was furthermore not represented by a lawyer was rejected. The first instance court had used the police protocol, although the unlawfulness was claimed in the trial, with the argument that the accused had signed the police protocol confirming that he had understood the content and that there were no contrary indications.<sup>309</sup>*



Also Bulgarian legislation sanctions the failure to respect procedural rights in the investigation phase. However, the law does not contain any provisions mandating the use of understandable wording, support by a person of trust, medical assistance and other kinds of support to persons with intellectual and/or psychosocial disabilities during police proceedings. Therefore, the failure to provide any of the mentioned safeguards is not considered a violation of the law that renders the interrogation unlawful. The information obtained during initial interrogations at the police may still be used during criminal proceedings as evidence by using the testimony of a police officer as a witness who was present at the “off the record” interrogations. The law requires mandatory legal assistance only for persons who are not able to defend themselves due to physical or psychosocial disabilities and only after indictment. Failing to provide a lawyer and to require a mental capacity evaluation in case of potential disabilities constitutes grave procedural violations which can serve as a foundation for appealing subsequent court decisions and judgements that are based on proof of guilt of the indicted person. Also in the event that the vulnerability was not taken into consideration during the arrest or pre-trial detention of the person, his/her attorney can file a request that the restraint measure be replaced with a lighter measure and/or a request to do a forensic evaluation of the person’s mental capacity and competence to stand trial. The situation is similar both in Lithuania and the Czech Republic. Whereas in Slovenia, a stronger protection of the procedural safeguards seems to be in place:



### PROMISING EXAMPLE: SLOVENIA

*The record of the police questioning may be used as evidence in further proceedings only if it was conducted in the presence of the suspect’s lawyer.<sup>310</sup> If the suspect has not been informed of his rights<sup>311</sup>, or the instruction and the statement of the suspect in respect of his right to a lawyer have not been noted down in the record, or the suspect was interrogated without a lawyer being present the court may not base its decision on the statement of the suspect.*





### Violation of procedural rights during the trial phase:

In *all countries*, if the procedural rights are violated in the trial phase, the sentence can be appealed or an appeal for nullity can be filed - depending on the gravity of the procedural error. In *Austria*, for example, this is the case if the vulnerability of the defendant is not taken into account and effective participation is not granted or the defendant was not represented by a lawyer in case of the mandatory defence. Also in *Bulgaria*, a failure to take intellectual and/or psychosocial disabilities into account during the trial proceedings may serve as grounds for vacating a judgement.<sup>312</sup> Incorrect judgements or considerable procedural violations that compromise the rights of the defendant may serve as grounds for appeal. If the court reached the decision without taking into account the defendant's vulnerability and if the defendant's disability is such that it prevents him/her from meaningfully participating in criminal proceedings, then this fact constitutes a substantial procedural violation; if the defendant's impairment is such that he/she may not be considered legally responsible, then a judgement reached under such circumstances is considered to be incorrect (i.e. ground for vacating a judgement).

In *Slovenia*, a judgement may be challenged if there was a substantial violation of provisions of the criminal procedure. Among others, substantial violations exist, where the judgement rests on evidence obtained in violation of constitutionally granted human rights and basic freedoms - e.g. if the defendant was not properly informed of his rights before giving a statement.<sup>313</sup> Substantial violations of provisions of the criminal procedure can also exist if the court omitted to apply a provision of the CPA or applied it incorrectly, or if the court in the course of the main hearing violated the rights of the defence (e.g. if there were grounds for mandatory defence and the defendant was not represented by a lawyer), but only if such conduct influenced or might have influenced the legality and regularity of the judgement.<sup>314</sup>



**In all countries, remedies are available against decisions on compulsory medical treatment.** Furthermore accused persons may file extraordinary remedies, e.g. to the Supreme Courts and obtain compensation for damages.

### **Remedies against the expert assessment<sup>315</sup>:**

**In all five countries accused persons may reject an expert due to partiality and a lack of expertise.** Furthermore an expert opinion can only be challenged by another expert opinion. The contradictions have still to be evident and the court needs to not or only very poorly have dissolved these differences in the judgement. In practice it remains difficult to challenge an expert opinion.

In Austria, in the investigative phase the suspect can claim that the expert should be dismissed due to partiality or lack of expert knowledge.<sup>316</sup> Similarly, in the Czech Republic the defendant may object to the qualification or the lack of impartiality of the expert<sup>317</sup> or to the questions raised.<sup>318</sup> Objections are mostly submitted when an expert is appointed, meaning before the elaboration of the expert opinion. However, they can be submitted throughout the whole trial. The authorities may decide to replace the expert, to change the questions or to reject the objections.<sup>319</sup> There is any remedy against the decision about objections. In Bulgaria, in the event that the parties disagree with the findings either of the parties involved may request a second or an additional expert opinion. However, the authority receiving the request is under no obligation to grant the request for a subsequent expert assessment.<sup>320</sup>







## *Part II:*

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# **Criteria For Good Practice**





## 1 DEFINITION: PROMISING AND GOOD PRACTICES WITH REGARD TO PROCEDURAL RIGHTS OF SUSPECTS WITH INTELLECTUAL AND/OR PSYCHOSOCIAL DISABILITIES

The criteria for good and promising practice aim to **assist in identifying and developing good practice examples** for criminal procedures against persons with intellectual and/or psychosocial disabilities. They are based on the joint expertise of the research team and the Advisory Groups as well as on the project findings.

The term 'promising or good practice' refers to practices that have proven to work well in certain national contexts and are therefore recommended as potential models that could be transferred to other countries or contexts. At the same time the research team is aware of the fact that these models need to be adapted to the respective national legal context and that the transferability of some good practices might be challenging given the various heterogeneous needs of persons with intellectual and/or psychosocial disabilities. The following criteria for the identification of good practices provide an exemplary list which gives an overview of desired conduct.

None of the practices highlighted in the Comparative Report meet all criteria of good practices but they do meet some criteria in relevant areas. They have therefore been highlighted as 'promising practices' which would, according to the research team, be worthwhile to strengthen, extend and institutionalise more broadly.

## 2 GUIDING PRINCIPLES

The following guiding principles have been identified as overarching indicators for good practices in criminal proceedings against persons with intellectual and/or psychosocial disabilities.

- **Human rights compliance:** National criminal laws are in line with the provisions of the Convention on the Rights of Persons with Disabilities





(CRPD) and the European Convention on Human Rights (ECHR) and ensure a fair trial against persons with intellectual and/or psychosocial disabilities.

- **Social-relational understanding of disability:** Criminal justice systems take account of a social-relational understanding of disabilities as articulated in the CRPD.
- **Respecting self-determination:** The will and preferences of persons with intellectual and/or psychosocial disabilities is respected throughout the criminal proceedings. They are granted adequate support to make free and self-determined decisions.
- **Accessibility:** In line with art. 9 CRPD relevant information throughout the proceedings is provided in an accessible format to persons with intellectual and/or psychosocial disabilities.
- **Diversity:** The criminal proceedings recognise and take into account the diversity within the population of persons with disabilities as a paramount precondition to ensure a fair trial.
- **Individual approach:** During criminal proceedings an individual approach is applied respecting the heterogeneous needs of persons with intellectual and/or psychosocial disabilities when ensuring procedural safeguards.
- **Non-discrimination:** Criminal procedures and applicable specific safeguards are not discriminatory in nature. Further, persons with disabilities are not subject to any discrimination in the exercise of their rights during proceedings.
- **Procedural safeguards:** All actors involved in criminal proceedings respect and ensure throughout the procedure that the procedural safeguards enshrined on the national, European (Roadmap) and international level enable the suspect's effective participation and a fair trial.



- **Prison Rules:** While deprived of liberty the standards required by national, European and international instruments are ensured. There exist mechanisms to prevent torture and ill-treatment. Situations of potential powerlessness and further support needs of persons with intellectual and/or psychosocial disabilities are taken into account. The settings are adequately adapted if required by the disability of the person.

### 3 CRITERIA FOR IDENTIFYING PROMISING AND GOOD PRACTICES

#### 3.1 LEGAL FRAMEWORK

- ☐ **Fair trial:** Does the law provide for a fair trial by an independent judiciary?
- ☐ **Definition of minimum standards:** Does the law set minimum standards for police custody, pre-trial detention and preventive detention for the purpose of medical assessments, in particular with regard to the preconditions, the duration, and the surrounding conditions (space, access to toilet/water/food/clothes/light/hygiene/phone/TV/books)?
- ☐ **Access to remedies:** Does the law provide for an appeal procedure? Does the procedure also include a remedy against the outcome of an expert assessment (e.g. second independent expert opinion)? Is the suspect's access to remedies facilitated (e.g. by the person of trust, lawyer)? Are the complaints confidential?
- ☐ **Monitoring:** Does an independent and impartial mechanism exist to control the conditions at detention facilities, psychiatric hospitals or specialised psychiatric establishments where inpatient psychiatric assessments are performed or compulsory medical treatment is provided (e.g. National Preventive Mechanisms, NPM)?





## 3.2 POLICE PROCEEDINGS AND PRE-TRIAL HEARINGS

### 1. Surrounding conditions

#### a. Interrogation

- ☐ Do the police **interrogation rooms** have a peaceful ambience (police officers do not wear weapons openly, no constant disturbance by people walking around, phone ringing all the time, etc.)?
- ☐ Is the the **interrogated person** offered something to drink and given the opportunity to take breaks if necessary?

#### b. Custody/Detention

- ☐ **Police custody:** Do the police custody cells provide adequate space and hygienic standards (as defined by national and international standards<sup>321</sup>)? Do detainees have the possibility to go outside/get some air (at least one hour during the 24 hours detention)? Are they given edible food and are their dietary requirements respected?
- ☐ **Pre-trial detention:** Do the cells provide adequate space and hygienic standards (as defined by national and international standards<sup>322</sup>)? Do detainees have the possibility to go outside/get some air (at least one hour a day)? Are they given edible food and are their dietary requirements respected? Are there designated areas for smoking and sport activities?
- ☐ **Preventive detention for the purpose of medical assessments:** Do the rooms provide adequate space and hygienic standards (as defined by national and international standards<sup>323</sup>)? If possible from a medical point of view, do hospitalized persons have the possibility to go outside/get some air (at least one hour a day)? Are they given edible food and are their dietary requirements respected?



## 2. Respectful and adequate communication

- **Respect and de-escalation:** Do the police ensure respectful communication and reduce stress during the interrogation (are courteous and speak in full sentences, avoid aggressive questioning methods)? Do they pose open questions and ask whether the suspect has understood the questions? Is the suspect given enough time to answer, to ask again and to explain? Do the authorities adapt the length of the questioning to the person's ability to concentrate and allow for breaks?
- **Evaluation:** Do suspects have the possibility to give anonymous feedback on how the authorities talked to them as well as on the information (their rights, person of trust, medical assistance etc.) they were provided with (e.g. by putting an anonymous short questionnaire in a feedback box)?

## 3. Assessment of vulnerability

- **Assessment mechanisms:** Do the police and the pre-trial judge refer to specific predetermined assessment mechanisms/strategies to identify intellectual and/or psychosocial disabilities (e.g. checklists, indicators, expert opinions, questionnaires etc.)?
- **Adequate time:** Do the medical experts take adequate time to talk and listen to the suspect before concluding their assessment?
- **Quality control of medical expert opinions:** Are medical experts who perform the assessment independent and adequately qualified by training and experience?
- Does there exist a **quality control system** for expert opinions?

## 4. Right to information

- **Information about procedural rights:** Was the suspect informed about his/her right to a lawyer, to a person of trust, to medical assistance?





tance as well as about the course and the potential outcomes of the proceedings?

- ☐ **Information about remedies:** Was the suspect informed about existing complaints mechanisms (e.g. National Preventive Mechanisms, Ombudsman, National Human Rights Institutions etc.) and judicial remedies?
- ☐ **Provision of information in an accessible format:** Did the authorities provide information and legal explanations in an accessible language and ensure that the suspect has understood the information (e.g. by asking to summarise) before starting the interrogation?
- ☐ **Person of trust:** Did the authorities inform a person of trust (e.g. family, legal representative, social worker, or guardian) upon arrest? Did they allow the suspect to inform a person of trust?

## 5. Right to medical assistance

- ☐ **Medical therapy:** Was the suspect's medical therapy ensured without interruption throughout the whole criminal proceedings? If necessary was it adjusted to his/her actual conditions? Was access to medicine ensured throughout the whole proceedings, especially during police custody and pre-trial detention?
- ☐ **Choice of and access to psychiatrists/psychotherapists/psychologist:** Did the suspect have the possibility to choose the psychiatrist/psychotherapist/psychologist or have access to his/her own therapist? Were suspects given the possibility to discuss with them regularly or whenever needed?
- ☐ **Person of trust:** Was the person of trust (family member, social worker, etc.) asked about the medication and care of the suspect? Could the person of trust, if the suspect wished, be present during the suspect's talk with the psychiatrist/psychotherapist/psychologist? Was it possible for the suspect to have confidential meetings with their person of trust?



## 6. Right of access to a lawyer and psychosocial support

- ☐ **Presence of a lawyer/person of trust:** Was the suspect informed about his/her possibility to have a lawyer/person of trust present during the police interrogation/pre-trial hearing? Did the authorities wait until the lawyer/person of trust was present to start the interrogation? Did the suspect have the time to discuss the case with their lawyer?
- ☐ **Access to and quality of legal aid:** Was the suspect informed about the possibility to have legal aid? Did the suspect have the possibility to meet privately with his/her lawyer and to discuss the case with adequate time?
- ☐ **Psychosocial support:** Was the suspect granted psychosocial support throughout the whole pre-trial proceedings?
- ☐ **Support by lawyer/persons of trust:** Could the lawyer/person of trust add information after the questioning of the suspect?

## 7. Audio-visual recording

- ☐ **Audio-visual recording:** Were all police questionings as well as pre-trial hearings audio-visually recorded? Were the suspects informed that the recordings would not be public and that they are able to see them afterwards?

### 3.1 TRIAL PHASE

#### 1. Right to information

- ☐ **Court proceeding settings:** Were the settings (court room, toilet, etc.) explained to the suspect in advance (before the first hearing)? Was he/she explained where he/she would stand/sit in the room, who would be present at the hearing and in which role? Was the suspect informed that it is possible to have a break if concentrating is no longer possible?







## 2. Respectful and understandable communication of the judgement

- ☐ **Understanding and participation:** Was the judgement explained in an understandable way for the person with intellectual and/or psychosocial disabilities? Did the judge ensure that he/she understood the essential information (e.g. by asking him/her to repeat in their own words)?

## 3. Right to access to a lawyer and psychosocial support

- ☐ **Access to and quality of legal aid:** Was the accused informed of the possibility to have legal aid?
- ☐ **Preparation with the lawyer:** Did the accused person have the possibility to meet his/her lawyer before the trial hearing and to spend an adequate amount of time with him/her to prepare?
- ☐ **Choice of support persons:** Was the accused person allowed to choose who should be present at the hearing?
- ☐ **Psychosocial support:** Was the accused granted psychosocial support during the trial?

## 4. Audio-visual recording

- ☐ Audio-visual recording: Were the trial hearings audio-visually recorded?

## 3.4 TRAINING AND SENSIBILISATION OF PROFESSIONALS

- ☐ **Capacity building trainings:** Were the authorities trained in communication and deescalation methods with persons with intellectual and/or psychosocial disabilities (e.g. by special seminars, online tools, handbooks etc.)? Do they have knowledge about their potential needs, skills, and obstacles?
- ☐ **Supervision:** Do professionals have access to supervision (as regards stress management, burn out prevention etc.)?







## *Part III:*

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# Recommendations





## 1 RECOMMENDATIONS FOR PRACTITIONERS

### 1.1 PRE- TRIAL PHASE

#### 1.1.1 Police proceedings

##### 1.1.1.1 Initial assessment of vulnerability

- **IDENTIFICATION MECHANISM.** The police should refer to a clear and independent mechanism/procedure for identifying the suspect's vulnerability due to his/her intellectual and/or psychosocial disabilities.
- **ASK THE SUSPECT.** At the very beginning the police and the doctor, who is examining the suspect, should explicitly ask whether the person has a guardian or is supported by a social or psychological care organisation.
- **ASK AN INDEPENDENT EXPERT.** During the Austrian Roundtable the experts suggested the establishment of an independent instance (e.g. social workers or psychologists at the police station) to facilitate the identification.

##### 1.1.1.2 Right to information

- **ENSURE ACCESSIBLE INFORMATION.** Appropriate and accessible information materials, e.g. video and audio materials, information in braille, large print, sign language, or easy to read formats should be provided by the police officers to suspects with intellectual and/or psychosocial disabilities.
- **INFORM ABOUT THE PROCEDURAL RIGHTS.** Suspects should be informed about their procedural rights, the police custody/detention, the procedural steps as well as the possible outcomes of their actions and inactions. The information materials should also be available for use while being held in custody. Also summons, interrogation protocols and indictments should be provided in accessible formats.





- **MAKE SURE THE INFORMATION WAS UNDERSTOOD.** The police should explain key points of the procedural rights orally and ask the suspect to repeat the information in his/her own words.
- **INFORM IN A TIMELY MANNER.** The police should inform the suspect before the first interrogation or immediately upon arrest.
- **NO VIOLENCE.** Police officers must refrain from physical violence and psychological abuse during the interrogation and while the suspected/accused person is in police custody or brought to the police station for other purposes.

#### 1.1.1.3 Right to medical assistance

- **OBLIGATION TO PROVIDE MEDICAL ASSISTANCE.** Medical assistance should be provided ex-officio and not only upon request. It should be tailored to the specific needs of the suspects.
- **SPECIALISED DOCTORS.** Doctors providing medical assistance during the police proceedings (including police custody) should have adequate expertise on intellectual and psychosocial disabilities.
- **INDEPENDENT DOCTORS.** Medical assistance should include examinations by independent health professionals and the provision of medical assistance in cases of police ill-treatment.
- **PRESENCE OF PERSON OF TRUST.** Upon the request of the suspect, the person of trust should be allowed to be present at the examination.
- **MEDICAL INFORMATION.** Upon the request of the suspect, copies of the medical documents should be provided to him/her and his/her person of trust.



#### 1.1.1.4 Deprivation of liberty

- **FITNESS FOR DETENTION.** The mental condition of every person brought to police custody should be assessed by adequately trained doctors. The assessment should be thoroughly done ensuring the necessary time to grasp the situation of the person.
- **CALL PERSON OF TRUST.** Persons with intellectual and/or psycho-social disabilities should be afforded the right to personally call their relatives or important others when they are deprived of liberty. The implementation of this right should be ensured in practice.
- **NOTIFY A LAWYER.** A lawyer should be notified about the police custody.

#### 1.1.1.5 Right to a lawyer/right to have support by a person of trust/legal representative

- **MANDATORY LAWYER FROM FIRST QUESTIONING ONWARDS.** Every suspect should be ensured the mandatory presence of a lawyer from the first police questioning onwards. This ensures adequate protection of the rights of all suspected persons. Under no circumstances should a person who is unable to defend himself/herself be allowed to waive the right to a lawyer.
- **MANDATORY PRESENCE OF PERSON OF TRUST.** Every suspect should be ensured the mandatory presence of a person of trust from the first police questioning onwards unless the suspect contradicts. The person of trust should be bound by confidentiality and should not be heard as a witness in further proceedings.
- **CHOICE OF PUBLIC DEFENDER.** Suspects should be entitled to choose the lawyer they are appointed, also in case of legal aid. Easy access should be ensured (e.g. there exists a list of competent criminal lawyers that can be called).





- **INDEPENDENCE OF PUBLIC DEFENDERS.** The appointment of public defenders who are close to the police/investigative authorities must be prohibited.
- **CRIMINAL LAW EXPERTISE.** All public defenders should have a criminal law background; this should equally be a requirement for lawyers within the legal aid framework.
- **SPECIALISED LAWYERS.** Once the vulnerability has been identified, specially trained lawyers, who have undergone trainings on how to deal with defendants with intellectual and/or psychosocial disabilities, should be mandated to the case.
- **TIME FOR PREPARATION:** Suspects should be ensured sufficient time and privacy to meet with their lawyer. Lawyers should receive the files in due time to be able to prepare the case.
- **PSYCHOSOCIAL SUPPORT.** Persons with intellectual and/or psychosocial disabilities should receive free psychosocial support throughout the whole criminal procedure.

#### 1.1.1.6 Recordings

- **AUDIO- AND VIDEO-RECORDING.** All police questionings should be audio and video recorded.
- **DATA PROTECTION.** To ensure protection of the suspect's privacy, safeguards need to be put in place to prevent dissemination outside of the purposes of the criminal investigation.





## 1.1.2 Proceedings with the investigative judge

### 1.1.2.1 Assessment of vulnerability

- **PERSONAL CONTACT.** The judge should see the accused person before deciding on pre-trial detention or imposing preventive detention for the purpose of medical/ forensic assessment. If the person is not able to appear before a court the judge should see him/her in the institution where he/she is placed. It would equally be desirable that judges communicate with services for people with disabilities, organisations for self-representation or with their supported accommodation.
- **THOROUGH MEDICAL ASSESSMENTS.** Medical and psychiatric experts should take sufficient time for assessment talks to capture the situation. They should avoid copying text parts from other assessments.
- **CERTIFIED FORENSIC MEDICAL EXPERTS.** The medical assessment (medical evaluation, functioning as evidence in court) of the mental condition of every accused/detainee should be done by certified forensic doctors. The list of court experts in the field of psychiatry should display further subcategories so that the courts may appoint the most competent court expert for the case.
- **QUALITY CONTROL.** Expert opinions should be subject to quality control. Poor assessments should be sanctioned.

### 1.1.2.2 Right to information

- **PROVIDE INFORMATION.** Whenever a person with intellectual and/ or psychosocial disabilities has a court hearing he/she should be prepared by the lawyer/person of trust by visiting the room before the hearing. It should be explained who would be present, when and how he/she may talk, who will be there to support him/her, where he/she can have access to water, toilet, etc.
- **ENSURE ACCESSIBLE INFORMATION.** Before the hearing appropriate and accessible information materials, e.g. video and audio materials,







information in braille, large print, sign language, or easy to read formats should be provided by the pre-trial judge to suspects with intellectual and/or psychosocial disabilities. They should be informed about their procedural rights, the detention, the procedural steps as well as the outcomes of their actions and inactions. The information materials should also be available for use while being in detention.

- **MAKE SURE INFORMATION WAS UNDERSTOOD.** The judge should explain key points of the procedural rights orally and ask the suspect to repeat the information in his/her own words.
- **INFORM TIMELY.** The judge should inform the person of his/her procedural rights before the first interrogation.

### 1.1.2.3 Deprivation of liberty

- **AVOID DETENTION WHEREVER POSSIBLE.** In cases of persons with intellectual and/or psychosocial disabilities alternatives to detention should be used as widely as possible. Resources for follow-up care in forensic day-care facilities should be available.
- **ENSURE ESSENTIAL CONDITIONS.** Persons with intellectual and/or psychosocial disabilities in pre-trial detention should be ensured:
  - » Sufficient and understandable information about the criminal proceedings they participate in;
  - » Safeguards against lengthy stay in detention;
  - » Regular access to their lawyers and confidential meetings with them;
  - » Regular access to their relatives/close persons;
  - » Access to activities;
  - » Medical assistance and access to easy-to-understand information about the diagnosis and therapies applied.
- **DETENTION CAPACITIES.** Prisons and forensic medical institutions should provide for adequate capacities and up to date standards (hygiene, activities, etc.) to accommodate women, men and juveniles separately.



- **MONITORING:** When persons with intellectual and/or psychosocial disabilities are detained in pre-trial detention facilities, regular monitoring of places of detention, and preventive detention should be performed by independent institutions, e.g. National Human Rights Institutions, Ombudsman institutions or human rights NGOs. Monitoring visits should include confidential private talks with detainees.

#### 1.1.2.4 Right to medical assistance

- **FITNESS FOR DETENTION.** The mental condition of every person brought to detention should be (again) assessed by adequately trained doctors. The assessment should be thoroughly done ensuring the necessary time to grasp the situation of the detainee.
- **MEDICAL ASSISTANCE IN DETENTION.** Adequate medical assistance to persons with intellectual and/or psychosocial disabilities should be ensured.
- **CRISIS MANAGEMENT.** Crisis intervention teams composed of trained nurses and doctors should be available to calm patients in psychiatric or forensic units.
- **EXPLAIN DIAGNOSIS.** The diagnosis and therapies applied should be explained to the suspect in an accessible and understandable format (e.g. braille, easy to read materials).
- **CONFIDENTIALITY.** The confidentiality of the medical examination and assessment should be strictly ensured.

#### 1.1.2.5 Right of access to a lawyer, right to have support by a person of trust/legal representative

- **MANDATORY PRESENCE OF PERSON OF TRUST.** Every accused person should be ensured the mandatory presence of a person of trust during all pre-trial hearings. The person of trust should be bound by confidentiality and should not be heard as a witness in further proceedings.





- **CHOICE OF PUBLIC DEFENDER.** Accused persons should be entitled to have a say in the public defender they are appointed, as well as in the framework of legal aid.
- **INDEPENDENCE OF PUBLIC DEFENDERS.** The appointment of public defenders who are close to the investigative authorities must be prohibited.
- **CRIMINAL LAW EXPERTISE.** All public defenders should have a criminal law background.
- **SPECIALISED LAWYERS.** Once the disability has been identified, specially trained lawyers, who have undergone trainings on how to deal with defendants with intellectual and/or psychosocial disabilities, should be mandated with the case
- **TIME FOR PREPARATION:** Accused persons should be ensured sufficient time and privacy to meet with their lawyer. Public defenders should invest more time in the preparation with their clients, explain legal issues in an understandable way and prepare the suspect for the process. They should particularly inform about the meanings and the consequences of preventive detention for the purpose of medical/forensic assessments and possible compulsory medical treatment.
- **PSYCHOSOCIAL SUPPORT.** Persons with intellectual and/or psychosocial disabilities should receive free psychosocial support throughout the whole criminal procedure.

### 1.1.3 Prosecutor

- **ENSURE PROCEDURAL SAFEGUARDS.** The prosecutor monitoring the investigation should guarantee for:
  - » Timely initiation of pre-trial proceedings and issuing of indictment act
  - » Clear explanation in an understandable manner of the accusation to the accused





- » Timely appointment of a forensic expert to assess the mental capacity of the accused and timely appointment of a lawyer
  - » Ensure safeguards in order to prevent torture, inhumane and degrading treatment
- **SPECIALISED PROSECUTORS.** Since the prosecutor is responsible for continuing the proceedings and requiring pre-trial detention or preventive detention, cases against persons with intellectual and/or psychosocial disabilities should be dealt with by specially trained prosecutors.

## 1.2 TRIAL PHASE

- **SPECIALISED COURTS / COURT DEPARTMENTS.** Cases against accused persons with intellectual and/or psychosocial disabilities should be heard by specialised judges that hold specialised knowledge, professional experience and adequate social skills. The panel should include specialised lay judges (e.g. educators, mental health experts).

### 1.2.1 Assessment of vulnerability

- **SECOND EXPERT OPINION.** The legal representative/lawyer of the accused person may ask the court to impose an additional examination or re-examination, with concrete experts. The second expert conclusion should be provided in accordance with the adversarial and defence principle (if the suspect or the accused does not agree with the initial expert report). It should be possible to include any specialist, not only one from the approved forensic psychiatric expert list. The second expert opinion should be considered on an equivalent basis by the prosecutor and the court. The prosecutor or the court must justify and argue why they were guided by one or the other expert opinion by adopting a reasoned decision.

### 1.2.2 Right to information

- **ACCESSIBLE INFORMATION.** The main court documents (such as information on the defendant's procedural rights, indictment, verdict, and





summons) should be available in accessible formats (e.g. easy to read text, videos with graphic explanation). Judges and prosecutors should use simple and respectful language during the trial and when proclaiming the verdict and take into account the defendant's needs.

- **TRANSLATION.** Judges should involve interpreters who communicate in alternative or augmentative languages.

### 1.2.3 Right of access to a lawyer, support by person of trust

- **MANDATORY LAWYER.** The legal representation of persons with intellectual and/or psychosocial disabilities, who due to their disability will have difficulties in participating in criminal proceedings, should be mandatory. Court hearings should not be held without the presence of a lawyer. All statements obtained without the presence of a lawyer (in pre-trial or trial phase) should be considered null or void.
- **EVALUATION OF LEGAL AID.** Effective legal aid should be provided to persons, suspects and accused with intellectual and/or psychosocial disabilities. Evaluation mechanisms and procedures should be used by the courts that allow replacement of a lawyer who is not providing effective representation.
- **PERSON OF TRUST.** The presence of a person of trust to support the accused person and help him/her understand and cope with the proceedings should be ensured during the trial.

### 1.2.4 Privacy

- **EXCLUSION OF PUBLIC.** The public should be excluded during hearings of the accused and court experts when providing their expert opinion on the defendant's procedural capacity and criminal liability.

### 1.2.5 Audio-visual recording

- **AUDIO- AND VIDEO RECORDING.** All hearings of persons with intellectual and/or psychosocial disabilities should be audio-visually recor-



ded. Data protection needs to be ensured (e.g. data can only be accessed but not copied).

### 1.2.6 Judgement

- **ACCESSIBLE INFORMATION.** The judgement should be explained in an understandable way for the accused person. The judge should ensure that the accused person understands the essential information (e.g. by asking him/her to repeat in their own words).

## 1.3 REMEDIES

- **EFFECTIVE REMEDIES.** Remedies should be in place to effectively complain against violations of procedural rights throughout the whole criminal proceedings, including the pre-trial phase. Further, it should be possible to appeal the outcome of the expert assessment (e.g. by a second expert opinion) and the judgement.





## 2 RECOMMENDATIONS FROM BENEFICIARIES

For most of the interviewed beneficiaries it was not easy to make concrete suggestions. Nevertheless they named problems and expressed wishes:

- **INFORMATION IN BARRIER-FREE FORMAT.** „I think they should talk slowly and clearly. So you can save some of the information in your brain. I would appreciate that.“<sup>324</sup>
- **SUPPORT FROM A PERSON OF TRUST.** Some of the interviewees had the support from persons of trust (social worker, guardian, lawyer, family) during the criminal proceedings. They said this support was very helpful and important. With such a support, the beneficiaries felt more confident and represented in a better way during these challenging situations. „I would have wanted to inform someone, so I wouldn't have felt so lonely. [...] My guardian for example. I would have been better because I needed that support.“ The person of trust can help with the preparation of the trial and can give some support by answering important questions. „Also to talk about everything, so you know more about the upcoming trial. Nobody had prepared me for the trial. That's what I would wish for.“<sup>325</sup>
- **MORE PREPARATION TIME WITH THE LAWYER.** Many of the interviewees criticized the lack of preparation time with their lawyer. Many of them met their lawyer right before the trial so they could talk about the case only for a short time. Therefore they didn't feel well represented and prepared. It is recommended that the lawyers invest more time in the preparation of the cases to get a better impression of the person and the whole case. Also to explain the beneficiaries the juristic procedures and terms. Lawyers should provide more information about the relevant paragraphs of the criminal code, which are specifically for people with mental health issues and about the consequences of these paragraphs.



- **MORE TIME FOR THE ASSESSMENT BY MEDICAL EXPERTS.** Those interviewees who had to go to a medical expert for a forensic assessment, reported a time range for the examinations from 10 to 45 minutes. They expressed irritation about the fact that it took the medical expert such a short time to get an impression of their health status and the shaping of their mental health problems. Concretely the beneficiaries asked for more time with medical experts.<sup>326</sup>
- **MEDICAL EXPERT ASSESSMENT.** One interviewee recommended to do a medical assessment before the police interview because the ability to process what's happening for a beneficiary depends on the phase of the psycho-social disorder, and on his/ her present situation. „The most important thing is, that before anybody is questioned by the police a medical assessment gets done, to check if the questioning is possible and the person has a clear state of mind. Because sometimes you get more drugs and sometimes less. Therefore you have to get used to the different situations. I think that's very important.“<sup>327</sup>







### 3 LEGAL RECOMMENDATIONS FOR MEMBER STATES

#### 3.1 General Recommendations

- **APPLY CRIMINAL JUSTICE SAFEGUARDS OF JUVENILES ANALOGOUSLY.** Suspected and accused persons with intellectual and/or psychosocial disabilities may face similar difficulties in participating in and understanding criminal proceedings as juvenile persons. Due to their similar vulnerability, Member States should consider applying procedural safeguards for juveniles to persons with disabilities in an analogous way. These concern in particular the regulations with regard to support persons and legal representation during the proceedings, audio-visual recordings, accessible information, adequate accommodation and alternatives to detention.
- **DEFINE VULNERABLE SUSPECTS.** National criminal legislations should introduce the concept of “vulnerable suspects” and define them as persons who are unable to understand and to effectively participate in criminal proceedings on an equal basis due to their age, mental or physical condition or disabilities.<sup>328</sup> Laws should clearly specify the procedural safeguards that are linked to this vulnerability.
- **PRESUMPTION OF VULNERABILITY.** Persons with serious psychosocial, intellectual, physical or sensory impairments, mental illnesses or cognitive disorders which hinder them to understand and effectively participate in the proceedings should benefit from a legal presumption of vulnerability.
- **DEFINE DISABILITIES IN ACCORDANCE WITH INTERNATIONAL STANDARDS.** National criminal laws tend to include outdated or discriminatory terminology when referring to persons with disabilities. It is strongly recommended to revise the legislation according to international standards, in particular the UN Convention on Persons with Disabilities. Accordingly criminal laws should not only consider persons with psychosocial but also persons with intellectual disabilities and provide safeguards for a fair trial for all people with disabilities.



- **ENSURE SAFEGUARDS THROUGHOUT ALL PROCEEDINGS.** National legislations should ensure that procedural safeguards for vulnerable persons (the right to accessible information, right to lawyer, right to medical assistance, etc.) are ensured throughout all proceedings, also when criminal proceedings include preventive detention for medical assessments or compulsory medical treatment but also when separate procedural tracks under civil mental health laws are taken.
- **PERSON OF TRUST/ APPROPRIATE ADULT.** The EC Recommendation introduces the term 'appropriate adult' which is defined as "a relative or a person with a social relationship with the vulnerable person who is likely to interact with the authorities and to enable the vulnerable person to exercise his or her procedural rights."<sup>329</sup> Member State legislation should integrate this concept and ensure assistance by a person of trust who is nominated by the vulnerable suspect. The law should also define the qualifications, rights and duties of persons of trust and stipulate that they should be bound by confidentiality and not be heard as a witness in further proceedings.

### 3.2 Assessment of vulnerability

- **ASSESSMENT MECHANISMS.** Member State legislation should introduce clear and specific assessment mechanisms for police officers, police doctors, prosecutors, judges and penitentiary staff to identify a suspects' vulnerability due to intellectual and/ or psychosocial disabilities. Mechanisms should include indicators, guiding questions, independent expert opinions, audio-visual recordings, etc. In any case they should follow a clearly predictable and transparent procedure which allows for the necessary flexibility with regard to the individual case.
- **INDEPENDENCE OF MEDICAL EXPERTS.** The independence, the qualification and the registration procedure for those professionals who perform initial medical assessments and elaborate expert opinions should be clearly regulated by law. All experts must dispose of forensic knowledge.





- **ADEQUATE EXPERTS.** The vulnerability of persons with intellectual disabilities should be assessed by experts who dispose of adequate knowledge about intellectual disabilities, e.g. pedagogical or psychological experts or social workers.
- **EXCLUSION OF PUBLIC.** The law should always require the exclusion of the public during hearings of vulnerable perpetrators and court experts when providing their expert opinion on the vulnerable defendant's procedural capacity and criminal liability.
- **INDEPENDENT REVIEW.** Legislation should provide for the possibility to challenge the outcome of the assessment which may be requested by the accused person or his/her legal representative. It should be subject to a formal review procedure by independent experts free of charge for the suspected/accused person. To avoid dependency bias and professional hierarchies the review experts should be qualified professionals not included in the court list of certified forensic psychiatric experts. The second expert opinion should be viewed as evidence on an equivalent basis by the prosecutor and the court. The prosecutor or the court must justify and argue why they are guided by one or the other expert opinion and adopt a reasoned decision.
- **CONTROL OF EXPERT OPINIONS.** In addition the law should foresee effective ex officio quality control mechanisms of expert opinions (e.g. regular random quality checks). Poor assessments should entail legal consequences (e.g. expert liability, suspension or exclusion from the expert directory, compensation for the accused person and/or resumption of the proceedings).

### 3.3 Right to information

- **ACCESSIBLE INFORMATION.** National legislations should require that information on procedural rights and obligations, the legal consequences following from the observance or violation of these rights throughout all stages of criminal proceedings, as well as during detention and questioning by the police be made available in various barrier-free formats (braille, easy-to-read, audio, video with subtitles,



sign language interpretation, etc.). States are encouraged to involve disability NGOs in developing these materials.

- **SPECIFY PROCEDURE OF INFORMING.** Laws should elaborate on the procedure of how information should be provided to vulnerable suspects including the time, the responsible person and the necessary accommodations for providing information to suspected, accused and detained persons. The authorities should provide information in barrier-free formats as soon as they assume a potential intellectual and/or psychosocial disability, not only upon request of the suspect.

### 3.4 Audio-visual recording

- **AUDIO-VISUAL RECORDING.** National laws should require mandatory audio-visual recording of all questionings and hearings from the first police questioning onwards. States should ensure that recording becomes a consistent practice. To protect personal data, the recorded material should be accessible only for stakeholders in the criminal proceeding. They should be prevented from copying the data and taking them with them.

### 3.5 Right of access to a lawyer

- **MANDATORY LAWYER.** Persons with intellectual and/or psychosocial disabilities who are not able to effectively participate in criminal proceedings and represent themselves should not be allowed to waive their right to a lawyer/public defender. Since it is often difficult to identify the vulnerability of a suspect it would be desirable that national laws require the mandatory presence of a lawyer for all suspects from the first police questioning onwards.
- **NULLITY IN CASE OF LACK OF LEGAL REPRESENTATION.** In case there is no lawyer present during the questioning or hearing and the police or court protocol is nevertheless used as evidence in the proceedings it should be considered null and void.





- **REFORM OF LEGAL AID SCHEMES.** Member States are encouraged to reform their legal aid schemes in a way that it ensures defence by lawyers that are adequately trained in criminal law and in working with persons with intellectual and/or psychosocial disabilities. To this end Member States should provide for adequate financial resources for legal aid and establish quality control mechanisms.
- **MANDATORY LEGAL AID UPON ARREST.** Criminal procedure legislation and laws governing the arrest procedures should provide for the possibility of legal aid during the proceedings before the police.
- **PSYCHOSOCIAL SUPPORT.** National laws should entitle persons with intellectual and/or psychosocial disabilities to receive free psychosocial support throughout the whole criminal procedure. To this end the human resources of e.g. the patient lawyers' network and the procurators' network should be strengthened. They are already cooperating with the courts (e.g. victim support), are specifically trained, and could play a more important part in the proceedings.

### 3.6 Right to medical assistance

- **ENSURE SPECIALISED MEDICAL ASSISTANCE.** National legislations should foresee clearly defined mechanisms and procedures to provide timely and continuous specialised medical assistance to persons with intellectual and/or psychosocial disabilities from the moment of their arrest by the police throughout the whole criminal proceedings. The mechanism should guarantee examinations by independent health professionals and the provision of medical assistance in cases of police ill-treatment. It should equally ensure the respect of the minimum standards on protection from inhuman or degrading treatment during the enforcement of preventive detention for the purpose of medical/forensic assessments.



### 3.7 Deprivation of liberty

- **PROVIDE ALTERNATIVES TO DETENTION.** Member State legislations should emphasize that deprivation of liberty of persons with intellectual and/or psychosocial disabilities should be ordered only as a last resort. If nevertheless necessary, it should be proportionate and take account of the vulnerable person's special needs. The law should list alternatives to detention, in particular follow-up care in forensic day care facilities, and ensure that adequate resources are provided for their implementation.
- **ENSURE ADEQUATE ACCOMODATION.** National legislations should require that police cells and pre-trial detention facilities provide adequate accommodation for persons with intellectual and/or psychosocial disabilities. Disability NGOs should be consulted to highlight the needs of different disability groups. Persons with intellectual disabilities should be accommodated in special care centres; pre-trial detention and preventive detention should be avoided wherever possible.

### 3.8 Ensure understandable communication of judgement

- **SPECIALISED JUDGES.** The law should require that cases of accused persons with intellectual and/or psychosocial disabilities be heard by specialised judges that hold knowledge on intellectual and/or psychosocial disabilities, professional experience and adequate social skills. This way courts would decrease their dependency on expert opinions. In case of a court setting as a jury or lay, the panel should include specialised lay judges (e.g. educators, mental health experts).
- **INTERPRETATION.** The law should provide for court interpreters who communicate in alternative or augmentative languages.





### 3.9 Monitoring

- **MONITORING MECHANISMS.** Member States should provide for NPM to ensure the protection from ill-treatment and the respect of human rights, and procedural standards of persons with intellectual and/or psychosocial disabilities. Places of detention and psychiatric hospitals or specialised psychiatric establishments where inpatient psychiatric assessments are performed or involuntary medical treatment is provided should be regularly monitored. Monitoring visits should include confidential talks with detainees and patients. In addition to the regular NPM monitoring of institutions, national human rights (ombudsman) institutions should conduct special investigations on the practical implementation of the procedural safeguards, examine individual complaints and engage in review procedures.



## 4 POLICY RECOMMENDATIONS FOR MEMBER STATES

- **REGULAR TRAININGS FOR PROFESSIONALS.** National legislations should require that all professionals involved in criminal proceedings undergo regular trainings on identifying and working with vulnerable suspects including persons with intellectual and/or psychosocial disabilities as well as on their procedural rights. To this end responsible authorities should develop training programmes for police officers, prosecutors, judges, lawyers and forensic experts. The programs should be developed in cooperation with disability NGOs or other organisations representing persons with intellectual and/or psychosocial disabilities.
  - » **POLICE TRAININGS.** In addition to the already existing trainings Member States should take further measures to comprehensively strengthen the capacities and awareness of all police officers. For that purpose the adoption of clear and specific guidelines containing criteria for the assessment of vulnerability is strongly recommended. Trainings should equally enhance professionalism among colleagues to voice a suspicion on a suspect's disability without fearing to be not respected by their peers.<sup>330</sup> The Austrian police for example offers a 5-day seminar on intellectual and/or psychosocial disabilities which is provided by renowned experts from various fields. It includes information on different forms of psychosocial disabilities, legal regulations, expert opinions, practical case studies, alternative care options, follow-up support as well as inputs from organisations representing persons with psychosocial disabilities and their close ones.
  - » **TRAININGS FOR JUDGES AND PROSECUTORS.** Currently no trainings for judges and prosecutors exist. Therefore Member States are strongly encouraged to introduce regular mandatory trainings aimed at providing up to date information on the regulations for persons with intellectual and/or psychosocial disabilities and, information on the UN Convention on the Rights of Persons with Disabilities. Trainings should equally include awareness raising and







sharing experiences and lessons learned. They should address the impact of intellectual and/or psychosocial disabilities upon the capacity to commit a crime and discuss available options for diversion.

- » **TRAININGS FOR ATTORNEYS.** Mandatory trainings are also urgently needed for attorneys, in particular public defenders and legal aid attorneys. Research has shown that suspects with intellectual and/or psychosocial disabilities tend to benefit in a disproportionately high number from legal aid.
- » **TRAININGS FOR POLICE AND PRISON DOCTORS.** Most of the police and public service doctors as well as prison doctors are general practitioners who usually lack adequate expertise on intellectual and/or psychosocial disabilities. All of them should undergo regular mandatory advanced trainings in the area of forensic psychiatry and mental health. Their skills should be verified by independent evaluations (e.g. expert monitoring bodies).
- **FORENSIC STUDIES.** Member States should introduce forensic studies as a specialisation area in the curricula of psychiatrists and psychologists. Courses should also include a suspect's potential criminal accountability as well as his/her ability to participate in the proceedings against the background of different disabilities. If it is not possible to introduce forensic studies in the university curricula, Member States should ensure equivalent training opportunities.
- **STRENGTHEN COOPERATION AND EXCHANGE.** One of the major systemic flaws that were mentioned by the interviewed experts is the lack of inter-institutional cooperation. Close cooperation between the involved authorities and other stakeholders, e.g. NGOs, disability organisations, and medical experts, facilitates information sharing and allows for pooling the necessary expertise to identify a potential vulnerability of the suspect. Research has shown that, for the time being, the quality of inter-institutional cooperation depends primarily on the personal commitment and connections of the involved representatives of the authorities. Cooperation is rarely institutionalised and happens



usually on a case by case basis. The National Roundtables were very successful events that allowed for valuable knowledge exchange and mutual understanding. Similar formats could be used as a permanent forum for cooperation and exchange which could be organised periodically focusing on different issues. They could equally be linked to the already existing exchange fora, e.g. regional conferences or jour fixes of psychosocial support networks, etc.

- **STRENGTHEN CIVIL SOCIETY ORGANISATIONS.** It is of great importance to have strong and competent civil society organisations (human rights watchdog organisations, disability NGOs, etc.) and to support them in raising awareness on the rights of persons with intellectual and/or psychosocial disabilities including their rights in criminal proceedings, in following-up on individual cases, creating support networks and undertaking advocacy activities to properly implement international and national standards.
- **SOCIAL NETWORKS AS ALTERNATIVES TO DETENTION.** In Austria Social Network Conferences (Sozialnetzkonferenz) integrate the social environment/community of an accused person to plan reintegration measures. The conference is mainly used for conditional release of compulsory medical treatment. The goal is to increase the number of conditional releases and decrease the time of detention.<sup>331</sup> This successful practice which aims at reintegrating detainees and released prisoners, should be applied in order to reduce the detention of persons with intellectual and/or psychosocial disabilities.
- **ENSURE ADEQUATE CAPACITIES OF FORENSIC WARDS.** Member States should provide for sufficient capacities of forensic units in hospitals and ensure enough resources for adequate support.
- **CREATE CRISIS INTERVENTION TEAMS** By no means should psychiatric hospitals resort to security personnel to manage escalations. They should establish crisis intervention teams. These teams should be composed of 3-5 nurses who are specifically trained in de-escalation techniques and headed by an experienced senior nurse, ideally a





## RECOMMENDATIONS

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de-escalation trainer. The team should be on duty in shifts 24/7 and may be reached by an emergency number. It should support the hospital staff in all situations related to aggression and violence, ensure a professional handling of escalations, facilitate conflict resolution and accompany persons after escalating incidents. The crisis intervention team is familiar with all relevant legal regulations and human rights requirements and is bound by the principle of proportionality; it strives to deescalate by verbal methods. Particularly dangerous situations may be supported by the police.



## 5 RECOMMENDATIONS FOR THE EUROPEAN UNION

- **ELABORATE A DIRECTIVE ON THE PROCEDURAL RIGHTS OF VULNERABLE SUSPECTS.** Based on the findings of this research it is strongly recommended to transpose the Recommendation into a binding Directive. Areas which are in particular need for regulation include
  - » a broad definition of vulnerable adults that is in line with the CRPD
  - » the identification of a suspect's/accused person's vulnerability by institutionalised assessment mechanisms
  - » the elaboration and provision of accessible information as soon as there are doubts about the suspect's ability to understand and participate
  - » the quality of legal representation, in particular legal aid as well as the need to have representation from the first police questioning onwards
  - » the quality of expert opinions as well as the qualification of court experts
  - » the need for psychosocial support throughout the whole proceedings
  - » the need for audio-visual recordings of all procedural actions
  - » the quality of accommodation standards for persons with intellectual and/or psychosocial disabilities in detention facilities/psychiatric wards
- **FOSTER TRAININGS OF PROFESSIONALS.** The European Union is strongly encouraged to promote and provide interdisciplinary trainings on the identification of and the procedural safeguards for intellectual and/or psychosocial disabilities. There exists a huge knowledge and capacity gap which Member States seem reluctant to address without EU support and encouragement.
- **MUTUAL LEARNING.** The Project Roundtables and Capacity Building Workshops highlighted the importance and the need for exchange and mutual learning among the stakeholders. It is recommended to





institutionalise regular multi-stakeholder gatherings to discuss actual developments and challenges and to improve professional collaboration and exchange.

- **MONITORING THE IMPLEMENTATION OF PROCEDURAL SAFEGUARDS.** The EU is encouraged to take measures to regularly monitor the implementation of the future Directive, to identify challenging areas and to provide support to Member States.
- **POLICY COHERENCE.** To comprehensively ensure procedural safeguards for persons with intellectual and/or psychosocial disabilities the EU is advised to introduce them consistently in all related areas, in particular in its regulations on legal aid, the right to information, and all other relevant regulations.



## **ANNEX I:**

### **CHECKLIST: FIRST INDICATIONS FOR A PERSON'S POTENTIAL INTELLECTUAL AND/OR PSYCHOSOCIAL DISABILITIES**

#### **I. Screening for the police**

1. Is the questioned person able to comprehend complex information and express himself/herself?
2. Does the questioned person have temporal and local orientation?
3. Does the questioned person suffer from an obvious thinking disorder (e.g. person is talking in a confusing manner) or affect disorder (e.g. person reacts in an exaggerated way or shows hardly any emotion)?

#### **II. Questions for the suspect**

1. Does the person get any kind of professional psychosocial support (social work, guardian, supported living, working in a therapy programme)?
2. Is it possible to call a person of trust, to get further information about the questioned person?

#### **III. Further indications the police might refer to**

- » Deprivation of liberty in a psychiatric hospital in the past
- » Information about ambulant psychiatric treatment
- » Already existing psychiatric or psychological assessments of other trials
- » Actual medication
- » Drug screening
- » Alcohol screening
- » Reports from police colleagues about previous official actions
- » Information from relatives, close persons or caretakers about the person's disability
- » Suicide attempts

## ANNEX II:

### DOCUMENTATION SHEET ABOUT THE RIGHTS AND OBLIGATIONS DURING A CRIMINAL PROCEDURE: POLICE\*

#### EASY TO READ INFORMATION

The authorities need to go through this documentation sheet with the suspect. The authority must hand out a copy of this document to the suspect.<sup>331</sup>

1. The police can take you to a police station when they think that you have done something forbidden. The police must explain to you why they arrested you.

*I understand the reason why the police arrested me.*

YES / NO

2. The police need to explain you your rights immediately. Everybody has rights. They are very important. Because of these rights, you are allowed to do the following:

**a** You are allowed to call one person (for example: family member/ care giver/ guardian). You have to be able to talk to this person on the phone. If there is an important reason, the police can make the phone call for you.

*I want to call somebody.*

YES / NO

**b** During the phone call you are allowed to tell the person that you got arrested and where you are. On the phone you are not allowed to tell the reason why you got arrested.

*I will speak German/Bulgarian/Czech/Lithuanian/Slovenian.*

YES / NO

*I want the police to call somebody for me.*

YES / NO

\* needs to be adapted according to national regulations



**c** You have the right to call a lawyer. A lawyer is very important. He gives you legal advice. In case you do not yet have a lawyer, you can do a first call with a lawyer for free.

*I want to call a lawyer.*

YES / NO

**d** You do not have to tell the police anything, unless it helps you.

*I want to tell the police something.*

YES / NO

*I want to remain silent.*

YES / NO

*I want to tell the police something,  
as soon as my lawyer is here.*

YES / NO

**e** You can tell the police if you need special assistance to understand everything.

*I need a translator.*

YES / NO

**3. Please inform at every questioning (police, doctor) in case one or more of the following information is applicable.**

*I take medication every day/ frequently.*

YES / NO

*I have a guardian or a caretaker.*

YES / NO

*I have a disability pass.*

YES / NO

**4. You have the right to see a doctor.**

*I want to get a medical examination from a doctor*

YES / NO





**5. After 48/24 hours the police has to either**

- » release you or
- » bring you into a prison.

*I understand, that I don't have to stay at the police station longer than 48/24 hours.*

YES / NO

- 6. At the end of the police questioning you have to sign the protocol. The information of this protocol can be used against you in the criminal procedure. Please sign the protocol after reading it very carefully. It is necessary that you understand the protocol. The protocol has to repeat everything that you have said to the police officer.**

*I understand all of the information on the documentation sheet.*

YES / NO

*I need further explanations.*

YES / NO

## ANNEX III: DOCUMENTATION SHEET ABOUT THE RIGHTS AND OBLIGATIONS DURING A CRIMINAL PROCEDURE: JUDGE

### EASY TO READ INFORMATION

The authorities need to go through this documentation sheet with the suspect. The authority must hand out a copy of this document to the suspect.<sup>332</sup>

1. **You are in a prison/pre-trial detention facility. The judge must explain to you why they detain you.**

*I understand the reason why I am in prison.*

YES / NO

2. **The judge needs to explain to you your rights immediately. Everybody has rights. They are very important. Because of these rights, you are allowed to do the following:**

**a** You are allowed to call one person (for example: family member/ care giver/ guardian). You have to be able to talk to this person on the phone.

*I want to call somebody.*

YES / NO

**b** You have the right to call a lawyer. A lawyer is very important. He gives you legal advice. In case you do not yet have a lawyer, you can have a first call with a lawyer for free.

*I want to call a lawyer.*

YES / NO

3. **You do not have to tell the judge anything, unless it helps you.**

*I want to tell the judge something.*

YES / NO

*I want to remain silent.*

YES / NO

*I want to tell the judge something,  
as soon as my lawyer is here.*

YES / NO

4. You can tell the judge if you need special assistance to understand everything.

*I need a translator (special assistance).*

YES / NO

5. Please inform the judge in case one or more of the following information is applicable.

*I take medication every day/ frequently.*

YES / NO

*I have a guardian or a caretaker.*

YES / NO

*I have a disability pass.*

YES / NO

6. You have the right to see a doctor.

*I want to get a medical examination from a doctor.*

YES / NO

7. The judge can either

- » release you or
- » make you stay in prison for two more weeks (pre-trial detention). Then he will question you again. A lawyer will support you.

*I understand that I have to get released after the questioning, or that I have to stay in prison/ pre-trial detention facility.*

YES / NO

8. At the end of the questioning by the judge you have to sign the protocol. The information of this protocol can be used against you in the criminal procedure. Please sign the protocol after reading it very carefully. It is necessary that you understand the protocol. The protocol has to repeat everything that you have said to the judge.

*I understand all of the information on the documentation sheet.*

YES / NO

*I need further explanations.*

YES / NO

**ANNEX IV:  
COMMISSION RECOMMENDATION  
OF 27 NOVEMBER 2013 ON PROCEDURAL SAFEGUARDS FOR  
VULNERABLE PERSONS SUSPECTED OR ACCUSED  
IN CRIMINAL PROCEEDINGS**

THE EUROPEAN COMMISSION,  
Having regard to the Treaty on the Functioning of the European Union,  
and in particular Article 292 thereof,

Whereas:

- (1) The aim of this Recommendation is to encourage Member States to strengthen the procedural rights of all suspects or accused persons who are not able to understand and to effectively participate in criminal proceedings due to age, their mental or physical condition or disabilities ('vulnerable persons').
- (2) By establishing minimum rules on the protection of procedural rights of suspects or accused persons, this Recommendation should strengthen the trust of Member States in criminal justice systems of other Member States and can thus help improve the mutual recognition of decisions in criminal matters.
- (3) The Stockholm Programme<sup>1</sup> put a strong focus on the strengthening of the rights of individuals in criminal proceedings. In its point 2.4, the European Council invited the Commission to put forward proposals setting out a step by step approach<sup>2</sup> to strengthening the rights of suspects or accused persons.
- (4) Three measures have been adopted to date, namely Directive 2010/64/EU of the European Parliament and of the Council<sup>3</sup>, Directive 2012/13/EU of the European Parliament and of the Council<sup>4</sup> and Directive 2013/48/EU of the European Parliament and of the Council<sup>5</sup>.
- (5) References in this Recommendation to suspects or accused persons who are deprived of liberty should be understood to refer to any situation where, in the course of criminal proceedings, suspects or accused persons are deprived of liberty within the meaning of Article 5(1)(c) of the ECHR, as interpreted by the case-law of the European Court of Human Rights.

- (6) It is essential that the vulnerability of a person suspected or accused in criminal proceedings is promptly identified and recognised. For that purpose, an initial assessment should be carried out by police officers, law enforcement or judicial authorities. The competent authorities should also be able to ask an independent expert to examine the degree of vulnerability, the needs of the vulnerable person and the appropriateness of any measures taken or envisaged against the vulnerable person.
- (7) Suspects or accused persons or their lawyers should have the right to challenge, in accordance with national law, the assessment of their potential vulnerability in criminal proceedings, in particular if this would significantly impede or restrict the exercise of their fundamental rights. That right does not entail the obligation for Member States to provide for a specific appeal procedure, a separate mechanism, or a complaint procedure in which such failure or refusal may be challenged.
- (8) The term 'legal representative' means a person who represents the interests and oversees the legal affairs of a vulnerable person. An example is notably a court appointed guardian of a vulnerable person.
- (9) The term 'appropriate adult' means a relative or a person with a social relationship with the vulnerable person who is likely to interact with the authorities and to enable the vulnerable person to exercise his or her procedural rights.

- 1 OJ C 115, 4.5.2010, p. 1.
- 2 OJ C 295, 4.12.2009, p. 1.
- 3 Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings (OJ L 280, 26.10.2010, p. 1).
- 4 Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings (OJ L 142, 1.6.2012, p. 1).
- 5 Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and European arrest warrant proceedings and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities (OJ L 294, 6.11.2013, p. 1).



- (10) Vulnerable persons need appropriate assistance and support during criminal proceedings. For that purpose, the legal representative of a vulnerable suspect or accused person or an appropriate adult should be informed as soon as possible of the criminal proceedings against him, of the nature of the accusation, the procedural rights and the available remedies. The legal representative or an appropriate adult should be notified as soon as possible of the deprivation of liberty and be informed about the reasons for it, unless it is contrary to the person's best interests.
- (11) Persons who are recognised as particularly vulnerable are not able to follow and understand the criminal proceedings. In order to ensure that their fair trial rights are ensured, they should not be able to waive their right to a lawyer.
- (12) In order to ensure the personal integrity of a vulnerable person who is deprived of liberty, vulnerable persons should have access to medical examination assessing their general condition and compatibility of possible measures taken against them with their condition.
- (13) Vulnerable persons are not always able to understand the content of police interviews to which they are subject. In order to avoid any contestation of the content of an interview and thereby undue repetition of questioning, these interviews should be audio-visually recorded.
- (14) Subject to the specific circumstances of each case, the state of vulnerability should not constitute an obstacle for the suspected or accused person to have access to material evidence held by the competent authorities with regard to the criminal case in question in the exercise of their procedural rights and with a view to the right to effective remedies.
- (15) This Recommendation applies to vulnerable persons who are subject to surrender procedure pursuant to Council Framework Decision 2002/584/JHA<sup>1</sup> (European arrest warrant proceedings). The competent authorities in the executing Member State should

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1 Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (OJ L 190, 18.7.2002, p. 1).



apply the specific procedural rights of this Recommendation to European arrest warrant proceedings.

- (16) References in this Recommendation to appropriate measures to ensure effective access to justice for persons with disabilities should be understood in light of the objectives defined in the 2006 United Nations Convention on the Rights of Persons with Disabilities and in particular in Article 13 thereof.
- (17) In order to ensure that professionals in contact with vulnerable persons are aware of the specific needs of these persons, they should receive adequate training.
- (18) This Recommendation respects fundamental rights and observes the principles recognised by the Charter of Fundamental Rights of the European Union. In particular, this Recommendation seeks to promote the right to liberty, the right to a fair trial and the rights of defence.
- (19) Member States should inform the Commission on the follow up on this Recommendation within [36 months] of its notification. Based on this information, the Commission should monitor and assess the measures taken by Member States,

RECOMMENDS:

## **SECTION 1**

### **SUBJECT-MATTER AND SCOPE**

1. This Recommendation calls upon Member States to strengthen certain procedural rights of vulnerable suspects or accused persons in criminal proceedings and of vulnerable persons who are subject to European arrest warrant proceedings.
2. The specific procedural rights of vulnerable persons should apply from the time they are suspected of having committed an offence. Such rights should apply until the conclusion of the proceedings.
3. Vulnerable persons should be associated in accordance with their best interests to the exercise of procedural rights taking into account their ability to understand and effectively participate in the proceedings.

## SECTION 2

### IDENTIFICATION OF VULNERABLE PERSONS

4. Vulnerable persons should be promptly identified and recognised as such. Member States should ensure that all competent authorities may have recourse to a medical examination by an independent expert to identify vulnerable persons, and to determine the degree of their vulnerability and their specific needs. This expert may give a reasoned opinion on the appropriateness of the measures taken or envisaged against the vulnerable person.

## SECTION 3

### RIGHTS OF VULNERABLE PERSONS

#### *Non-discrimination*

5. Vulnerable persons should not be subject to any discrimination under national law in the exercise of the procedural rights referred to in this Recommendation.
6. The procedural rights granted to vulnerable persons should be respected throughout the criminal proceedings taking into account the nature and degree of their vulnerability.

#### *Presumption of vulnerability*

7. Member States should foresee a presumption of vulnerability in particular for persons with serious psychological, intellectual, physical or sensory impairments, or mental illness or cognitive disorders, hindering them to understand and effectively participate in the proceedings.

#### *Right to information*

8. Persons with disabilities should receive upon request information concerning their procedural rights in a format accessible to them.
9. Vulnerable persons and, if necessary, their legal representative or an appropriate adult should be informed of the specific procedural rights referred to in this Recommendation, in particular those relating to the right to information, the right to medical assistance, the right to a lawyer, the respect of privacy and, where appropriate, the rights related to pre-trial detention.
10. The legal representative or an appropriate adult who is nominated by the vulnerable person or by the competent authorities to



assist that person should be present at the police station and during court hearings.

*Right of access to a lawyer*

11. If a vulnerable person is unable to understand and follow the proceedings, the right to access to a lawyer in accordance with Directive 2013/48/EU should not be waived.

*Right to medical assistance*

12. Vulnerable persons should have access to systematic and regular medical assistance throughout criminal proceedings if they are deprived of liberty.

*Recording of questioning*

13. Any questioning of vulnerable persons during the pre-trial investigation phase should be audio-visually recorded.

*Deprivation of liberty*

14. Member States should take all steps to ensure that deprivation of liberty of vulnerable persons before their conviction is a measure of last resort, proportionate and taking place under conditions suited to the needs of the vulnerable person. Appropriate measures should be taken to ensure that vulnerable persons have access to reasonable accommodations taking into account their particular needs when they are deprived of liberty.

*Privacy*

15. Competent authorities should take appropriate measures to protect the privacy, personal integrity and personal data of vulnerable persons, including medical data, throughout the criminal proceedings.

*European arrest warrant proceedings*

16. The executing Member State should ensure that a vulnerable person who is subject to European arrest warrant proceedings has the specific procedural rights referred to in this Recommendation upon arrest.

*Training*

17. Police officers, law enforcement and judicial authorities competent in criminal proceedings conducted against vulnerable persons should receive specific training.



## **SECTION 4 MONITORING**

18. Member States should inform the Commission on the measures taken to give effect to this Recommendation, by [36 months after notification].

## **SECTION 5 FINAL PROVISIONS**

19. This Recommendation is addressed to the Member States.



## ANNEX V: OVERVIEW ON EMPIRICAL DATA

### Overview of interviews conducted for this research

#### Expert Interviews

Austria	Interview number	Representative of	Date
	Interview 1	judiciary	25.10.2016
	Interview 2	lawyer	09.11.2016
	Interview 3	prosecutor	29.11.2016
	Interview 4	NGO	14.12.2016
	Interview 5	police	21.02.2017

#### Beneficiary Interviews

Austria	Interviewee number	Date
	Beneficiary 1	06.12.2016
	Beneficiary 2	12.12.2016
	Beneficiary 3	14.12.2016
	Beneficiary 4	20.12.2016
	Beneficiary 5	12.01.2017
	Beneficiary 6	30.01.2017
	Beneficiary 7	30.01.2017
	Beneficiary 8	30.01.2017
	Beneficiary 9	30.01.2017
	Beneficiary 10	30.01.2017
	Beneficiary 11	24.02.2017
	Beneficiary 12	24.02.2017
	Beneficiary 13	17.03.2017
	Beneficiary 14	16.05.2017
	Beneficiary 15	01.08.2017

## Expert Consulting

Austria	Interview number	Representative of	Date
	Interview 1	NGO	15.07.2016
	Interview 2	NGO	20.07.2016
	Interview 3	NGO	13.10.2016
	Interview 4	legal expert	28.10.2016
	Interview 5	legal expert	07.11.2016
	Interview 6	NGO	08.11.2016
	Interview 7	legal expert	18.11.2016
	Interview 8	legal experts	10.01.2017
	Interview 9	detention facility manager	30.01.2017
	Interview 10	prosecutor	28.02.2017

## Expert Interviews

Bulgaria	Interview number	Representative of	Date
	Interview 1	judiciary	11.12.2016
	Interview 2	lawyer	15.12.2016
	Interview 3	psychiatrist	19.01.2017
	Interview 4	psychologist	05.03.2017

## Beneficiary Interviews

Bulgaria	Interviewee number	Date
	Beneficiary 1	23.11.2016
	Beneficiary 2	28.11.2016
	Beneficiary 3	23.11.2016
	Beneficiary 4	23.11.2016
	Beneficiary 5	04.11.2016
	Beneficiary 6	29.11.2016

## Beneficiary Interviews

Bulgaria	Interviewee number	Date
	Beneficiary 7	04.11.2016
	Beneficiary 8	04.11.2016
	Beneficiary 9	28.11.2016
	Beneficiary 10	15.11.2016
	Beneficiary 11	15.11.2016
	Beneficiary 12	07.11.2016
	Beneficiary 13	07.11.2016
	Beneficiary 14	24.11.2016
	Beneficiary 15	07.11.2016
	Beneficiary 16	24.11.2016

## Expert Interviews

Czech Republic	Interview number	Representative of	Date
	Interview 1 prison psychologist	health care	10.12.2016
	Interview 2 judge n. 1	judiciary	12.12.2016
	Interview 3 public prosecutor n. 3	public prosecutor	15.12.2016
	Interview 4 psychiatrist	health care	20.12.2016
	Interview 5 public prosecutor n. 1	public prosecutor	05.01.2017
	Interview 6 police officer 1a	police	09.01.2017
	Interview 7 police officer 1b	police	09.01.2017
	Interview 8 police officer 1c	police	09.01.2017
	Interview 9 public prosecutor n. 2	public prosecutor	09.01.2017
	Interview 10 police psychologist	police	12.01.2017
	Interview 11 police officer 2	police	18.01.2017
	Interview 12 judge n. 2	judiciary	04.01.2017
	Interview 13 NGO n. 1	NGO	22.12.2016

## Beneficiary Interviews

Czech Republic	Interviewee number	Date
	Beneficiary 1	20.12.2016
	Beneficiary 2	25.01.2017
	Beneficiary 3	25.01.2017

## Expert Interviews

Lithuania	Interview number	Representative of	Date
	Interview 1	scientist, lawyer	05.01.2017
	Interview 2	NGO activist, lawyer	10.01.2017
	Interview 3	coordinator and head of the pre-trial investigation	11.01.2017
	Interview 4	prosecutor	11.01.2017
	Interview 5	criminal investigator	16.01.2017

## Beneficiary Interviews

Lithuania	Interviewee number	Date
	Beneficiary 1	16.12.2016
	Beneficiary 2	16.12.2016
	Beneficiary 3	19.12.2016
	Beneficiary 4	19.12.2016
	Beneficiary 5	21.12.2016
	Beneficiary 6	22.12.2016
	Beneficiary 7	02.01.2017
	Beneficiary 8	04.01.2017
	Beneficiary 9	09.01.2017
	Beneficiary 10	10.01.2017
	Beneficiary 11	12.01.2017
	Beneficiary 12	16.01.2017
	Beneficiary 13	17.01.2017
	Beneficiary 14	18.01.2017
	Beneficiary 15	18.01.2017

## Expert Interviews

Slovenia	Interview number	Representative of	Date
	Interview 1	judiciary	20.3.2017
	Interview 2	lawyer	20.3.2017
	Interview 3	police	31.3.2017
	Interview 4	public prosecutor	11.4.2017
	Interview 5	psychiatrist/court expert	13.4.2017

## Beneficiary Interviews

Slovenia	Interviewee number	Date
	Beneficiary 1	19.01.2017
	Beneficiary 2	19.01.2017
	Beneficiary 3	19.01.2017
	Beneficiary 4	24.01.2017
	Beneficiary 5	24.01.2017
	Beneficiary 6	26.01.2017
	Beneficiary 7	26.01.2017
	Beneficiary 8	31.01.2017
	Beneficiary 9	07.02.2017
	Beneficiary 10	07.02.2017
	Beneficiary 11	07.02.2017
	Beneficiary 12	07.02.2017
	Beneficiary 13	05.05.2017



## FOOTNOTES

- 1 Verbeke, P.; Vermeulen, G.; Meysman, M.; Vander Beken, T.; Protecting the fair trial rights of mentally disordered defendants in criminal proceedings: Exploring the need for further EU action, *Int J Law Psychiatry*. 2015 Jul-Aug;41:67-75, <http://www.ncbi.nlm.nih.gov/pubmed/25907825>, (accessed 16. 04.2018), p.69.
- 2 UN General Assembly, Interim Report of the Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak on torture and other cruel, inhuman or degrading treatment or punishment, A/63/175, (28.07.2008), [www.un.org/disabilities/images/A.63.175.doc](http://www.un.org/disabilities/images/A.63.175.doc), accessed 16.04.2018, para 38.
- 3 Commission Recommendation of on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings, 2013/ C 378/02, (27 November 2013). The Recommendation is part of the Procedural Roadmap for strengthening procedural rights of suspects or accused persons. See Council of the European Union, Roadmap for strengthening procedural rights of suspects or accused persons in criminal proceedings, OJ 2009/C 295/01 (30.11.2009), <https://eur-lex.europa.eu/legalcontent/EN/TXT/?uri=OJ%3AC%3A2009%3A295%3ATOC> (accessed 16.04.2018); European Council, The Stockholm Programme – An open and secure Europe serving and protecting citizens, OJ 2010/C 115/01 (04.05.2010), <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=OJ:C:2010:115:FULL&from=ES> (accessed 16.04.2018).
- 4 Commission Recommendation of on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings, 2013/ C 378/02, (27 November 2013), Recital 1.
- 5 Adult persons are considered as persons aged between 18/19 and 65 years. This definition is in line with the UN definition of persons with mental and intellectual disabilities. Persons above 65 years are considered as being potentially vulnerable due to their age and therefore belonging to another vulnerable group. Children are covered by the Directive 2016/800/EU on procedural safeguards for children suspected or accused in criminal proceedings and will therefore not be subject to the research of this project.
- 6 The first case to effective participation was the Case Stanford. ECtHR, *Stanford vs the UK* (11 April 1994).
- 7 ECtHR, *T vs the UK*; *V vs the UK* (Joint Decision 16 December 1999) para 88.
- 8 ECtHR, *S.C. vs the UK* (15 June 2004), para. 29. The abovementioned cases refer to children, but the arguments of the courts are general in nature and therefore also applicable for adults. Law Commission, Consultation Paper no.197 *unfitness to plead*, 2010, para. 2.95.
- 9 European Commission, Impact Assessment on the Proposal for a directive of the European Parliament and of the Council on procedural safeguards for children suspected or accused in criminal proceedings, Brussels, 27.11.2013, SWD(2013) 480 final, p. 25.
- 10 United Nations: Convention on the Rights of Persons with Disabilities. Article 1 – Purpose. <http://www.un.org/disabilities/convention/conventionfull.shtml> (accessed 15.04.2018).
- 11 People First, <http://peoplefirstltd.com/>, (last accessed 15.04.2018).
- 12 United Nations: Convention on the Rights of Persons with Disabilities. Preamble, e.
- 13 World Network of Users and Survivors of Psychiatry, Psychosocial Disability, [http://www.wnusp.net/documents/2012/Psychosocial\\_disability.docx](http://www.wnusp.net/documents/2012/Psychosocial_disability.docx), (accessed 15.04.2018).
- 14 Ibid.





- 15 A detailed overview is provided in each of the five National Baseline Studies of the partner countries. Their condensed summaries in English entitled as "Key findings" include also tables mapping the relevant legal instruments and provisions.
- 16 BG, Ministry of the Interior Act (27.06.2014), Art.72.
- 17 BG, Key findings, p.8.
- 18 GHK law offices, Impact assessment of measures covering special safeguards for children and other vulnerable suspected or accused persons in criminal proceedings, DG Justice, JUST/2011/EVAL-JPEN/FW/1017/A4, Revised interim report, p.12.
- 19 Cz Rep, Act para 2 art. 4 letter b of Act no. 45/2013 Col. on Victims of Crimes available from: <https://www.zakonyprolidi.cz/cs/2013-45?citace=1>.
- 20 AT, CPC (Criminal Procedure Code) paras 66, 66a, 70, 156, 165, only acknowledge the vulnerability of victims. Not one para provides for a definition of vulnerability of suspects.
- 21 In Lithuania and Slovenia a definition of vulnerable persons including e.g. orphans, children from social risk families, individuals living in poverty or at a high risk of poverty, people with disabilities, elderly people etc. may be found in other legal areas such as social security, energy, construction, urban planning, housing health care and anti-discrimination.
- 22 LT, Criminal Procedure Code (CPC), art 51, 1.2.
- 23 BG, Criminal Procedure Code (CPC) (29.04.2006), Art. 94, para. 1, item 2.
- 24 AT, CPC, Art. 50 para 2.
- 25 Cz Rep, CRPD, art 1, para 2 art. 4 letter b of an act no. 45/2013 Col. on Victims of Crimes.
- 26 AT, Criminal Code (CC), Art. 21.
- 27 BG, Criminal Code (CC), Art. 33, para.1.
- 28 SL, Key findings, p.6.
- 29 More up-to date definitions of disabilities can be found in pertinent laws concerning persons with disabilities such as the Austrian Federal Act on Equal Opportunities for Persons with Disabilities (BundesBehindertengleichstellungsgesetz - BGStG).
- 30 AT\_Expert consultation 9.
- 31 SIAK (Austrian Academy for Security), Curriculum for basic training, (2012); AT\_Federal Ministry of Internal Affairs, [http://www.polizei.gv.at/lpd\\_docs/940.pdf](http://www.polizei.gv.at/lpd_docs/940.pdf), (accessed 2 March 2017), in particular p. 13, 41; AT\_expertinterview\_5.
- 32 SL\_expert interview 2.
- 33 AT\_expert consultation\_10; SL, key Findings, p. 7.
- 34 AT\_expert interview 2.
- 35 See Meijers Committee, Note on the Package of Fair Trial Rights, CM 1402 (18 March 2014), p.3.
- 36 Cz Rep, CCP Art. 159(3), Art. 172(1)(e) of the Act no. 141/1961 Col.; Opinion of the Supreme Public Prosecutor from September 5th 2014, available online: <http://www.bulletin-advokacie.cz/nejvyssistatni?browser=mobi> (accessed 15 March 2018); SL, CPA 1994 and subsequent modifications, Articles 179, 227/2, 310/1 and 352/1(3). AT, CC, Art. 21.
- 37 AT, Accommodation Law (AL) – Civil Procedure, Art. 8; Security Police Law Art. 46, in conjunction with AL para 9, para 3 Z1 and 2. This does not mean that there is automatically an expert opinion issued.
- 38 Cz Rep, CPC, Art. 75 of Act no. 141/1961 Col., Art. 24 of the Act no. 273/2008 Col., Police Act, Art. 31(2) of the Act no. 40/2009 Col. CC; BG, Execution of Punishments and Detention on Remand Act, Art.48. AT, AL, Art.7.
- 39 BG, CPC, Art. 144, para. 2, item 3, item 4.

- 40 BG, Key Findings, p 4.
- 41 LT, Order of the General prosecutor of Lithuanian Republic on Recommendations for providing of tasks for specialists and experts, 2011-01-20, Nr. 8-379, art. 58.1.
- 42 AT, key findings p.7.
- 43 AT, AL. Art. 7 (1) and (3).
- 44 AT, only if there are clear indications that the statement is wrong, this does not apply. See key findings p.7.
- 45 Cz Rep, Opinion of the Supreme Public Prosecutor from September 5th 2014, available online: <http://www.bulletin-advokacie.cz/nejvyssi-statni?browser=mobi> (accessed 15 March 2018). The guidelines are in the form of a recommendation. There is no formalised mechanism.
- 46 AT, AL para 7; SL, Ministry of the Interior, Republic of Slovenia, Ljubljana, Police Handbook on Implementation of Police Custody, Ljubljana, (2011), p. 25.
- 47 SL\_Rules on police powers (2014), Art. 35.
- 48 SL\_beneficiary interview 11.
- 49 Cz Rep\_ CPC, Art. 36 of the Act no. 141/1961 Col.; AT\_National Roundtable (15 Dec. 2016); SL CPC 1994 and subsequent modifications, Art. 1(1), 265/1(2).
- 50 ECHR Art. 6, see Law Commission, Unfitness to Plead, Volume 1: Report (House of Commons, 12 January 2016), p.43 et seq.
- 51 SL, key findings, p.10.
- 52 SL, expert interview 5.
- 53 AT, key findings p. 8.
- 54 AT\_National Roundtable (15 Dec. 2016).
- 55 SL\_beneficiary interview 1.
- 56 AT, Police doctors are contracted doctors acting for a regional state police department or the Ministry of Justice.
- 57 AT, key findings, p.9.
- 58 European Prison Rules, UN Standard Minimum Rules for the Treatment of Prisoners.
- 59 Human Rights Ombudsman of the Republic of Slovenia, Annual report for 2015, Ljubljana, 2016, p.78.
- 60 AT, key findings, p.8
- 61 AT\_J. Pont und R. Wool, Ein Leitfaden für den Gefängnisarzt – Richtlinien für Ärzte, die Gefangene betreuen (a guideline for prison doctors) (Vienna, 2016), <http://docplayer.org/8172576-Ein-leitfaden-fuer-dengefaengnisarzt.html>, (accessed 18.03.2018), p. 29-31.
- 62 SL, Statement by a psychologist at the National Roundtable, (28 March 2017), Austrian National Roundtable (15 December 2016).
- 63 AT, CCP, Art. 126 (2). Nimmervoll, 291, seq.
- 64 P.Aichinger, Die Macht der Sachverständigen (the power of experts), Die Presse, 21.03.2014, <http://diepresse.com/home/politik/innenpolitik/1577792/Die-Macht-der-Sachverstaendigen>, (accessed 17.11.2016). AT\_expert consultation 10.
- 65 AT\_expert consultation 9.
- 66 AT, key findings, p 26.
- 67 AT\_beneficiary interview 7.
- 68 AT\_beneficiary interview 12.
- 69 AT\_expert interview 5; AT\_expert interview 1, Austrian Advisory Group discussions.
- 70 BG, Decree # 2 from 26 October 2011 for the terms and conditions of carrying out forensic, forensic psychiatric and forensic psychological evaluations, including reimbursement of healthcare institutions for the provided services issued by the Ministry of Justice, the

- Ministry of Interior, and the Ministry of Health, promulgated, State Gazette 91/18.11.2011, available at: <http://www.lex.bg/bg/laws/ldoc/2135760470>.
- 71 BG, Decree #2 of 29 June 2015 for the Registration, Qualifications and Remuneration of Expert Witnesses, promulgated, SG 50/03.07.15, amended SG 28/08.04.16, available at: <http://www.lex.bg/bg/laws/ldoc/2136560327> (accessed 15 March 2018).
- 72 BG, Decree No. 2 of 29 June 2015, Art. 8. The Supreme Court of Cassation, the Supreme Administrative Court, the Supreme Cassation Prosecutor's Office, the Supreme Administration Prosecutor's Office and the National Investigative Service may maintain separate specialised expert witness directories for their particular needs.
- 73 BG, CPC, Art 147, 148.
- 74 BG, Key findings, p.6.
- 75 Cz Rep\_beneficiary interview 1a.
- 76 Cz Rep, CPC, Art. 105(3) and 116(2) of the Act no. 141/1961 Col., and art. 38(1)(a)(3) of the Act no. 372/2011 Col., on Health Care Services; Decision of the Constitutional court no. III.ÚS 2569/14 (April 16th 2016).
- 77 Cz Rep, Code on the experts and interpreters Art 24 of the Act no. 36/1967 Col.; Cz Rep, Decision of the SC Czech republic no. 3 Tz 139/2000 available online: [http://nsoud.cz/Judikatura/judikatura\\_ns.nsf/WebSearch/2C3D8EDD0B7D1474C1257A-4E00669F49?openDocument&Highlight=0,specifická věrohodnost,právní otázka](http://nsoud.cz/Judikatura/judikatura_ns.nsf/WebSearch/2C3D8EDD0B7D1474C1257A-4E00669F49?openDocument&Highlight=0,specifická věrohodnost,právní otázka) (accessed 15 March 2018).
- 78 The evidence of experts database, available at <http://www.evidencecznalcu.cz/obor-zdravotnictvi-odvetvipsychiatrie>.
- 79 Cz Rep., Code on the experts and interpreters, Art 25 of the Act no. 36/1967 Col.
- 80 Cz Rep., Draft law on Forensic Experts, Forensic Offices and Forensic Institutes, available online: <http://www.psp.cz/sqw/text/tiskt.sqw?O=7&CT=1025&CT1=0>.
- 81 LT, expert interview 2, 3.
- 82 The person can be held there until the examination report is submitted to the prosecutor or the court. The time of stay at the institution is credited to the time of arrest. LT, CPC, Art. 141.
- 83 SL, CPA 1994 and subsequent modifications, Art 249/1.
- 84 SL\_expert interview 1.
- 85 SL\_expert interview 5.
- 86 European Commission Recommendation on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings, 2013 C 378/02, section 3, especially recommendation 8,9,10.
- 87 Ibid, recital 8: 'The term "legal representative" means a person who represents the interests and oversees the legal affairs of a vulnerable person', e.g. appointed guardian.
- 88 Ibid, recital 9: 'the term „appropriate adult" means a relative or a person with social relationship with the vulnerable person who is likely to interact with the authorities and to enable the vulnerable person to exercise his or her procedural rights.'
- 89 The Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings is applicable to all participating countries.
- 90 AT Key Findings, p.11; BG Key Findings, p. 7,8; LT Key Findings p.8; SL Key Findings p.11; Cz Rep mentioned the procedural rights feed-backing to the draft comparative report.
- 91 See e.g. Bulgaria Key Findings, p.8.
- 92 AT, expert interview 4.
- 93 BG, beneficiary interview 14.

- 94 See Recommendation on the Right to Information, AT, CPC, rec. 26 para 171 (4) in connection with para 50.
- 95 AT, National Roundtable (15 Dec. 2016).
- 96 SL, CPA 1994 and subsequent modifications, Article 4/5.
- 97 SL, This gap could eventually be bridged by interpreting the CPA in the light the Constitution of the Republic of Slovenia and the provisions of the Equalisation of Opportunities for Persons with Disabilities Act. Statement by the representative of the Law Faculty, University of Ljubljana at the National Roundtable.
- 98 SL, expert interview 3.
- 99 BG, Ministry of Interior Act (27.06.2014), Art. 74 and Instruction 8121 -78 of 24 January 2015 on the Order for Executing Arrests, and the Accommodation Requirements, Rules and Procedures at Detention Facilities of the Ministry of Interior, Art. 15, para 1, available in Bulgarian at: <http://dv.parliament.bg/DVWeb/showMaterialDV.jsp;sessionId=C90D4AE4E1A53C0CD2D603FEF8CF166D?idMat=91688>, (accessed 18.03.2018).
- 100 BG, Instruction 8121 -78 of 24 January 2015 on the Order for Executing Arrests, and the Accommodation Requirements, Rules and Procedures at Detention Facilities of the Ministry of Interior, Annex 1 to Art. 15, para. 2.
- 101 Ibid, Art. 15, para. 1, item 3 and the Ministry of Interior Act, Art. 74, para.3.
- 102 BG, CPC (29.04.2006), Art. 15, para. 3.
- 103 BG, CPC, Art. 94, para.1, item 2.
- 104 BG, four of the 16 interviewees reported at the Regional Police Office by themselves after receiving a summons over the phone (some received the summons personally, others received this information through relatives); four of the interviewees were apprehended at the scene of the crime; three people were arrested in their homes, two women were arrested while visiting with friends and/or family and the last three were arrested on the street.
- 105 BG, Key Findings, p.8.
- 106 AT Key Findings, p. 11,12; BG Key Findings, p. 8; Cz Rep. Key Findings, p. 10, 11; LT Key Findings, p. 10, SL; Key Findings p.11.
- 107 AT, beneficiary interview 9.
- 108 Cz Rep, Art. 28(2) of the Act no. 141/1961 Col., AT, CPC; Art. 56(7).
- 109 LT, beneficiary interview 2, 7; The right of the suspect to be informed: theoretical assumptions and implementation possibilities. JURISPRUDENCIJA Mokslo darbai 2008 6(108); 60-66.
- 110 LT beneficiary interview, 2.
- 111 LT, beneficiary interview, 7.
- 112 Cz Rep, beneficiary interview 1.
- 113 AT, e.g. beneficiary interviews 1, 5, 6.
- 114 AT, SC decision, 11. Nov. 2015, 15 Os 112/15g.
- 115 AT, beneficiary interview 6.
- 116 SL, statement by the representative of the Police at the National Roundtable.
- 117 SL, Beneficiary interview 11.
- 118 AT, expert\_consultation\_4; Cz Rep, expert interview 1b.
- 119 European Commission Recommendation on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings, 2013 C 378/02, recommendation 9-10.
- 120 LT, Beneficiary interview 11.

- 121 AT, Key Findings, p. 11, AT expert interview 4.
- 122 AT, Expert\_Consultation\_4;key findings, p. 10.
- 123 AT, Expert Interview 4.
- 124 AT, beneficiary interview 5.
- 125 BG, instruction 8121 -78 of 24 January 2015 on the Order for Executing Arrests, and the Accommodation Requirements, Rules and Procedures at Detention Facilities of the Ministry of Interior, art. 15, para. 1, item 3; Ministry of Interior Act, art.15, para.9.
- 126 BG, Key Findings, p.11.
- 127 CZ, expert interview 1.
- 128 LT, art. 128 of CPC.
- 129 LT, art 16, 23 of the Law of pre-trial detention implementation.
- 130 LT, art 23 of the Law of pre-trial detention implementation. The procedure for the implementation of the right of the arrested person to call by phone is established in the Rules of interior procedure of pre-trial detention facilities.
- 131 SL, expert interview 3.
- 132 SL, CPA, Article 208.
- 133 See e.g, AT, CPC, para 429 (2); Cz Rep, The mandatory presence of a defence lawyer is only required in case the suspect has a mental impairment. Art. 36 para 2 of the Act no 141/1961 Col., LT, CCP. Art.51.
- 134 BG, Constitution, Art.30, para. 4.
- 135 AT, Expert\_2 and 4. LT, Interviews with respondents, A1 and A11
- 136 BG, Key Findings, p.10; beneficiary interviews 3,5,6,7,14,16.
- 137 Bulgaria, Bulgarian Helsinki Committee, The Normative and Practical Obstacles to Effective Prosecution of Ill-Treatment by Official Persons, 2017.available in English at: [http://www.bghelsinki.org/media/uploads/2016police\\_en.pdf](http://www.bghelsinki.org/media/uploads/2016police_en.pdf).
- 138 SL mentioned the procedural rights feed-backing to the draft comparative report.
- 139 Cz Rep, expert interview\_1.
- 140 LT, beneficiary interview 1.
- 141 E.g., LT, CPC, Art. 48, 209. CZ Rep, CPC, Art. 36.
- 142 AT, this contradicts the legal requirements, Halmich para 8 (9).
- 143 Cz Rep, Art 4 and 32 of the Regulation of the Ministry of Interior on the Detention Procedure Code.
- 144 BG, Key Findings, p.10.
- 145 BG, Open Society Foundation, Independent Custody Visiting at Police Detention Facilities, (2010-2011), p. 20, available in English at: [http://www.osi.bg/cyeds/downloads/Grajd\\_nabljudenie\\_policia\\_ENG.pdf](http://www.osi.bg/cyeds/downloads/Grajd_nabljudenie_policia_ENG.pdf), (accessed 18.03.2018).
- 146 BG, Key Findings, p 12.
- 147 Ibid.
- 148 LT, Order of the General Prosecutor of Lithuanian Republic 2014 m. December 29, No. I-288, Appendix to the Protocol explaining rights to the suspect. The rights to receive emergency medical care which should be provided by the temporary detention or arrest body according to the laws regulating their activities.
- 149 Expert Interview 1,3.
- 150 SL, Police Tasks and Powers Act 2013, Article 68/1.
- 151 SL, Police Tasks and Powers Act 2013, Article 68/2.
- 152 BG, Key Findings, p.19.
- 153 LT, Key Findings p. 11

- 154 LT, Art. 11 para 1 of the Regulation of Ministry of Interior on the Detention Procedure Code.
- 155 SL, Rules on police powers 2014, Article 35.
- 156 SL, Key Findings, p.19.
- 157 SL, Rules on police powers 2014.
- 158 AT, Key Findings, p.7.
- 159 AT, Key Findings, p. 7.
- 160 AT, CPC, Art. 75 of Act no. 141/1961 Col.
- 161 AT, Police Act, Art. 32(1) of the Act no. 273/2008 Col.
- 162 BG, Key Findings, p.4.
- 163 AT, expert interview 5.
- 164 AT, key findings, p.12.
- 165 AT, beneficiary interview 1-14.
- 166 BG, CPC (29.04.2006), Art. 238 – Art. 241.
- 167 BG, Instruction 81213-78 of 24 January 2015 on the Order for Executing Arrests, and the Accommodation Requirements, Rules and Procedures at Detention Facilities of the Ministry of Interior, Art. 75, para. 1, item 4.
- 168 BG beneficiary interviews 6, 12.
- 169 Cz Rep, Police Act Art. 62(1) of the Act no. 273/2008 Col.
- 170 Cz Rep, Key Findings, p. 9.
- 171 LT, CPC, Art. 188, 189.
- 172 LT, Interviews with Experts1-5.
- 173 LT, Beneficiary Interviews 1-15.
- 174 SL, CPA, 1994 and subsequent modifications, Article 148/6 and 148a/2.
- 175 SL, expert interview 3.
- 176 SL beneficiary interview 5, 11.
- 177 BG, beneficiary interview 3, 6, 14.
- 178 BG beneficiary interview 6.
- 179 SL beneficiary interview 10.
- 180 SL beneficiary interviews 2,5,6.
- 181 Recognising that some countries have registers of persons legally incapable and with restricted legal capacity (LT) or Registers for Guardianships (AT), these are however mainly only accessible on request or by the judiciary.
- 182 LT, Art. 9 of the Law on Patients' Rights and Compensation; Law on Legal Protection of Personal Data, 1996, No. 63-1479.
- 183 LT, The confidentiality of medical documentation is regulated by act no. 372/2011 col; para. 51 art. 2 lettera. d provides for an exemption from confidentiality for information that is provided to police/courts in criminal proceedings.
- 184 SL, expert interview 3.
- 185 SL, expert interview 4.
- 186 AT, expert interview 5.
- 187 SL, Police Tasks and Powers Act 2013.
- 188 BG, Protection of Personal Data Act, Art.5, para.1, item 3 in connection with Art.5, para.2, item 3.
- 189 BG, Key Findings, p. 10.
- 190 SL, e.g, expert interview 4.
- 191 Cz Rep, interview with public prosecutor 2.

- 192 Cz Rep, CPC, Art. 173 para 1, c.
- 193 Cz Rep, CPC, Art. 173 para 1, 2.
- 194 BG, Key Findings, p.12.
- 195 SL, State Prosecutor Act 2011, Article 184/1.
- 196 SL, expert interview 4.
- 197 SL, expert interview 1.
- 198 SL, expert interview 1.
- 199 SL, expert interview 4.
- 200 BG, Key Findings, p.8. Cz Rep, CPC Art. 33 para 1., SL, expert interview 1.
- 201 AT, SC 9.4.2002, 11 Os 181/01.
- 202 AT, SC 9.4.2002, 11 Os 181/01.
- 203 AT, Roundtable, (15. 12.2017).
- 204 CZ Rep., information provided during elaboration of comparative report.
- 205 LT, CPC, art. 53; this would be another representative by law, and if this is not possible, temporarily, until the issue of a new representative by law is resolved, a representative or any other person who can properly represent the interests of the minor or legally incapable person is appointed.
- 206 BG, Key Findings, p.14.
- 207 AT, CPC, Art. 61 (1) and 3.
- 208 AT, CPC, Art. 61 (3).
- 209 AT, CPC, Art. 61m (1) Z.2, Art. 429 (2) Z.1, Art. 436.
- 210 Cz Rep, CPC, Art 36, para 2; Art 36b, para 1.
- 211 Cz Rep, CPC, Art 165, para 2.
- 212 Cz Rep, expert interview 13.
- 213 Cz Rep, expert interview 5.
- 214 BG, CPC (29.04.2006), Art. 63, para.1. The experts claim that this legal scenario is rarely enforced in practice and mostly in those cases when it is imperative that the accused person's mental state be evaluated and he/she refuses to cooperate with the assessment and determination of his/her psychiatric state.
- 215 BG, CPC, Art.94, para.1, item 2.
- 216 BG, Key findings p. 13.
- 217 BG, Key Findings, p. 10.
- 218 LT, CPC, art. 51.
- 219 LT, Interviews with beneficiaries.
- 220 SL, expert interview 4.
- 221 SL, Key findings, p.15.
- 222 SL, Statement by a lawyer at the National Roundtable.
- 223 SL, interview beneficiary 6.
- 224 This section only compromises criminal proceedings but do not refer to civil law proceedings, see in detail Introduction.
- 225 BG, Key Findings, p.16.
- 226 AT, Key Findings p. 38.
- 227 AT, key findings p. 39.
- 228 BG, CPC, (29.04.2006), Art. 63, para.1.
- 229 The experts claim that this legal scenario is rarely enforced in practice and mostly in those cases when it is imperative that the accused person's mental state be evaluated and he/she refuses to cooperate with the assessment and determination of his/her psychiatric state.

- 230 BG, CPC, (29.04.2006), Art. 70.
- 231 BG, Key Findings, p 15.
- 232 LT, CPC, Chapter XXIX Procedure for application of compulsory medical measures.
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 310 SL, CPA, art. 148.a  
 311 These rights comprise that he/she is not obliged to give any statement or answer questions and that, if he or she intends to plead his/her case, he/she is not obliged to incriminate



- nate him- /herself or his or her fellow beings or to confess guilt, that he/she is entitled to have a lawyer of his choosing present at his/her interrogation, and that whatever he/she declares may be used against him/her in the trial.
- 312 Vacating means that the upper court disregards the judgement of the lower court and give instructions to it how to proceed to take into account what was not taken into account. The proceeding will continue.
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