JUSTICE FOR ALL

Enhancing the Rights of Defendants and Detainees with Intellectual and/or Psychosocial Disabilities: EU Cross-Border Transfers, Detention and Alternatives – JUSTICE FOR ALL

National report for Slovenia

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Enhancing the Rights of Defendants and Detainees with Intellectual and/or Psychosocial Disabilities: EU Cross-Border Transfers, Detention and Alternatives – JUSTICE FOR ALL

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Abbreviations

CCMMSEUA	Cooperation in Criminal Matters with the Member States of the European Union Act
CJEU	Court of Justice of the European Union
CPA	Criminal Procedure Act
CPT	European Committee for the Prevention of Torture
CRPD	UN Convention on the Rights of Persons with Disabilities
EAW	European Arrest Warrant
ECtHR	European Court of Human Rights
ESO	European Supervision Order
NPM	National Preventive Mechanism under the OPCAT
PAS	Probation and Alternative Sanctions
TC	Therapeutic Community

Table of content

Executive summary

National framework concerning deprivation of liberty

To determine, whether a person can be held criminally responsible, the judge may order a psychiatric examination. If it is found that the defendant is lacking criminal legal capacity, **proceedings for the application of security measures** may be carried out. This may result in imposing of the security measure of compulsory psychiatric treatment and confinement in a medical institution. Currently there is only one such facility in Slovenia, where this measure can be carried out - Forensic Psychiatry Unit of the University Clinical Centre Maribor. No specific measures or accommodations in the criminal proceedings are available when it comes to deprivation of liberty of criminally responsible defendants with psychosocial and/or intellectual disabilities. There are no specific measures stemming from their vulnerability - they will be tried and may be subjected to detention and imprisonment under the rules prescribed by the law for all defendants and detainees. **In Slovenia, in criminal law, there are no measures that could be considered as preventive detention**.

National framework concerning alternatives and probation

Alternative sanctions and probation measures are prescribed by the Criminal Code. Probation services are relatively new in Slovenia. The legal basis for its functioning - Probation Act, was adopted in 2017. The Probation Agency was established in 2018.

National policy framework concerning deprivation of liberty

The Resolution on the National Mental Health Programme 2018–2028 is addressing the "Rehabilitation of people with recurrent mental disorders". One of the specific objectives of the Resolution is to establish integrated and effective treatment for people with mental health problems and dangerous behaviour, offering continuous, safe and effective care.

National legal framework concerning the application of cross-border instruments to persons with intellectual and/or psychosocial disabilities

In Slovenia, all project-relevant cross-border instruments and related proceedings are regulated by the Cooperation in Criminal Matters with the Member States of the European Union Act (CCMMSEUA). This act does not contain any provisions regarding the applicability or the manner of application of cross-border instruments to persons with intellectual and/or psychosocial disabilities or in general persons in a situation of vulnerability. The act does not refer to the Recommendation (2013/C 378/02) or include any concept of vulnerability. There seems to be an absence of any caselaw regarding the application of these measures in the case of persons with intellectual and/or psychosocial disabilities.

1. Introduction

This report was prepared as a result of the Peace Institute's research activities within the project 'JUSTICE FOR ALL - Enhancing the Rights of Defendants and Detainees with Intellectual and/or Psychosocial Disabilities: EU Cross-Border Transfers, Detention and Alternatives'.

Respect for fundamental rights is vital to build mutual trust between the European Union Member States and ensure the good functioning of cross border cooperation. The Stockholm Programme urged to take efforts to strengthen mutual trust and render the principle of mutual recognition in the area of detention more efficient.

In 2021, the Conclusions on the Protection of Vulnerable Adults across the European Union noted that "vulnerable adults who are suspects or accused persons in criminal proceedings may experience a number of difficulties that may impair the full exercise of their procedural rights and may undermine the right to a fair trial" and that "the EU and its institutions should respond to the problems and difficulties faced by European citizens in exercising their rights, especially in cross-border situations, and must ensure full and effective access to justice for all European citizens".[1]

Against this background, it should not be forgotten that, for the first time in history, the EU has ratified a UN treaty: the UN Convention on the Rights of Persons with Disabilities (CRPD), together with all EU Member States. The CRPD, adopted in 2006 and which entered into force in 2008, marked a breakthrough in setting minimum standards for rights of persons with disabilities and was defined as a 'paradigm shift' in approach to the concept of 'disability' in international human rights law.[2]

The EU is progressing with the implementation of the CRPD in several areas and has recently adopted EU Disability Strategy 2021-2030. Amongst other things, the Strategy recalls the UN International Principles and Guidelines on Access to Justice for Persons with Disabilities and plans that the EU will provide guidance to Member States on access to

[1] Council of European Union, Draft Council Conclusions on the Protection of Vulnerable Adults across
the European Union § 30.
[2] UNCRPD Commentary, OUP 2018.

justice for persons with disabilities in the EU, building on international guidance provided by the United Nations.

However, up until now, in the EU as well as in Slovenia, most of the attention focused mostly on civil involuntary placement and treatment or victims of crime,[3] and there was little discussion as to how the principles of the CRPD should be reflected for defendants and detainees with intellectual and/or psychosocial disabilities. This was also more generally highlighted by the OHCHR, which noted that the subject of the CRPD's impact on criminal responsibility remains significantly under-examined within both disability and legal discourses and called for more debate, research and identification of good practices is needed to advance the reform of existing legal frameworks.[4]

1.1. Methodology and definitions

The project "Justice for All" aims to contribute to the above- described discussions within the European Union. This document aims to present the national law and practice on the subject matter. It is based on the results of the national research, which consisted of the following activities:

- Desk research: National (relevant national laws and policies, caselaw, monitoring mechanisms' reports, academic literature) and international (UN, CoE, EU) sources were consulted.
- Interviews: Ten interviews were conducted. These included a judge, state prosecutor, lawyer, three psychiatric experts and representatives of the Human Rights Ombudsman, Probation Agency, NGO representing persons with psychosocial disabilities and academia.

[3] FRA, 2012 https://fra.europa.eu/sites/default/files/involuntary-placement-and-involuntary-treatment-of-persons-with-mental-health-problems_en.pdf, which excludes placement and treatment arising from the commission of a crime.

[4] https://www.ohchr.org/en/calls-for-input/calls-input/draft-guidance-mental-health-human-rights-legislation-who-ohchr#:~:text=It%20seeks%20to%20encourage%20the,wellbeing%20and%20good%20mental%20health. See also Prof Bartlett, "In a European context, remarkably little has been written …. The North American literature is considerably richer, and European lawyers new to the representation of people with mental disabilities would be well advised to consider it with care. Nonetheless, in the absence of literature directed to a European audience, we provide in appendix 7 to this volume an introductory guide to representation of people with mental disabilities, and to some of the particular problems it raises."

- National roundtable discussion: the event gathered 16 participants that included the following groups - lawyers, judges, state prosecutors, national monitoring mechanisms, NGOs, academia, policy makers, social services.

The project team received guidance and input from the National Advisory Board consisting of five members (judge, lawyer, national monitoring mechanism, NGO, academia).

The document is divided in two main chapters. One chapter covers the Slovenian legal framework concerning the application of cross-border instruments to persons with intellectual and/or psychosocial disabilities; and the other is on the national legal and policy frameworks concerning defendants and persons deprived of liberty with intellectual and/or psychosocial disabilities.

One of the first challenges encountered in the drafting of the document concerned the terminology. The terminology used to describe the situation of persons with intellectual and/or psychosocial disabilities has changed over time and varies from country to country, making it impossible to find a universally satisfactory definition. Considering that this project is based on a human rights approach and has the overall aim to strengthen the protection afforded to these persons, we have chosen to follow an inclusive approach, based on the approach adopted by the UN Convention on the Rights of Persons with Disabilities[5] and followed in previous projects by the LBI GMR and the members of this consortium,[6] and adopt the project wording "defendants and detainees with intellectual and/or psychosocial disabilities".

In brief, following the CRPD approach, the project:

- Recognises that disability is an evolving concept that results from the interaction between persons with impairments and attitudinal and environmental barriers that hinder their full and effective participation in society on an equal basis with others;

[5] The CRPD does not contain a definition of 'disability' and/or 'persons with disabilities'. Its preambular paragraph (e) asserts that 'disability is an evolving concept'; Article 2 CRPD provides definitions of the CRPD's key terms, but not of 'persons with disabilities'. Rather a description of the term 'persons with disabilities' is included in Article 1(2) CRPD, as part of the CRPD's purpose. See Emily Kakoullis, Yoshikazu Ikehara, in Ilias Bantekas, Michael Ashley Stein, Dimitris Anastasiou, *The UN Convention on the Rights of Persons with Disabilities: A Commentary* (OUP 2018).

[6] Information on the project: Dignity at Trial, 2018; for accessing the full publication see Barbara LINDER, Nóra KATONA, Julia KOLDA, Dignity at Trial, 2018, p 24 https://bim.lbg.ac.at/sites/files/bim/attachments/04_handbook_dignity_at_trial.pdf .

- Departs from a 'medical model of disability' that views persons with disabilities as 'objects' of medical treatment and in need of charity;
- Takes into consideration the ideas underpinning the "social model of disability", which views persons with disabilities as 'subjects' with rights and focuses on the barriers persons with disabilities face that may hinder their societal participation;
- Applies a "human rights-based approach to disability", which recognizes the intrinsic value of every person for their own end, 'rather than focusing on a lack of overall capabilities as measured against a functional baseline".[7]

We are aware however that in the European context other terms are commonly used to indicate the same or similar situations.

By way of example, the **ECHR** uses the word persons of "unsound mind" under Article 5(1)(e) ECHR, while the ECtHR often uses the term "mentally ill-persons".

The **CPT** prefer the use of "patients" or "forensic patient" over the word "prisoners" when talking about persons who were declared criminally irresponsible,[8] but refers to "prisoners suffering from a mental illness" to indicate prisoners serving imprisonment in penitentiary facilities.[9]

The **CoE Council for Penological Co-Operation (PC-CP)** speaks about prisoners with "mental health disorders".

EU law - and specifically the European Commission Recommendation of 27 November 2013 on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings - uses the term "vulnerable person", which encompasses "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."[10]

[7] Ilias Bantekas, Michael Ashley Stein, Dimitris Anastasiou, The UN Convention on the Rights of Persons with Disabilities: A Commentary (OUP 2018), especially Article 1 by Emily Kakoullis, Yoshikazu Ikehara.
[8] Malta CPT/Inf (2016) 25, para. 107
[9] Ireland CPT/Inf (2015) 38, p. 8
[10] Commission Recommendation of 27 November 2013 on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings (2013/C 378/02).

As recently reported by the OHCHR, other terms commonly used to refer to mental health experiences include 'mental illness', 'mental disorders', 'mental health problems' and 'mental health conditions'.[11]

1.2. National definitions and statistics

Disability policy in Slovenia is not provided for in a single, umbrella law, but is dealt with in many laws in different portfolios under sectoral legislation. All relevant laws use for disability the term that can be directly translated as 'invalidity' (*invalidnost*) for disabilities and 'invalid' for persons with disabilities. One of these laws, Equalisation of Opportunities for Persons with Disabilities Act (*Zakon o izenačevanju možnosti invalidov*) defines persons with disabilities (*invalidi*) as „persons who have long-term physical, mental or sensory impairments and/or developmental mental disorders that in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others".[12] The definition of "mental […] and/or developmental mental disorders" is not included in the law.

Slovenian legislation in the field of mental health does not use the term „intellectual and/or psychosocial disability". The Mental Health Act uses the term "mental disorder" (*duševna motnja)*, which is defined as "*a temporary or permanent irregularity in the functioning of the brain characterised by alterations in cognition, emotion, perception, behaviour and the perception of oneself and the environment. Difficulty in adapting to moral, social, political or other values of society, in itself, shall not be considered a mental disorder*."[13] For intellectual disability, Slovenian legislation is using the term intellectual impairment or mental development impairment (*motnja v duševnem razvoju)*.

The two most relevant acts of the criminal justice system, the Criminal Procedural Act (hereinafter: CPA)[14] and the Criminal Code[15] do not provide for any definitions related to intellectual and/or psychosocial disabilities. For the CPA, intellectual and/or psychosocial disabilities are relevant in the framework of assessment of the defendant's mental

[11] September 2022, the Office of the High Commissioner for Human Rights and the WHO issued a Call for inputs on a "Draft guidance on Mental Health, Human Rights, and Legislation".
[12] Slovenia, Article 3(1) of the Equalisation of Opportunities for Persons with Disabilities Act (*Zakon o izenačevanju možnosti invalidov*), 16 November 2010.
[13] Slovenia, Article 2(3) of the Mental Health Act (*Zakon o duševnem zdravju*), 15 July 2008.
[14] Slovenia, Criminal Procedure Act (*Zakon o kazenskem postopku*), 29 September 1994.
[15] Slovenia, Criminal Code (*Kazenski Zakonik*), 20 May 2008.

capacity that may eliminate criminal responsibility ('legal insanity') or the assessment of the defendant's fitness to stand trial. Vulnerability or needs resulting from vulnerability are not emphasised. Similarly, the Criminal Code uses the relevant terms in the definition of 'legal insanity': "*A perpetrator who when committing an unlawful act was incapable of understanding the meaning of his or her actions or controlling his or her conduct due to a mental disorder or mental underdevelopment shall be deemed to be legally insane*".[16] This definition is not in line with the CRPD.

Statistics

The statistical data regarding persons with psychosocial and/or intellectual disabilities in criminal proceedings – both domestic and cross-border are few or are at least not publicly available.

The Slovenian Statistical Office publishes the annual number of new security measures of compulsory psychiatric treatment in the forensic psychiatry unit and at liberty:

	2018	2019	2020	2021	2022
Compulsory psychiatric treatment in the forensic psychiatry unit	19	19	14	20	15
Compulsory psychiatric treatment at liberty	42	48	28	43	29

Source: SiStat

The Slovenian Prison Administration included some information on the number of persons who were considered not criminally responsible and were subjected to the security measure of compulsory psychiatric treatment in the forensic psychiatry unit in its 2021 annual report of the Prison Administration. The same type of data was not included in the previous annual reports:

Year / Compulsory psychiatric treatment in the forensic psychiatry unit	Total number	New	Discharged	On 31 December 2021
2021	45	15	13	32

Source: Prison Administration

[16] Slovenia, Article 29(2) of the Criminal Code (*Kazenski Zakonik*), 20 May 2008.

The annual reports of the Probation Administration for the years 2019 and 2020 report on the number of persons with mental health issues that were subject to alternative sanctions/probation. In 2019, mental health issues were observed in 226 persons – 135 were included in treatment, 91 were not. In 2020, mental health issues were observed in 216 persons – 142 were included in treatment, 74 were not.

Probationers / Year	2019	2020
No of persons with observed mental health issues	226	216
Included in treatment	135	142

Source: Probation Administration

2. National legal framework concerning the application of cross-border instruments to persons with intellectual and/or psychosocial disabilities in law and in practice

In Slovenia, all project-relevant cross-border instruments and related proceedings are regulated by the Cooperation in Criminal Matters with the Member States of the European Union Act (*Zakon o sodelovanju v kazenskih zadevah z državami članicami Evropske unije*).[17]

As stipulated in Article 2(3) of this Act, with respect to the issues of cooperation in criminal matters not regulated under this Act, the provisions of the Criminal Code and the Acts regulating the liability of legal persons for criminal offences, the criminal procedure (Criminal Procedure Act), the execution of sentences, and minor offences, apply *mutatis mutandis* in accordance with their nature under the law of the Republic of Slovenia.

2.1. European Arrest Warrant

The Cooperation in Criminal Matters with the Member States of the European Union Act (hereinafter: CCMMSEUA), does not contain any provisions regarding the applicability or the manner of application of EAW to persons with intellectual and/or psychosocial disabilities or in general persons in a situation of vulnerability.

CCMMSEUA (as well as the CPA and the Criminal Code) does not refer to the Recommendation (2013/C 378/02) and this instrument is not referred to in the preparatory materials for the adoption of this act (background information) nor is the instrument listed as one of the EU instruments that the CCMMSEUA in transposing into the national legislation. In the conducted interviews, respondents reported that they did not observe any discussions, in policy or legislative processes, pertaining to the Recommendation.[18] It seems that there is a lack of awareness of the existence of this instrument both among policy makers and practitioners. It was mentioned that if there is no hard obligation to transpose and implement such as in the case of Directives and

[17] The Cooperation in Criminal Matters with the Member States of the European Union Act (*Zakon o sodelovanju v kazenskih zadevah z državami članicami Evropske unije*), 23 May 2013.
[18] Interviews with judge, state prosecutor and representative of the Human Rights Ombudsman.

Regulations, the prospects of such instruments being taken into account in practice are very low.[19]

General conditions for surrender and grounds for refusal

Surrendering a person on the basis of a warrant is admissible if the warrant is issued for a criminal offence punishable in the ordering State by deprivation of liberty for a maximum period of at least one year, or for the purpose of enforcing a custodial sentence, security measure or other measure imposed by a criminal court involving deprivation of liberty for at least four months, and if the act for which surrender is requested is also considered a criminal offence under the national criminal code (double criminality).[20]

The CCMMSEUA prescribes a list of mandatory grounds for refusal;[21] for example, if a warrant is issued for a criminal offence which would have been covered by an amnesty in Slovenia; or for which the requested person has already been finally acquitted or convicted in the Republic of Slovenia or in another Member State or a third country (if a sentence has been imposed, the sentence has already been served or is currently being served, or may no longer be executed under the legislation of the sentencing Member State); or if for the criminal offence the criminal proceedings against the requested person were finally discontinued in the Republic of Slovenia, or the charge was finally dismissed as unfounded, etc.

The CCMMSEUA also prescribes a list of optional grounds for refusal, for example in cases, where the person who is the subject of the warrant is subject to prosecution in the Republic of Slovenia for the same criminal offence as that on which the warrant is based, provided that criminal proceedings could clearly be conducted more easily in the Republic of Slovenia.[22]

[19] Interview with a representative of the Human Rights Ombudsman.
[20] Article 9(1) of the Cooperation in Criminal Matters with the Member States of the European Union Act (*Zakon o sodelovanju v kazenskih zadevah z državami članicami Evropske unije*), 23 May 2013.
[21] Article 10 of the Cooperation in Criminal Matters with the Member States of the European Union Act (*Zakon o sodelovanju v kazenskih zadevah z državami članicami Evropske unije*), 23 May 2013.
[22] Article 11 of the Cooperation in Criminal Matters with the Member States of the European Union Act (*Zakon o sodelovanju v kazenskih zadevah z državami članicami Evropske unije*), 23 May 2013.

The CCMMSEUA transposed Article 23 of the Council Framework Decision on EAW[23] by stipulating that the surrender of a requested person may exceptionally be temporarily postponed for serious humanitarian reasons, in particular if it is possible that the surrender will manifestly seriously threaten the life or health of the requested person. The surrender must take place as soon as these grounds have ceased to exist. The investigating judge notifies the ordering judicial authority of such fact and agree on a new method, time or place of the surrender, which must take place within the following ten days.[24]

Consent

The requested person must be informed about the possibility to consent to being surrendered both by the police and the investigating judge. The consent is irrevocable once given, and a decision on the execution of EAW is taken in summary proceedings within ten days.[25]

Procedural Safeguards under Council Framework Decision on EAW

The below paragraphs show the analysis of the national implementation of the procedural safeguards under the Council Framework Decision on EAW.[26] These safeguards apply to all requested persons equally.

- **Trial in absentia**

Surrender of a requested person is refused if the warrant is issued for the purpose of executing a custodial sentence or another measure imposed by a criminal court involving deprivation of liberty, and the requested person was not present at the trial on the basis

[23] Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA), OJ L 190, 18.7.2002, p. 1–20 <http://data.europa.eu/eli/dec_framw/2002/584/oj>

[24] Article 35(3) of the Cooperation in Criminal Matters with the Member States of the European Union Act (*Zakon o sodelovanju v kazenskih zadevah z državami članicami Evropske unije*), 23 May 2013.

[25] Article 21(2) of the Cooperation in Criminal Matters with the Member States of the European Union Act (*Zakon o sodelovanju v kazenskih zadevah z državami članicami Evropske unije*), 23 May 2013.

[26] Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA), OJ L 190, 18.7.2002, p. 1–20 <http://data.europa.eu/eli/dec_framw/2002/584/oj>

of which the decision was issued, unless the conditions are met for executing a warrant issued on the basis of a trial in absentia.[27]

These conditions for a surrender in such cases are the following:[28]

- the person was personally summoned in good time or officially notified of the expected date and venue of the trial on the basis of which the decision was issued, and under a further condition that the person was warned of the fact that a court would issue a decision even in the person's absence, or
- the person was notified of the date and venue of the trial at which their lawyer, whether of the person's own choosing or provided by the court, was present and defended the person, or
- if, after the person was served with a decision and expressly notified of the right to a retrial or appeal in which such person has the right to participate, and which enables the matter to be reconsidered, with new evidence which could lead to a different decision from the original one, such person expressly stated that they would not contest the decision, or did not request a retrial, or file an appeal within the relevant time-limit.
- an EAW can also be enforced if it states that the person was not served in person with the decision under the procedural requirements determined by the national law of the issuing State, but that the person would be served in person with such a decision immediately after surrender, and that at such time the person would be expressly notified of the right to a retrial or appeal in which the person has the right to participate, and which enables the matter to be reconsidered along with new evidence which could lead to a different decision from the original one, and would also be notified of the time limit within which the person must request a retrial or file an appeal, as provided by such EAW. In such case, the person may request a copy of the judgment after they are notified of the contents of the warrant and prior to the surrender.

[27] Article 10(10) of the Cooperation in Criminal Matters with the Member States of the European Union Act (*Zakon o sodelovanju v kazenskih zadevah z državami članicami Evropske unije*), 23 May 2013.
[28] Article 13 of the Cooperation in Criminal Matters with the Member States of the European Union Act (*Zakon o sodelovanju v kazenskih zadevah z državami članicami Evropske unije*), 23 May 2013.

Member States (included in the project) which have refused to execute an EAW in the context of criminal proceedings involving irregular in absentia trial hearings in 2021[29]

Austria	Bulgaria	Italy	Germany	Lithuania	Slovenia
4	3	0	105	X	0

- **EAWs regarding offences punishable by custodial life sentence or life-time detention order**

A national court may, prior to making a decision on surrender, request the from the ordering judicial authority a guarantee that the legislation of the ordering State allows for the possibility of granting a pardon to a convicted person, or a possibility of commuting an imposed sentence, either at a convicted person's request or *ex officio*, within twenty years of the sentence becoming final at the latest if a warrant was issued for a criminal offence for which life imprisonment is prescribed in the issuing State.[30]

- **EAWs concerning a national or resident of the executing Member State**

A national court may, prior to making a decision on surrender, request from the ordering judicial authority a guarantee that the requested person will be returned to the Republic of Slovenia after the proceedings are concluded if the warrant was issued for the purpose of conducting criminal proceedings and the requested person is a national of the Republic of Slovenia, a national of a Member State who is residing in the territory of the Republic of Slovenia, or a foreign national with a permanent residence permit in the Republic of Slovenia, and if a national court undertakes by issuing a written statement to execute the judgment of the court of the issuing State in accordance with national law.[31]

Procedural Safeguards under the Recommendation (2013/C 378/02)

As explained above, the Recommendation is not implemented in the national legislation. Nonetheless, this section of the report is analysing Slovenian national safeguards in EAW

[29] https://commission.europa.eu/system/files/2023-07/SWD_2023_262_1_EN_document_travail_service_part1_v2.pdf page 21.
[30] Article 14(1) of the Cooperation in Criminal Matters with the Member States of the European Union Act (*Zakon o sodelovanju v kazenskih zadevah z državami članicami Evropske unije*), 23 May 2013.
[31] Ibid.

proceedings and how they are (not) corresponding to the safeguards included in the Recommendation.

- **Presumption of vulnerability**

No presumption of vulnerability for persons with psychosocial and/or intellectual disabilities is prescribed by the national law.

- **Right to information**

Both the police and the competent investigating judge must inform the requested person of their rights:

- that they are not obliged to make any statement;
- that they have the right to the immediate legal assistance of a defence counsel of their own choosing;
- that they the right to right to choose a lawyer in the issuing state who can assist the defence counsel in the effective exercise of his or her rights by providing information and advice;
- that on the person's request a competent authority must notify the person's next-of-kin their deprivation of liberty;
- if the requested person is not a national of the Republic of Slovenia, they must also be notified of the fact that on their request, a competent authority must notify a consulate of the person's country of the deprivation of liberty.[32]

At the hearing, the investigating judge must also instruct the person about content of the EAW and about the possibility of consenting to the surrender.[33] They must also instruct the requested person on the meaning of the speciality rule, on the fact that the person may waive the application of this principle, on the consequences of such waiver, and on the fact that the waiver is voluntary and may not be revoked.

The Act does not foresee any special form for the provision of information, only who is responsible to provide the information and which information should be provided. The

[32] Articles 19 and 20 of the Cooperation in Criminal Matters with the Member States of the European Union Act (*Zakon o sodelovanju v kazenskih zadevah z državami članicami Evropske unije*), 23 May 2013.
[33] Article 21 of the Cooperation in Criminal Matters with the Member States of the European Union Act (*Zakon o sodelovanju v kazenskih zadevah z državami članicami Evropske unije*), 23 May 2013.

law does not explicitly provide for any obligation to provide information in an accessible form to vulnerable groups of persons.

There is also no explicit right to have a person of trust present during the proceedings.

- **Right of access to a lawyer**

In accordance with the CCMMSEUA, the requested person must have a defence counsel appointed during the entire surrender proceedings, or from the first hearing on the surrender until the execution of the surrender.[34] If the requested person does not take a defence counsel, the investigating judge will appoint one *ex officio*. As explained above, the requested person must be informed about the right to a lawyer immediately upon deprivation of liberty by the police and by the investigating judge.

If the requested person, when brought before the investigating judge, states that he or she wishes to exercise the right to choose a lawyer in the issuing Member State, the investigating judge must immediately inform the competent authority of the issuing state. The investigating judge then provides the requested person with information received from the competent authority of the issuing state to facilitate the choice of a lawyer, including information on eligibility for free legal aid.[35] This obligation of the investigation judge is relatively new, as it was added to the Act with the amendment adopted in 2021.[36]

- **Right to medical assistance**

Requested persons have the same rights regarding medical assistance as all other detainees in Slovenia (please see below, Section 3.1.2.3).

- **Recording of questioning**

CCMMSEUA does not provide for any provisions regarding the recording of questioning. However, in accordance with the CPA, the investigating judge can order that a hearing is recorded by appropriate technical means for audio or audio-visual recording but must

[34] Article 17(1) of the The Cooperation in Criminal Matters with the Member States of the European Union Act (*Zakon o sodelovanju v kazenskih zadevah z državami članicami Evropske unije*), 23 May 2013.
[35] Article 17(3) of the The Cooperation in Criminal Matters with the Member States of the European Union Act (*Zakon o sodelovanju v kazenskih zadevah z državami članicami Evropske unije*), 23 May 2013.
[36] The Act Amending the Cooperation in Criminal Matters with the Member States of the European Union Act (*Zakon o spremembah in dopolnitvah Zakona o sodelovanju v kazenskih zadevah z državami članicami Evropske unije – ZSKZDČEU-1C)*, 1 June 2021.

inform the person being questioned beforehand.[37] There are no guidelines on mandatory recording of hearings concerning vulnerable persons. Although the recording of interviews is quite common, the decision to do so remains with the investigating judge.

- **Deprivation of liberty**

In general, the authorities must always consider the principle of proportionality when deciding upon deprivation of liberty as this obligation derives from the Constitution of the Republic of Slovenia. The provisions of the CCMMSEUA regarding the ordering of detention indicate that the same must be done when ordering detention in EAW proceedings. For the purpose of successfully conducting surrender proceedings against a requested person, and provided that the circumstances exist which indicate that there is a risk of the requested person absconding, the investigating judge decides, on the basis of a decision issued by the ordering judicial authority, or a motion of a competent state prosecutor, whether to order detention of the requested person or any of the other measures to ensure that the person attends proceedings, all by applying, *mutatis mutandis*, the provisions of the Act regulating criminal procedure.[38] However, lawyers report that detention is almost always ordered when the concerned person is a foreign national and that alternatives are not duly considered as it is assumed that a person with no significant ties to Slovenia is a flight risk.[39]

Absence of case-law

No case-law regarding cases in Slovenia concerning persons with intellectual and/or psychosocial disabilities where an EAW was refused on fundamental rights grounds could be identified. None were reported by our interviewees. This absence of case-law is also reflected in the European Commission's statistical data for 2021:

[37] Article 84 of the Criminal Procedure Act (*Zakon o kazenskem postopku*), 29 September 1994.
[38] Article 24(12) of the Cooperation in Criminal Matters with the Member States of the European Union Act (*Zakon o sodelovanju v kazenskih zadevah z državami članicami Evropske unije*), 23 May 2013.
[39] Vučko K., Thaler I. (2021), Vodnik: Sistemi odpovedi pravici do sojenja v Sloveniji, Ljubljana, Mirovni inštitut, p. 38.

Refusal to execute an EAW based on general fundamental rights grounds in 2021 (article 1.3 EAW FD) for MS covered in the project[40]

Austria	Bulgaria	Italy	Germany	Lithuania	Slovenia
0	2	64	4	X	0

Findings from interviews and national roundtable discussions

It seems that the stakeholders we consulted during our research have limited experiences in EAW and other cross-border proceedings – not only regarding defendants with psychosocial and/or intellectual disabilities but also in general. As one lawyer mentioned, lawyers that represent clients in EAW cases are most often appointed *ex officio*, which in practice means that a lawyer rarely gets to work on an EAW case. This lack of specialisation, not only of lawyers but also judges and prosecutors, could present an issue when it comes to the protection of rights of the requested persons in general.

The interviewed prosecutor mentioned that prior to the person being brought to the investigating judge based on an EAW, the authorities only have access to information that is included in the EAW itself. If information regarding the person's possible psychosocial and/or intellectual disability is missing, the prosecution is not aware of the person's vulnerability. If the prosecution then makes a motion for ordering of the detention and the detention is ordered, the person will then receive the same treatment in the detention as any other detainee, including psychiatric examination upon admission to the detention facility (see below → **3.1.1.2 Deprivation of liberty of criminally responsible defendants with psychosocial and/or intellectual disabilities**).[41]

The interviewed lawyer also commented that the EAW proceedings are extremely bureaucratic and that the use of the common EAW form is good as a check list but does not provide much contextual information.[42] At the same time, the principle of mutual trust among Member States has an emphasised impact on the decision-making. As a result, the courts do not, for example, consider detention conditions or the respect for procedural rights (fair trial) *ex officio* but leave it to the defence to raise such concerns.

[40] European Commission Statistics on the practical operation of the European arrest warrant 2021, SWD(2023) 262 final, pages 46 and 47 https://commission.europa.eu/system/files/2023-07/SWD_2023_262_1_EN_document_travail_service_part1_v2.pdf
[41] Interview with a prosecutor.
[42] Interview with a lawyer.

When it comes to considering the individual situation of the requested person, circumstances such as health reasons could lead to a postponement of the surrender but would not affect the decision itself.

2.2.Transfer of Prisoners

CCMMSEUA does not contain any provisions regarding the applicability or the manner of application of transfer of prisoners to persons with intellectual and/or psychosocial disabilities or in general persons in a situation of vulnerability.

A national court will recognise and execute a final decision of a court of the issuing State imposing a custodial sentence, a safety or other measure involving deprivation of liberty, if the sentenced person is in the territory of the issuing State or the Republic of Slovenia, and under the following conditions:

- **regardless of the sentenced person's consent**, if they are a national of the Republic of Slovenia, and
    - the sentenced person is a permanent or temporary resident in the Republic of Slovenia, including cases where a sentenced person fled, or arrived in, the Republic of Slovenia in order to avoid criminal proceedings or the execution of a sentence in the issuing State, or
    - if a person was sentenced to expulsion, forcible removal or other measure resulting in the fact that such person would no longer be permitted to remain in the territory of the State which issued a final decision upon such person's release from serving the sentence or measure involving deprivation of liberty;
- **with the consent of the sentenced person**, if it is established special circumstances and ties of the sentenced person to the Republic of Slovenia exist, on the basis of which a reasonable conclusion may be drawn that the execution of the sentence in the Republic of Slovenia would facilitate the sentenced person's social rehabilitation.

The CCMMSEUA lists among the grounds for non-recognition and non-execution if there are reasonable grounds to conclude that the judgment was rendered in the course of proceedings in which **fundamental human rights and freedoms were violated**, or where

the person was sentenced on the grounds of their sex, race, religion, ethnic origin, nationality, language, political conviction or sexual orientation, or where such person's position was significantly worse for any of these reasons.[43]

The courts also reject recognition and execution if the imposed sentence includes psychiatric treatment, health care or another measure involving deprivation of liberty which cannot be executed in the Republic of Slovenia in spite of the application of the provisions of the CCMMSEUA on the adaptation of sentences.[44] This provision implements Article 9(1)(k) of the Council Framework Decision on the application of the principle of mutual recognition to judgments in criminal matters.[45]

Prior to forwarding the decision, a competent authority of the issuing State may consult with a competent national court regarding whether the transferred execution of sentence would facilitate the social rehabilitation of the sentenced person. During consultations, a national court must take into account the opinion of the sentenced person regarding the transfer of execution of sentence if the sentenced person expresses such an opinion.[46]

A national court may submit to a competent authority of the issuing State a reasoned opinion of refusal which states why the transfer of execution to the Republic of Slovenia would not facilitate the social rehabilitation of the sentenced person.[47] If a competent authority of the issuing State forwards the judgment without the prior consultation, the opinion of the national court may be sent immediately upon receipt of the certificate and the judgment. In such cases, the national court will set an appropriate time limit within

[43] Article 132(1)(8) of the Cooperation in Criminal Matters with the Member States of the European Union Act (*Zakon o sodelovanju v kazenskih zadevah z državami članicami Evropske unije*), 23 May 2013.
[44] Article 132(1)(9) of the Cooperation in Criminal Matters with the Member States of the European Union Act (*Zakon o sodelovanju v kazenskih zadevah z državami članicami Evropske unije*), 23 May 2013.
[45] Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union, OJ L 327, 5.12.2008, p. 27–46 <https://eur-lex.europa.eu/eli/dec_framw/2008/909/oj>
[46] Article 133 of the Cooperation in Criminal Matters with the Member States of the European Union Act (*Zakon o sodelovanju v kazenskih zadevah z državami članicami Evropske unije*), 23 May 2013
[47] Article 133(3) of the Cooperation in Criminal Matters with the Member States of the European Union Act (*Zakon o sodelovanju v kazenskih zadevah z državami članicami Evropske unije*), 23 May 2013.

which the competent authority of the issuing State must communicate whether they still request the transfer of execution.[48]

Absence of case-law

No national court cases concerning persons with intellectual and/or psychosocial disabilities where transfer of prisoners was refused on fundamental rights grounds could be identified. None were reported by our interviewees.

Findings from interviews and national roundtable discussions

In general, consulted stakeholders in our research did not report on practical experience with transfer of prisoners. However, one interview revealed a case that was dealt with by the Slovenian Human Rights Ombudsman.

Identified case

The Human Rights Ombudsman received a petition from parents of a person, Slovenian national, who was prosecuted in Poland.[49] It concerned a case that has received a lot of attention from the public in Poland. In the proceedings it was established that they had mental health issues, and the question of the person's mental capacity was also considered. In this respect, criminal proceedings took place in Poland. Their parents became very concerned because they received information about the execution of the security measure of compulsory psychiatric treatment and that even electric shocks are allowed. Thus, they turned to the Human Rights Ombudsman for help. They wished to achieve transfer to Slovenia. The Ombudsman contacted the Ministry of Foreign Affairs and the Polish Ombudsman. In the end, the person was transferred to Slovenia and the security measure was implemented at the Forensic Psychiatry Unit.

2.3. European Supervision Order

CCMMSEUA does not contain any provisions regarding the applicability or the manner of application of European Supervision Order (ESO) to persons with intellectual and/or psychosocial disabilities or in general persons in a situation of vulnerability.

[48] Article 133(4) of the Cooperation in Criminal Matters with the Member States of the European Union Act (*Zakon o sodelovanju v kazenskih zadevah z državami članicami Evropske unije*), 23 May 2013.
[49] Interview with a representative of the Human Rights Ombudsman.

Slovenian courts may execute the following supervision measures by applying *mutatis mutandis* supervision measures for ensuring the accused's attendance, elimination of the risk of recidivism, and for successfully conducting criminal proceedings that are prescribed by the CPA:[50]

- obligation of the defendant to inform a national court of any change of residence, by issuing an instruction to respond to a summons and to immediately inform a national court of any change of address as well as any intention to change residence, and a caution as to the consequences if the accused fails to do so;
- obligation of the defendant not to enter certain localities, places or defined areas in the issuing and the executing state, which is enforced with a restraining order from a certain locality, place or area;
- obligation of the defendant, if necessary, to remain at a specified place at specified times, which, depending on the nature of the imposed supervision measure, is enforced by a promise made by the accused not to leave his or her residence, or by a house arrest;
- obligation on the defendant containing limitations on leaving the territory of the Republic of Slovenia, which is enforced by a promise made by the accused not to leave his or her residence or leave the Republic of Slovenia without a court's permission;
- obligation of the defendant to report to a specified authority at a specified time, which is enforced by reporting to a police station;
- obligation of the defendant to avoid contact with specific persons in relation to any alleged criminal offence or criminal offences, which is enforced by a restraining order with regard to a specified person;
- obligation of the defendant not to operate a vehicle, which is enforced by confiscation of the accused's driving licence for the duration of proceedings, and
- obligation to deposit a specified monetary amount, or provide other guarantees, either in a specified number of instalments or in a single sum, which is enforced by bail.

[50] Article 102 of the Cooperation in Criminal Matters with the Member States of the European Union Act (*Zakon o sodelovanju v kazenskih zadevah z državami članicami Evropske unije*), 23 May 2013.

Under the provisions of CCMMSEUA, a national court also executes the following supervision measures by applying *mutatis mutandis* the provisions of the Criminal Code regarding measures of custodial supervision (Articles 63 to 67 of the Criminal Code) or security measures (Articles 69 and 71 of the Criminal Code):

- an obligation to undergo **therapeutic treatment or treatment of addiction**, which is enforced by custodial supervision with the ordering of treatment in an appropriate medical institution, and if the person consents, also to treatment of addiction to alcohol or drugs; regarding the willingness to monitor this measure, Slovenia has also made a notification to the Council of the European Union;[51]
- prohibition on performing specified activities related to the alleged criminal offence, which may include working in a certain profession or in a certain type of employment, which is enforced by a safety measure banning the performance of an occupation.

During ESO proceedings and in the course of execution, a national court may hear the defendant, even if the accused does not have permanent or temporary residence in the Republic of Slovenia, regarding the following:[52]

- all circumstances related to the admissibility of recognising decisions on supervision measures,
- the possibility of executing supervision measures in the Republic of Slovenia,
- the adaptation of supervision measures,
- renewing, testing, amending and executing supervision measures, and
- violation of supervision measures.

A questioning of the defendant may also be conducted via **video conference**, pursuant to the procedure and under the conditions provided by the CCMMSEUA and in accordance

[51] Implementation of the Article 8(2)(d) of the Council Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention, OJ L 294, 11.11.2009, p. 20–40 http://data.europa.eu/eli/dec_framw/2009/829/oj and https://www.ejn-crimjust.europa.eu/ejn/libdocumentproperties.aspx?Id=1215.

[52] Article 106 of the Cooperation in Criminal Matters with the Member States of the European Union Act (*Zakon o sodelovanju v kazenskih zadevah z državami članicami Evropske unije*), 23 May 2013.

with the applicable regulations on assistance and cooperation under international law and the law of the European Union.

A national court may, among other, refuse recognition of a decision on supervision measures if there are objective reasons to believe that a supervision measure is issued against the accused for the purpose of punishing him or her on the grounds of his or her sex, race, religion, ethnic origin, nationality, language, political belief or sexual orientation, or that such person's status may be prejudiced for any of these reasons.[53] The provision corresponds to the wording of Recital 16 of the ESO Framework decision. The ground of disability is not included in this list.

If the nature of a supervision measure imposed by a competent authority of the issuing State is incompatible with the law of the Republic of Slovenia, a national court may adapt such a measure, taking into account the supervision measures by the national law.[54] The adapted supervision measure must, in its nature, correspond to the supervision measure imposed by the competent authority of the issuing State as far as possible, and must not exceed the severity of such measure. No caselaw regarding the adaptation of the supervision measures in cases concerning persons with intellectual and/or psychosocial disabilities could be identified.

Absence of case-law

No case law related to the implementation of the obligation to undergo therapeutic treatment or treatment of addiction could be identified. No case-law regarding cases in Slovenia concerning persons with intellectual and/or psychosocial disabilities where ESO was refused on fundamental rights grounds could be identified. None were reported by our interviewees.

Findings from interviews and national roundtable discussions

When it comes to the execution of these measures, it was pointed out during the conducted interviews in the field research that there is an **issue in the practical application of security measures of psychiatric treatment at liberty (which should**

[53] Article 108(1)(8) of the Cooperation in Criminal Matters with the Member States of the European Union Act (*Zakon o sodelovanju v kazenskih zadevah z državami članicami Evropske unije*), 23 May 2013.
[54] Article 110 of the Cooperation in Criminal Matters with the Member States of the European Union Act (*Zakon o sodelovanju v kazenskih zadevah z državami članicami Evropske unije*), 23 May 2013.

***mutatis mutandis* be applied when executing supervision orders). Namely, there is not even a list of national institutions that implement such measures in Slovenia, although the obligation to prepare such a list was prescribed over a decade ago**.[55]

2.4. Probation and Alternative Sanctions

CCMMSEUA does not contain any provisions regarding the applicability or the manner of application of Probation and Alternative Sanctions (PAS)[56] to persons with intellectual and/or psychosocial disabilities or in general persons in a situation of vulnerability.

Among the measures that can be implemented is also an obligation to undergo therapeutic treatment or treatment for addiction, which is enforced by custodial supervision and ordering of treatment in an appropriate medical institution; and if the person consents, also for the treatment of addiction to alcohol or drugs.[57]

In cases where Slovenia is the executing state, a national court recognises and executes a final decision of the issuing State:[58]

- if the sentenced person with temporary or permanent residence in the Republic of Slovenia agrees to be returned to the Republic of Slovenia, or has already returned to the Republic of Slovenia, after a competent authority of the issuing State has informed him or her of the sanction imposed, or
- if a national court agrees that a competent authority of another Member State may forward for execution to the Republic of Slovenia a decision on supervision measures regarding a sentenced person who is not a temporary or permanent resident of the Republic of Slovenia.

[55] Interview with a representative of the Human Rights Ombudsman.
[56] Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions, OJ L 337, 16.12.2008, p. 102–122 <http://data.europa.eu/eli/dec_framw/2008/947/oj>
[57] Article 163(j) of the Cooperation in Criminal Matters with the Member States of the European Union Act (*Zakon o sodelovanju v kazenskih zadevah z državami članicami Evropske unije*), 23 May 2013.
[58] Article 164 of the Cooperation in Criminal Matters with the Member States of the European Union Act (*Zakon o sodelovanju v kazenskih zadevah z državami članicami Evropske unije*), 23 May 2013.

In the case of the latter, a national court may consent if circumstances support the expectation that the sentenced person would reside permanently or temporarily in the Republic of Slovenia during the execution of a sentence and that it would be possible to execute the undertaken obligations effectively.

If necessary, and prior to granting such consent, a national court may question the sentenced person on the relevant circumstances of the PAS Framework Decision, Article 175(3) of the CCMMSEUA stipulates that a national court shall decide on the execution, amendment, revocation and discontinuance of the measures referred to in paragraph one in accordance with the law of the Republic of Slovenia.

Non-discrimination provision of Recital 5 of the PAS Framework Decision that "*Nothing in the Framework Decisions should be interpreted as prohibiting refusal to recognise a decision on supervision measures if there are objective indications that it was imposed to punish a person because of his or her sex, race, religion, ethnic origin, nationality, language, political convictions or sexual orientation or that this person might be disadvantaged for one of these reasons*" is not transposed in the CCMMSEUA.

Recital 16 of the Framework Decision states that "A Member State may refuse to recognise a judgment and, where applicable, a probation decision, if the judgment concerned was issued against a person who has not been found guilty, such as in the case of a mentally ill person, and the judgment or, where applicable, the probation decision provides for medical/therapeutic treatment which the executing State cannot supervise in respect of such persons under its national law." This provision is only partially reflected in the national law - among the reasons for non-recognition and non-execution is when the imposed sentence includes psychiatric treatment, health care or another measure which, under the law of the Republic of Slovenia, cannot be enforced in spite of the application of the provisions on the adaptation of sentence pursuant to this Act.[59] The national law does not make a reference to the wording "*judgment concerned was issued against a person who has not been found guilty, such as in the case of a mentally ill person*".

[59] Article 165(1)(8) of the Cooperation in Criminal Matters with the Member States of the European Union Act (*Zakon o sodelovanju v kazenskih zadevah z državami članicami Evropske unije*), 23 May 2013.

Absence of case-law

No caselaw regarding the above-mentioned provisions could be identified. No such cases were mentioned by our interviewees.

In our interview with the representatives of the Probation Agency they briefly mentioned a cross-border case in which a Slovenian national wished the probation measure to be implemented in Sweden where he had lived, but Sweden rejected the possibility of transfer without any particular explanations.[60]

[60] Interview with representatives of the Probation Agency.

3. National legal and policy frameworks concerning defendants and persons deprived of liberty with intellectual and/or psychosocial disabilities in law and in practice

3.1. National legal framework and its application in practice

3.1.1. National framework concerning deprivation of liberty

Fitness to stand trial

The judicial authorities have the obligation to *ex officio* inquire into whether the defendant is capable of performing procedural acts (fitness to stand trial).

If the defendant is considered not fit to stand trial, this may result in the suspension of the proceedings (either at the investigation stage[61] or at the main hearing[62]). This decision on the suspension of the proceedings is made if the accused person, after committing a criminal offence, becomes "mentally ill or suffers from a mental disorder" or from some other serious disease which prevents him or her from taking part in the proceedings for an extended period of time.

Criminal responsibility

If the defendant is declared incapable to be found criminal responsible due to the his/her mental state at the time of the offense ("legal insanity"), the state prosecutor makes a motion to the court to order compulsory psychiatric treatment and confinement of such perpetrator in a medical institution, or compulsory psychiatric treatment of the perpetrator at liberty, if the grounds for such precautionary measure exist as provided by the Criminal Code (See below → **3.1.1.1 Proceedings for the application of security measures**).[63]

[61] Article 179 of the Criminal Procedure Act (*Zakon o kazenskem postopku*), 29 September 1994.
[62] Article 310(1) of the Criminal Procedure Act (*Zakon o kazenskem postopku*), 29 September 1994.
[63] Article 491(1) of the Criminal Procedure Act (*Zakon o kazenskem postopku*), 29 September 1994.

If the defendant has committed a criminal offence in a state of mental incapacity but there are no grounds for the application of security measures, the criminal proceedings are discontinued.[64]

A reduced sentence may be imposed on the defendant perpetrator of a criminal offence in a state of substantially diminished mental capacity - whose ability to understand the meaning of his or her actions or to control his or her conduct was substantially diminished due to psychosocial and/or intellectual disability or due to any other permanent or severe mental impairment.[65] When imposing punishment on such a defendant, the court will, by the same judgment, also impose a security measure of compulsory psychiatric treatment and confinement in a medical institution if it establishes that the conditions for such measure under the Criminal Code are fulfilled.[66]

If the defendant cannot be held criminally responsible and at the same time there are no grounds for the application of security measures, the indictment is dismissed, and the proceedings are discontinued.[67]

If no state of mental incapacity is found (the defendant is criminally responsible) and they are considered as fit to stand trial, they will be tried and may be subjected to imprisonment (see below →**3.1.1.2 Deprivation of liberty of criminally responsible defendants with psychosocial and/or intellectual disabilities).**

In Slovenia, there are no measures that could be considered as preventive detention.

As explained by the interviewed judge, circumstances suggesting that a person may not be held criminally responsible are often identified already during the criminal investigation. An interviewed prosecutor mentioned that such information is collected already by the police or with the help of the social care services; information is then also provided by the doctors or psychiatrists that are treating the person.[68] When doubt arises, an expert opinion is then ordered.[69]

Expert opinion

[64] Article 277(1)(2) of the Criminal Procedure Act (*Zakon o kazenskem postopku*), 29 September 1994.
[65] Article 29(3) of the Criminal Code (*Kazenski Zakonik*), 20 May 2008.
[66] Article 494 of the Criminal Procedure Act (*Zakon o kazenskem postopku*), 29 September 1994.
[67] Articles 277(2) and 352(1)(3) of the Criminal Procedure Act (*Zakon o kazenskem postopku*), 29 September 1994.
[68] Interview with the prosecutor.
[69] Interview with a judge.

The judge may order a psychiatric examination if:

- A suspicion arises that the defendant lacked mental capacity due to their psychosocial or intellectual disability when the criminal offence was committed, or that their mental capacity was diminished (**criminal responsibility**); or

- A serious doubt exists that they are incapable of participating in criminal proceedings due to their mental condition (**fitness to stand trial**).

The motion to order a psychiatric examination can also be made by the defence. The examination is carried out by a psychiatric expert, during which the expert can also perform an interview with the accused person. However, concerns were raised that sometimes these interviews are too short to provide a quality assessment: " *I also think that there is a problem here and that it is difficult to perform an assessment based on one short conversation. I find it necessary that clinical psychologists are also included in the assessment so that they can provide insight in one part of the person's personality, which is then supplemented by the psychiatrist […] I often find it lacking in depth, (done) in a hurry.*"[70]

If the psychiatric expert finds that the accused person is suffering from a psychosocial or intellectual disability or some other lasting and severe mental condition, they should determine its nature, type, degree and duration, and give their opinion as to how such mental condition affected the accountability of the accused person at the time of committing the criminal offence (the question of mental capacity that might affect the defendant's guilt in accordance with the Criminal Code) and how it still affects their perception and behaviour, or whether their mental condition is such as to render the accused person incapable of participating in criminal proceedings, and the anticipated period of their procedural incapacity.[71]

The right to a second expert opinion

The Court will grant a request for the introduction of another expert where a party has argued on reasonable grounds that it doubts the competence and correctness of the expert's opinion. However, it will first seek to resolve the deficiencies and contradictions of the opinion by re-examining the expert. But if the doubts as to the correctness of the expert's opinion or the deficiencies cannot be resolved in this way, the court will request

[70] Interview with a prosecutor.
[71] Article 265(1) of the Criminal Procedure Act (*Zakon o kazenskem postopku*), 29 September 1994.

the opinion of another expert. All of the foregoing must relate to the essential circumstances relevant to the expert's reasoning and to the illogicality and persuasiveness of the expert's arguments.[72] But the interviewed judge mentioned that sometimes the defence will hire their own expert as an expert witness, which can then lead to several different expert opinions. The aim is to cast doubt on the opinion of the initially appointed expert and force the court to appoint another: "*Criminal responsibility is determined by the court, but to summarise: One (expert) will say that the person is not criminally responsible, one will say that he is, and another that his mental capacity was substantially diminished… Then we (the court) appoint another expert, since we do not have the necessary expert knowledge. Then you have three different opinions, and you have to establish who is right and who is not. In the end, the court is the one that decides.*"[73]

On the other hand, the interviewed lawyer commented that the Slovenian judicial system is overly reliant on the expert opinions: *"Us lawyers, we call it **trial by expert**. By an expert that the judge chooses him/herself. The judge knows which expert is conviction-oriented and which expert is acquittal-oriented. And then based on his/her own opinion on the case, the judge chooses and appoints the expert accordingly.*"[74] In the lawyer's opinion this practice is particularly unfair considering the financial element as some clients can afford to seek the opinion of several expert witnesses, while others cannot and therefore cannot counter the court appointed expert.

3.1.1.1. Proceedings for the application of security measures

"What makes these cases perhaps a little bit special is that they have even more emphasis on the therapeutic aspect, that is to say, that there should not be any punitive elements in these procedures. Although de facto there are, because any restriction of liberty hurts as much as a punishment hurts. So, in a sense, this current dualism of punishment and security measures, which serve different purposes and are very different, is also a bit of a sham. The purposes may be different, but the effects are very similar, so that is something

[72] The Supreme Court of the Republic of Slovenia, Judgement No. I Ips 32562/2013-330 of 28 May 2015.
[73] Interview with a judge.
[74] Interview with a lawyer.

that I think is useful to keep in mind when we are compartmentalising these different groups and saying that these are quite different situations."[75]

If a defendant could not be held criminally responsible at the time he/she has committed a criminal offence, the state prosecutor makes a motion to the court to order compulsory psychiatric treatment and confinement of such perpetrator in a medical institution, or compulsory psychiatric treatment of the perpetrator at liberty, if the grounds for such security measure exist as provided by the Criminal Code.[76] As mentioned above, circumstances suggesting that a person may not be held criminally responsible are often identified already during the criminal investigation. But sometimes there are no indicators early in the proceedings and the defendant will only mention previous psychiatric treatment when objecting against the indictment. In this case, the expert opinion will only be ordered at the start of the trial (pre-trial hearing), and if it turns out at that time that the perpetrator is not criminally responsible, then only then will the prosecutor make a motion to the court to order a security measure.[77]

Proceedings

The decision on the security measure is made after the main hearing is held by the court of jurisdiction at first instance.[78] In addition to the state prosecutor and the defendant's lawyer, psychiatrists from the institution entrusted as expert witnesses regarding the defendant's capability to be criminal responsible shall also be summoned as expert witnesses. The defendant is only summoned if their condition allows for their presence at the main hearing. Their spouse, parents or guardian must be notified of the main hearing and, depending on the circumstances, other close relatives as well.

If the accused person may not be heard during these proceedings or if their statement about their defence is unintelligible, it is considered that they object to the motion for the imposition of a security measure.[79]

[75] Interview with a representative of the academia.
[76] Article 491(1) of the Criminal Procedure Act (*Zakon o kazenskem postopku*), 29 September 1994.
[77] Interview with the judge.
[78] Article 492 of the Criminal Procedure Act (*Zakon o kazenskem postopku*), 29 September 1994.
[79] Article 492(2) of the Criminal Procedure Act (*Zakon o kazenskem postopku*), 29 September 1994.

Throughout the entire proceedings, and already when the state prosecutor makes a motion for security measures, the defendant must be represented by a lawyer.[80] If the defendant does not have a lawyer, the court will appoint one *ex officio*.

Deprivation of liberty

If the court establishes on the basis of the evidence taken that the defendant has committed a specific criminal offence and that at the time of its commission they lacked mental capacity, the court decides, after hearing the persons summoned, on the basis of the findings and opinion of psychiatric experts, whether or not to impose the security measure of compulsory psychiatric treatment and confinement in a medical institution or compulsory psychiatric treatment at liberty.[81]

If the defendant that is subjected to the proceedings for the application of security measures is in (pre-trial) **detention**, they will also be placed in an appropriate medical institution where the detention will be carried out. The provisions of the CPA on detention are applied *mutatis mutandis* to the length, review and termination of the placement of the defendant in such institution.[82]

In accordance with the Criminal Code, the court may impose either the compulsory psychiatric treatment and confinement in a mental health institution or compulsory psychiatric treatment at liberty if the defendant was not capable of being criminally responsible for the committed criminal offence if there is no other way to ensure people's safety.[83]

The decision to confine the defendant in a mental health institution can be made, if, based on the gravity of the act committed and the degree of the perpetrator's mental health issues, the court determines that, while at large, the perpetrator could commit a serious criminal offence against life and limb, sexual integrity or property and that this risk may only be eliminated by ensuring that the perpetrator receives treatment and is confined in

[80] Article 491(1) of the Criminal Procedure Act (*Zakon o kazenskem postopku*), 29 September 1994.
[81] Article 492(3) of the Criminal Procedure Act (*Zakon o kazenskem postopku*), 29 September 1994.
[82] Article 496(1) of the Criminal Procedure Act (*Zakon o kazenskem postopku*), 29 September 1994.
[83] Article 70(3) of the Criminal Code (*Kazenski Zakonik*), 20 May 2008.

a forensic psychiatric ward of a mental health institution that meets special security conditions provided by law.[84]

Judicial review

The measure compulsory psychiatric treatment and confinement in a medical institution may apply for a maximum of five years. However, the court will not determine in the judgement, how long the defendant will be confined in the mental health institution.[85] Namely, in accordance with the Criminal Code, **every six months, the court must re-examine whether further treatment and confinement in a mental health institution are still necessary**.[86] The same court of first instance that imposed the security measure of compulsory psychiatric treatment and confinement of the defendant in a medical institution is responsible for the review. The interviewed judge mentioned, that the review at their specific court is organised so that the same judge performs each of the six-month reviews in an individual case: "*I think it is good that the same judge monitors the case every six months.*"[87] The court will, *ex officio* or on the motion of the perpetrator or the medical institution and on the basis of the opinion of physicians, adopt all further decisions regarding the duration and modification of this measure.[88] Prior to making the decision, the judge will, if necessary, schedule a hearing, informing the state prosecutor and the defence counsel thereof. If the defendant's condition allows it, the court will also hear them if appropriate. Legal representation by a lawyer is also mandatory in these proceedings of reconsidering the duration or modification of the security measure.[89] The interviewed judge explained that at the hearing, the person will be given the opportunity to explain how they participate in therapy, how they spend their free time and whether they are receiving any support from their family. The interviewed lawyer on the other hand mentioned that some of the judges treat these hearings as a matter of formality and that the person's statement is not really taken into account as the only information that matters is the expert opinion.[90]

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[84] Article 70.a(1) of the Criminal Code (*Kazenski Zakonik*), 20 May 2008.
[85] Interview with a judge.
[86] Article 70.a(2) of the Criminal Code (*Kazenski Zakonik*), 20 May 2008.
[87] Interview with a judge.
[88] Article 496(1) of the Criminal Procedure Act (*Zakon o kazenskem postopku*), 29 September 1994.
[89] Article 496(3) of the Criminal Procedure Act (*Zakon o kazenskem postopku*), 29 September 1994.
[90] Interview with a lawyer.

Regarding the outcome of these reviews, the interviewed judge also mentioned that sometimes the security measure in a medical institution is then transformed into the security measure at liberty and it also sometimes happens that the security measure is stopped before the five-year limit, indicating that this is not the predominant practice.[91]

If the court finds that the treatment and confinement in a mental health institution are no longer necessary, it will either end the confinement or substitute it with the measure of compulsory psychiatric treatment at liberty.[92]

Right to be heard

The Human Rights Ombudsman has reported that it has repeatedly come across cases where the court has not heard the defendant before taking a new decision on the duration or modification of a compulsory psychiatric treatment measure or a compulsory psychiatric treatment at liberty.[93] On this issue, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), during its visit to Slovenia in 2017, had already recommended that the Slovenian authorities take the necessary measures - including at legislative level - **to ensure that all patients subject to this security measure are heard in person by a judge in the context of the six-month review of the security measure**.[94] In its response to the CPT report, the Government of the RS replied to the above recommendation that a system of six-monthly review is already duly prescribed at legislative level, and that it would draw the attention of the judiciary to the above recommendation by specifically communicating the text of the recommendation of the CPT. In 2018, the NPM specifically drew the attention of the Supreme Court of the Republic of Slovenia to this issue. In response, the Supreme Court of the Republic of Slovenia informed all judges of the recommendation.[95] However, it seems that this recommendation is not systematically followed. Some of interviewees explained that the court will acquire the report from the institution where the measure is being implemented, and the report will be sent to the perpetrator for them to read and comment on it. But if the court concludes that a hearing is not necessary and the parties

[91] Interview with a judge.
[92] Article 70.a(2) of the Criminal Code (*Kazenski Zakonik*), 20 May 2008.
[93] Varuh človekovih pravic (2019), *Letno poročilo Varuha človekovih pravic Republike Slovenije za leto 2018*, Ljubljana, Varuh človekovih pravic, pp. 190-191.
[94] CPT, 'Report of the Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment on Slovenia (28/3/2017 - 04/04/2017) [CPT/Inf (2017) 27].
[95] Varuh človekovih pravic (2019), *Letno poročilo Varuha človekovih pravic Republike Slovenije za leto 2018*, Ljubljana, Varuh človekovih pravic, pp. 190-191.

to the proceedings do not request one, the court will just issue a written decision regarding the extension of the measure.

The judge also mentioned that during the Covid-19 pandemic, the **hearings took place via videoconference**. Due to staff shortages, this practice also persists after the pandemic, as the prison that is responsible for the transfer of the person to the court for the hearing often requests that the hearing takes place remotely. But the judge also explained that the hearing in person is important: "*In a recent case, where the prison asked for a remote hearing, I opted for a postponement so that I could see him for once in person, I believe that such personal contact is different*." [96]

An interviewed lawyer mentioned that at the hearings, it is very difficult or impossible to dispute the opinion given by **the forensic psychiatry unit** where the measure is being implemented. Similarly, the interviewed prosecutor reported that the court gives the greatest weight to the opinion of the unit, while the prosecutor's opinion has no significant influence on the court's decision on whether or not to extend the measure.[97]

Remedies

The defendant may submit an objection against the motion of the state prosecutor to the court to order the security measure. The district court panel of judges then decides on the objection by the *mutatis mutandis* application of the provisions of the CPA on an objection against the indictment.[98] By linking this remedy to the provisions regarding an objection against an indictment, the law ensures that the prerequisites for filing a criminal indictment are also met in the proceedings for ordering security measures. Namely, *mutatis mutandis*, the panel of judges deciding on the objection rules that the motion is inadmissible, if:

- the act which is the subject of the indictment is not a criminal offence;
- circumstances exist which exclude guilt or criminal liability and there are no grounds for the application of safety measures;
- the criminal prosecution is statute-barred, or the act is covered by an amnesty or pardon, or other circumstances exist barring prosecution;

[96] Ibid.
[97] Interview with a prosecutor.
[98] Article 491(4) of the Criminal Procedure Act (*Zakon o kazenskem postopku*), 29 September 1994.

- there is insufficient evidence for the existence of a reasonable suspicion that the accused person has committed the offence he or she is charged with, or
- there is a lack of proportion between the minor relevance of the criminal offence (its risks are insignificant due to the nature or gravity of the offence, or because the harmful consequences are insignificant or did not occur, or due to other circumstances in which the criminal offence was committed and due to the low degree of the perpetrator's guilt, or due to his or her personal circumstances), and the consequences of criminal prosecution.[99]

The law thus protects the presumption of innocence, as also required by the Court of Justice of the European Union (CJEU) in the Case C 467/18.[100]

The court's ruling on the imposing of the security measure may be challenged within eight days of its receipt by all those entitled to appeal against a court judgment, with the exception of the injured party. An appeal may be lodged to the benefit of the accused person even against their will.[101]

Implementation of the measure of compulsory psychiatric treatment and confinement in a medical institution

The security measure is implemented in accordance with the provisions of the Enforcement of Criminal Sanctions Act.[102] The latter stipulates that the court which has imposed the security measure refers the person to the health care institution in which the measure is to be carried out.[103] The security measure of compulsory psychiatric treatment and care in a health care institution may be executed in the **forensic psychiatric wards of the health care institution** which meet special professional and security conditions prescribed by the law:[104]

[99] Article 277(1) of the Criminal Procedure Act (*Zakon o kazenskem postopku*), 29 September 1994.
[100] CJEU, Case 467/18, Request for a preliminary ruling from the Rayonen sad Lukovit — Bulgaria, 19 September 2019;
[101] Article 492(5) of the Criminal Procedure Act (*Zakon o kazenskem postopku*), 29 September 1994.
[102] Enforcement of Criminal Sanctions Act (*Zakon o izvrševanju kazenskih sankcij*), 23 February 2000.
[103] Article 151(1) of the Enforcement of Criminal Sanctions Act (*Zakon o izvrševanju kazenskih sankcij*), 23 February 2000.
[104] Article 151(2) of the Enforcement of Criminal Sanctions Act (*Zakon o izvrševanju kazenskih sankcij*), 23 February 2000.

- ensuring that detainees are separated according to the basis of the measure being enforced;
- providing premises and equipment enabling arrangements to be made for the professionally appropriate restraint of a violent person towards himself or other persons;
- adequately constructed, arranged, equipped and secured sleeping and resting, living, therapeutic and exercise facilities for detained persons, allowing for the treatment and physical, technical, communication and personal protection of detained persons in accordance with the requirements of the psychiatric, penological and security professions;
- the adequate number, competence and experience of the medical staff providing treatment and the competence and equipment of the judicial police officers providing security for persons subject to a security measure.

In addition to the security measure of compulsory psychiatric treatment and care in a health care institution, the **forensic psychiatric units** may during the proceedings also carry out detention and observation for the purpose of drawing up a psychiatric expert opinion on the mental capacity or the capacity to participate in the proceedings, as well as psychiatric hospital treatment of convicted persons.[105] According to the interviewed judge, detention of persons who are subject to proceedings for the application of security measures is always carried out at the forensic psychiatric unit.[106]

The implementation of the security measure is further defined by the Rules on the implementation of safety measures including compulsory psychiatric treatment and care in a health care institution and of compulsory psychiatric treatment without detention (the "Rules").[107]

The Rules address the persons subjected to the security measures as patients. In accordance with the Rules, patients are admitted to a forensic psychiatric unit on the basis of a decision of the court which has imposed the security measure, accompanied by an

[105] Article 151(5) of the Enforcement of Criminal Sanctions Act (*Zakon o izvrševanju kazenskih sankcij*), 23 February 2000.
[106] Interview with a judge.
[107] Rules on the implementation of safety measures including compulsory psychiatric treatment and care in a health care institution and of compulsory psychiatric treatment without detention (*Pravilnik o izvrševanju varnostnih ukrepov obveznega psihiatričnega zdravljenja in varstva v zdravstvenem zavodu in obveznega psihiatričnega zdravljenja na prostosti*), 25 April 2016.

expert's opinion and all available medical documentation relevant for the implementation of this security measure. Patients must be provided with treatment in accordance with a treatment plan adopted by a multidisciplinary team within seven days of admission to the forensic psychiatry unit, on the basis of an appropriate individual treatment plan and an individual protection plan. Patients are to be encouraged to participate in the preparation and implementation of the individual treatment plan. In their work, the multidisciplinary team must always take into account the patient's opinion and wishes, when they do not conflict with their medical interests and the individual care plan. **The multidisciplinary team must regularly monitor the care plan and shall check its adequacy at least once a month.**

Currently there is only one such facility in Slovenia - Forensic Psychiatry Unit of the University Clinical Centre Maribor (*Enota za forenzično psihiatrijo UKC Maribor*). All persons subjected to the security measure of compulsory psychiatric treatment and confinement and those detained during the proceedings for the application of the security measure are placed in this facility. The Forensic Psychiatry Unit was established in 2011, after years of recommendations from professionals that such a facility is needed.

As an interviewed psychiatrist explained, the Forensic Psychiatry Unit implements psychiatric care, medication, occupational therapies and physiotherapy, if the court orders it.[108] The treatment itself is not fundamentally different from other psychiatric wards, except for the security elements, such as the presence of the judicial police officers. The interviewee also pointed out to the cases, where the unit also implements the pre-trial detention during the proceedings for the application of the security measure. During this time, the person has the status of a (pre-trial) detainee and this regime can be prolonged for several months if the person or the state prosecution objects to the court decision ordering the security measure. As a result, such detainee does not have access to all the rehabilitation procedures, including exits, apart from the legally prescribed minimum daily walks. In some cases, where the patient has already reached a remission of psychosis, the implementation of rehabilitation activities should take place as soon as possible, it would therefore be beneficial if appeal procedures in such cases were prioritised by the courts.

[108] Interview with a psychiatrist I.

The National Preventive Mechanism at the Human Rights Ombudsman (NPM) performs regular visits of to the Forensic Psychiatry Unit.

The NPM frequently notes difficulties in enforcing the security measure of compulsory psychiatric treatment in a health care institution and at liberty. One of the endeavours of the NPM is to achieve the necessary upgrade of the forensic psychiatry in Slovenia, which was identified by the project assignment of the Ministry of Justice called '*Organisation of forensic psychiatry in Slovenia*' prepared in December 2015. There, the goal was set to establish a 'comprehensive system of specialised care that will enable multidisciplinary, tailored and person-centred professional treatment, with the aim of integration into the most independent and autonomous community life possible'.[109] The project also concluded that there is a need to upgrade forensic psychiatry in Slovenia:

- define norms and standards for the treatment of forensic patients in a health care institution (especially for minors),
- define norms and standards for the treatment of forensic patients at liberty (especially for minors),
- define programmes for the psychosocial and occupational rehabilitation of forensic patients,
- define norms and standards for institutional or community-based treatment of former forensic patients,
- define protocols for cooperation between different bodies and institutions in planning the follow-up of forensic patients after the expiry of the decision,
- prepare an analysis of the situation with an international comparison and elaborate short-term (up to five years), medium-term (up to ten years) and long-term strategies for the Republic of Slovenia,
- examine and, if necessary, amend the legislation for the implementation of the strategy,
- elaborate an evaluation tool to monitor the development of the field (system) of forensic and post-forensic psychiatry (psychiatric psychiatry in the forensic and post-forensic field).

[109] Varuh človekovih pravic (2020), *Letno poročilo Varuha človekovih pravic Republike Slovenije za leto 2019*, Ljubljana, Varuh človekovih pravic, p. 163.

However, the NPM reports that they had not been receiving any replies of information on whether and what activities are underway or planned to upgrade forensic psychiatry in Slovenia.

Other issues regarding the Forensic Psychiatry Unit the NPM has been reporting on:

- **Overcrowding** - This is a systemic issue that has remained unresolved for many years and the NPM has been warning about it ever since the opening of the unit.[110]
- **Insufficient number of judicial police officers in the Unit**, which has a significant impact on the safety of patients and staff, and also prevents patients from staying outdoors sufficiently. The need to carry out security checks on newly admitted patients would make it essential to recruit at least one female judicial police officer.[111]
- **Implementation of special protective measures** - Often, the premises used for physical restraint are inadequate, as they do not provide sufficient privacy for the restrained patient, and, due to staffing constraints, there is not always a guarantee of constant (continuous) supervision of the restrained patient.[112]

Unfortunately, in our research, we did not have the opportunity to collect first-hand experiences of people undergoing security measures in the forensic unit, but the interviewed lawyer pointed out that persons feel a lot of pressure, as any non-compliant behaviour results in stronger medication; and that people do not have the option to refuse medication - refusing it will only result in stronger medication.[113]

It is worth mentioning that in the past, Slovenia has had on open forensic unit - Department of Forensic and Social Psychiatry (DFSP) of the University Psychiatric Hospital in Ljubljana, Slovenia, which was an open institution organized as a therapeutic community and has had a psychotherapeutic and rehabilitative orientation. It offered treatment for „psychotic offenders, prisoners, and people with socially accentuated

[110] Varuh človekovih pravic (2022), *Letno poročilo Državnega preventivnega mehanizma za leto 2021*, Ljubljana, Varuh človekovih pravic, p. 45.
[111] Varuh človekovih pravic (2022), *Letno poročilo Državnega preventivnega mehanizma za leto 2021*, Ljubljana, Varuh človekovih pravic, p. 22.
[112] Ibid.
[113] Interview with a lawyer.

psychiatric disorders."[114] It was a open ward, even though many of the patients were subject to security restrictions. Although readmissions were not regarded as failure, a study claimed 100% success rates for patients being discharged - of the initial number of 127 offenders subject to security measures, none were still in the institution. The unit's success was attributed not only to the atmosphere of the therapeutic community (TC), but to a less severely disordered patient group, the small number and homogeneity of the Slovenian people, and the sociocultural tendencies of the population to self-aggressiveness rather than to violence (**See below → Annex I: Case Study - An open forensic and social psychiatry unit in Ljubljana**)

The Forensic Psychiatry Unit in Maribor currently has a semi-open ward, where patients are included in the available (limited) rehabilitation activities. The patients in this ward have supervised exits to the city and weekend exits.[115]

After the expiry of the security measure of compulsory psychiatric treatment and confinement in a medical institution

After the security measure of compulsory psychiatric treatment and confinement expires, the person can be released. However, if it is considered that the person still needs treatment, the court will inform the social care services.

The court must, not later than three months before the expiry of the security measure, notify the social welfare authority and the closest relatives of the imminent expiry if it establishes, on the basis of received reports on the implementation of the measure, that this is necessary for the purpose of continuing the treatment or the special protection and custody of the convicted person.[116] Further measures and treatment are then imposed in accordance with the provisions of the Mental Health Act. These measures are considered to be of a civil nature and all measures are outside the scope of the national criminal law and law governing the execution of criminal sanctions. Once the person is transferred under such civil law regime, they can be either treated and supervised within the community (at liberty) or, if they are considered unable to do so, they are placed in a social care institution ("*sociano-varstveni zavod*"). In such case, there is no time limit as in

[114] *Kobal,* M., & *Žagar, D. (1994).* An open forensic psychiatry ward organised as a *therapeutic community*. *Therapeutic Communities*, 15, 265-272.
[115] Interview with a psychiatrist II.
[116] Article 495 of the Criminal Procedure Act (*Zakon o kazenskem postopku*), 29 September 1994.

the case of the security measure and the deprivation of liberty can be periodically extended indefinitely.[117]

Another issue is the question of treatment of persons that are considered to be high-risk patients after the expiry of the five-year maximum. In our research this was particularly emphasised due to (rare cases) where the patients committed severe crimes after their release.[118] The existing social care institutions do not wish to accept them, as they lack the necessary conditions for their placement and supervision.[119] **There are reports of cases of persons who remain in the forensic psychiatry unit even after the expiry of the maximum of five years, which is a clear violation of the law.**

In terms of possible solutions, an interviewed psychiatrist explained that there are long-standing plans to open a special institution for such patients, but that these plans are far from being realised. The plan would be to provide security on the outside, but maximum life quality on the inside: ”*People can work there if it is feasible, they can do gardening, farming, they can have contact with domestic animals, pets, then religious activities, fitness. You can do practically everything that a person needs, but of course within the framework of this institution. Usually, which is common abroad, they are like one small village, but of course it is well guarded, fenced, you get inside in a way that maybe you get on an airplane or in a prison if you want*.”[120]

However, the interviewed NGO representative disagreed, arguing that additional institutions are not the solution as they simply do not work. It is also the negation of the global deinstitutionalisation movement: *“I think that the whole criminal justice system and the mental health system needs to be overhauled and made really rehabilitation-oriented, so that people can go back into the community. I think it is a question of whether we want to punish people or whether we want to rehabilitate them. I think we want to punish them*.”[121]

[117] Interview with a psychiatrist I.
[118] Interview with a prosecutor.
[119] Interview with a psychiatrist I.
[120] Ibid.
[121] Interview with a representative of an NGO that is representing persons with psychosocial disabilities.

Possible termination of the measure before the expiry of the maximum period of five years

An interviewed psychiatrist also explained that the forensic psychiatry unit where the security measure is implemented is by nature a hospital and therefore have a limited therapeutic activity. When with medicinal treatment the patient's state of mental health is stabilised and the unit has no capacities for further therapeutic and rehabilitation treatment, the unit proposes that the compulsory confinement is replaced with placement at the social care institution, where treatment can also be provided in therapeutic communities on open units. However, their opinion is not necessarily heard.

The interviewed judge also mentioned that sometimes the medical institution where the security measure is being implemented expresses the opinion that the treatment at this facility can no longer provide any improvement to the patient's condition even before the expiry of the five-year maximum. In that case the court will stop the security measure, but only after the person's transfer into an institution under the civil law regime.[122] But, as mentioned above, it has to be noted, that this does not necessarily mean the release of the person, just the change of the regime, under which the person is deprived of their liberty.

3.1.1.2. Deprivation of liberty of criminally responsible defendants with psychosocial and/or intellectual disabilities

Identifying disability

As mentioned in the beginning of the chapter (**3.1.2. National framework concerning deprivation of liberty**), the judicial authorities have the obligation to *ex officio* inquire into whether the defendant is capable of performing procedural acts.

The main aim of an expert opinion obtained through psychiatric examination is to determine whether the defendant may be found guilty and/or can they effectively participate in the proceedings.

[122] Interview wih a judge.

Apart from the expert opinion, there are no other assessment mechanisms available. For example, there are no specific assessment mechanisms that would prompt the ordering of the expert opinion.

That identification of defendants with psychosocial and/or intellectual disabilities was also identified by our interviewees. As the interviewed judge explained, it can happen that the defendant's psychosocial or intellectual disability is overlooked, if the defendant does not mention the disability or there are no particular circumstances or specific behaviour at the time of the offence: "*Illnesses can have different phases and the person participates normally in the investigation and their defence. If they do not say anything themselves and if it is not visible on the outside, it can be overlooked.*"[123]

The judge also mentioned that usually the police will gather information about the possible psychosocial and/or intellectual disability, or the defendant will mention that they have been receiving treatment. If the person does not mention anything and if there are no obvious indicators, it is possible that the disability goes unnoticed.[124] The interviewed representative of an NGO also reported a case of their client where disability was not recognised: "*Judging from what the person told me about his experience, the system would not care*."[125]

If psychiatric examination does not find mental incapacity (the defendant is capable of being criminally responsible) and if the defendant is considered as fit to stand trial, they will be tried and may be subjected to detention and imprisonment under the rules prescribed by the law for all defendants and detainees.

Lack of accommodations

There are no other measures or accommodations in the criminal proceedings for defendants with psychosocial and/or intellectual disabilities that have been considered as fit to stand trial and criminally responsible. As the interviewed representative of an NGO that is representing persons with psychosocial disabilities commented: "*They are either treated as if they are perfectly healthy, or they are treated as if they are completely*

[123] Interview with a judge.
[124] Interview with a judge.
[125] Intervies with a representative of academia and representative of an NGO that is representing persons with psychosocial disabilities.

ill. As a result, they either treat them in exactly the same way as everyone else, saying that they do not need anything, no special accommodations, they are just criminals. Or they treat them as if they are total lunatics and do not present them with any information that they need, they do not present them the case or what they are going to do with them in a way that is tailored to them."[126]

The only potential procedural accommodation identified was that if it is found that the defendants are unable to defend themselves, the court will appoint an *ex officio* lawyer to defend them for the continuation of the criminal proceedings until the judgment becomes final.[127] However, according to a judge, cases where such grounds for mandatory defence are recognised are rare.[128] Usually the court appoints an *ex officio* lawyer when other legally prescribed conditions are fulfilled, such as the defendant is subject to pre-trial detention or if the proceedings are taking place regarding a criminal offence that is punishable by imprisonment of eight years or a more severe sentence.[129]

That the law does not provide for any regulation or measures intended for defendants and detained with psychosocial and/or intellectual disabilities stemming from their vulnerability, was also identified by some of our other interviewees. The Human Rights Ombudsman has encountered cases which have shown that if a person does not have relatives, parents or others around him who then take care of them and seek additional help (e.g. legal aid) they do not receive any protection in practice.[130]

"*We had a case in which we were approached by the mother of one of these defendants, who was criminally responsible, but who had mental health problems. It was the mother who made sure that he was able to exercise the rights that he was otherwise entitled to in a timely and proper manner. She found him a lawyer herself, because it was not a case of mandatory defence […] As far as the Ombudsman is concerned, I have to say that we receive few petitions in this area, which is not surprising, because we know that it is*

[126] Interview with a representative of an NGO that is representing persons with psychosocial disabilities.
[127] Article 70(1) of the Criminal Procedure Act (*Zakon o kazenskem postopku*), 29 September 1994.
[128] Interview with a judge.
[129] Article 70 of the Criminal Procedure Act (*Zakon o kazenskem postopku*), 29 September 1994.
[130] Interview with the representative of the Human Rights Ombudsman.

already difficult for such defendants to look after their rights, it is also more difficult for them to then turn to some monitoring bodies."[131]

But it was underlined during our research, that defendants with psychosocial/intellectual disabilities would need a person of trust to accompany them in the criminal proceedings: "(*Defendants with psychosocial/intellectual disabilities that have experience with hospitalisation), they are used to hospitalisation, but when they fall into the wheels of criminal procedure, they don't think it's normal anymore and they don't know what's going on and they need someone to be there for them*."[132] As also the lawyers are usually not trained well in working with persons with psychosocial and/or intellectual disabilities, it is crucial that the concept of advocacy of the rights of persons with disabilities is also incorporated into the criminal justice system and strengthened with sufficient staff and funds.

Pre-trial detention

The CPA provides for several measures which may be used to ensure the presence of the accused, to prevent reoffending and to ensure successful conduct of the criminal proceedings: summons, compulsory appearance or 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.[133]

In deciding on which of the measures to apply to ensure the presence of the accused, the court must take account of the conditions stipulated for individual measures. In selecting the measure, it must also ensure that it does not apply a more stringent measure if the same purpose can be achieved with a more lenient one.[134] Although there are no rules or guidelines on using alternatives to detention in cases of persons with intellectual and/or psychosocial disabilities, in each case the court must perform a strict proportionality test between the public right to safety and the right to personal freedom of an accused person and always use the most lenient measure possible.

[131] Ibid.
[132] Ibid.
[133] Chapter XVII of the Criminal Procedure Act (*Zakon o kazenskem postopku*), 29 September 1994.
[134] Article 192(1) of the Criminal Procedure Act (*Zakon o kazenskem postopku*), 29 September 1994.

In the case of criminally responsible defendants with psychosocial and/or intellectual disabilities, the detention will be carried out in the general detention facilities. In terms of detention conditions, the authorities are obliged to treat the detained person in a humane manner and their physical and mental health must be protected.[135] The detention facility keeps record of the general health condition of the detained person. When placing the detainee into the detention facility, the personality and health condition of the detainee must be taken into consideration.[136]

All persons placed into pre-trial detention are examined by a doctor within 48 hours after being brought to the detention facility.[137] Health care is provided by the detention facility's infirmary.[138] 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 their costs, may also be examined by a doctor of their choosing.[139]

Prison sentence

A perpetrator of a criminal offence is sentenced within the legally prescribed limits for such offence and with regard to the gravity of their offence and guilt.[140] The Criminal Code prescribes the circumstances which the court must consider when determining the sentence, however, possible psychosocial and/or intellectual disability is not explicitly mentioned. But the law does require, among other, that personal circumstances related to the perpetrator's personality are taken into account. All the circumstances that influence the grading of the sentence (mitigating and aggravating circumstances) should be considered, in particular:

- the degree of the perpetrator's guilt;

[135] Article 209 (1) of the Criminal Procedure Act (*Zakon o kazenskem postopku*), 29 September 1994.
[136] Article 23(1) of the Rules on the implementation of remand (*Pravilnik o izvrševanju pripora*), 19 March 1999.
[137] Article 31(1) of the Rules on the implementation of remand (*Pravilnik o izvrševanju pripora*), 19 March 1999.
[138] Article 32(1) of the Rules on the implementation of remand (*Pravilnik o izvrševanju pripora*), 19 March 1999.
[139] Article 33(1) of the Rules on the implementation of remand (*Pravilnik o izvrševanju pripora*), 19 March 1999.
[140] Article 49(1) of the Criminal Code (*Kazenski Zakonik*), 20 May 2008.

- the motives for which the act was committed;
- the intensity of the danger or injury caused to the protected legal value;
- the circumstances in which the act was committed;
- the perpetrator's past behaviour;
- his or her personal and financial circumstances;
- his or her conduct after committing the act and especially whether he or she provided compensation for the damage caused by the criminal offence; and
- other circumstances relating to the perpetrator's personality and to the expected effect of the punishment on the perpetrator's future life in the social environment.[141]

Once a convicted person is sentenced to imprisonment and starts serving the sentence at a prison, they must undergo a medical examination.[142] The prison's doctor must interview and examine the convicted person immediately after admission, and at the latest on the next working day after admission.[143] During the examination, the doctor must identify any injuries and other medical features of the convicted person and shall document them. The law prescribes the obligation of prison institution to pay special attention to convicted persons during the reception period. During the reception period, all the activities and procedures are carried out that are necessary for the proper integration of the convicted person into the life of the institution and the drawing up of a personal plan for the convicted person, which must also take into account security considerations.[144]

Upon admission, the prison must also take the following measures:

- prepare **a suicide risk assessment**;
- verify whether their state of health requires immediate action, taking into account the findings on suicide risk;
- assess the need **for examination by a psychiatrist** and the need for examination by a specialist doctor;

[141] Article 49(2) of the Criminal Code (*Kazenski Zakonik*), 20 May 2008.
[142] Article 29(1) of the Enforcement of Criminal Sanctions Act (Zakon o izvrševanju kazenskih sankcij), 23 February 2000.
[143] Article 8 of the Rules on the implementation of prison sentences (*Pravilnik o izvrševanju kazni zapora*), 17 July 2019.
[144] Article 29(5) of the Enforcement of Criminal Sanctions Act (Zakon o izvrševanju kazenskih sankcij), 23 February 2000.

- record the particularities relevant to the placement and further treatment of the sentenced person, in particular: disability, whether the sentenced person smokes, possible danger or disturbance to other sentenced persons, danger from other sentenced persons, adjustment problems, need for an interview with a psychologist or other counsellor, social problems;
- obtain a statement from the convicted person as to whom the institution should inform in the event of his/her hospitalisation or death.[145]

On the doctor's referral, the prison allows the sentenced person to receive treatment or a medical examination from a health care provider outside the prison. The doctor refers the sentenced person for treatment or examination to the nearest hospitals or medical establishments, unless they consider it necessary to refer the person to a specific medical establishment. A convicted person in (an acute) need of psychiatric treatment is referred to the Forensic Psychiatry Unit of the University Medical Centre in Maribor.[146] However, according to the interviewed judge, these referrals to other institutions are short term and the person is then transferred back to the prison.[147] This was also confirmed by an interviewed psychiatrist, meaning that the same prisoners can be transferred back and forth between the prison and the forensic psychiatry unit several times.[148]

The National Preventive Mechanism at the Human Rights Ombudsman (NPM) performs regular visits of to the Slovenian prisons, including the pre-trial detention facilities. The NPM often receives prisoners' complaints concerning the availability of a psychiatrist, for example that the psychiatrist is not present in prison for a sufficient amount of time and that prisoners have to wait too long for psychiatric help.[149] Namely, psychiatrist providing psychiatric care are not employed by prisons but work within the public health network and the prisons conclude agreements with public health care institutions that they will provide psychiatric care. The frequency of the psychiatrists' presence in a prison varies from institution to institution. Sometimes practical issues such as sick leave of the

[145] Article 9 of the Rules on the implementation of prison sentences (*Pravilnik o izvrševanju kazni zapora*), 17 July 2019.
[146] Article 38 of the Rules on the implementation of prison sentences (*Pravilnik o izvrševanju kazni zapora*), 17 July 2019.
[147] Interview with a judge.
[148] Interviews with psychiatrists.
[149] Varuh človekovih pravic (2019), *Letno poročilo Državnega preventivnega mehanizma za leto 2018*, Ljubljana, Varuh človekovih pravic, pp. 164, 172.

psychiatrist lead to breaches of the agreements on the extent of service that should be provided.

This leads to the following overarching long-term problem – that particularly in the evening and at weekends, the medicinal therapy, including psychiatric, is not distributed by medical staff, but prison guards.

On the other hand, interviewed psychiatric experts reported of positive experience regarding availability and the quality of psychiatric care in prisons. They also mentioned that the assessment and referral mechanisms in place have led to significant decrease of suicide rates in Slovenian prisons in the last ten years.[150] The Prison Administration reportedly has a team for addressing self-harming behaviour, in which experts from all of the national prisons and the forensic psychiatry unit meet and discuss all cases of persons at risk. It was mentioned that the work of this team is very successful.[151]

Relevant issues in prisons the NPM has been reporting on:

- **Overcrowding**: reflected in the claims of imprisoned persons to the European Court of Human Rights (ECtHR) for compensation for inadequate conditions during their imprisonment and/or detention.[152]
- **Staff shortages** in all areas of work, especially in the areas of professional work with prisoners and security.
- **Provision of work for convicted prisoners/purposeful activities** – the NPM recommended that the prisons should put more efforts to find ways to improve the situation regarding the provision of work for convicted prisoners. It was stressed that work contributes to social rehabilitation and has a positive impact on the individual's psychological state and satisfaction, as well as changing the perception of time and giving a sense of having done a meaningful activity.[153]

[150] Interview with psychiatric expert III.
[151] Ibid.
[152] ECtHR, *Mandić in Jović v Slovenia,* App no 5774/10 and 5985/10, 7 20 October 2011; *Štrucl and others v Slovenia, App no* 5903/10, 6003/10 and 6544/10, 20 October 2011.
[153] Varuh človekovih pravic (2019), *Letno poročilo Državnega preventivnega mehanizma za leto 2018*, Ljubljana, Varuh človekovih pravic, p. 172.

3.1.2. National framework concerning alternatives and probation

Alternative sanctions and probation measures are prescribed by the Criminal Code:

- **'Weekend prison'** – a convict continues their work or education and resides at home, except on work-free days, normally on weekends, when they are required to stay in prison.[154]
- **House arrest** - if, considering the level of risk posed by the convicted person, the possibility of reoffending, and the personal, family and professional situation of the convicted person while serving the prison sentence, there is no need to serve the sentence in a prison or, if the sentence must and can be served in an appropriate public institution due to the illness, disability or old age of the convicted person.[155]
- **Community service** - The extent of work is defined so that one day in prison shall equal two hours of community service.[156]
- **Conditional release -** A convicted person who has served one half of their prison sentence may be released provided that until the expiration of the prison sentence they do not commit another criminal offence.[157] A convicted person who is to be conditionally released may be placed under protective supervision by the body responsible for granting and denying conditional release. The protective supervision is implemented by the probation services (see below).

All of these are measures intended for all convicted persons.[158] However, the tasks that may be imposed on the conditionally released convicted person include activities that may be of particular relevance to persons with intellectual and/or psychosocial disabilities, such as the obligation to undergo treatment in an appropriate healthcare institution, including treatment for alcohol or drug addiction with his or her consent; and to attend appropriate vocational, psychological, or other counselling services.[159] But in general, the main set of conditions for the application of the conditional release are related to the length of the prison sentence that may be enforced so that, instead of

[154] Slovenia, Article 86(4) of the Criminal Code (*Kazenski Zakonik*), 20 May 2008.
[155] Slovenia, Article 86(5) of the Criminal Code (*Kazenski Zakonik*), 20 May 2008.
[156] Slovenia, Article 86(8) of the Criminal Code (*Kazenski Zakonik*), 20 May 2008.
[157] Slovenia, Article 88(1) of the Criminal Code (*Kazenski Zakonik*), 20 May 2008.
[158] These measures do not apply to persons who have been subject to a security measure of compulsory psychiatric treatment and confinement in a medical institution.
[159] Article 88(1) of the Criminal Code (*Kazenski Zakonik*), 20 May 2008.

serving the prison sentence an alternative is ordered. For example, for house arrest, a person convicted to a prison sentence of up to nine months is eligible. Usually, prison sentences imposed for a criminal offence against sexual integrity are excluded. Convicted person's behaviour at the time of making the decision and the risk of offending once released are also taken into account – in addition to other circumstances that are specifically relevant for each of the prescribed alternatives.

Additional rules and procedures regarding the implantation of these measures are prescribed by the Enforcement of Criminal Sanctions Act. The execution is prepared, managed and supervised by the competent probation unit.

Probation services are relatively new in Slovenia. The legal basis for its functioning - Probation Act, was adopted in 2017.[160] The Probation Agency was established in 2018.

The work of the probation services with the person begins with the of counsellor or counsellor from among the probation staff, who will then draw up a personal plan together with the person.[161] The personal plan is an individualized method of execution of the sanction. It is prepared according to the type of probation order on the basis of an assessment of risk factors, an interview with the person, the individual needs and circumstances of the person and personal data. The personal plan defines the contacts between the person and the counsellor, possible sanctions, and, if necessary, the factors influencing the commission of the person's offence and the measures aimed at eliminating these factors, the methods and deadlines for their implementation, and the deadlines for the implementation of the personal plan. Contact with the person takes the form of individual interviews or group meetings, which shall take place in the probation unit, with providers of individual or group social, educational, psychosocial, health or other relevant programmes run by authorities, organisations, non-governmental organisations or other legal or natural persons, at the person's home or at other premises agreed in the personal plan.

The first few years of its existence were dedicated to setting up the probation service. Regardless, the agency has a wide range of service/programme providers. Still, the Probation Agency considers that the one of the main challenges for persons with psychosocial and/or intellectual disabilities is to find an appropriate service/programme

[160] Probation Act (*Zakon o probaciji*), 24 May 2017.
[161] Article 15 of the Probation Act (*Zakon o probaciji*), 24 May 2017.

provider that understands the specific needs of the group and has the staff that is sufficiently trained and equipped to adapt the programme to these needs.[162]

Potential psychosocial and/or intellectual disabilities are identified through the relationship that the probation staff develops with the person. The staff is trained to recognise the person's vulnerability and adapt communication and professional approach. When implementing protective supervision ordered by the court, the implementation depends on whether the court has set any details regarding the type of supervision. The probation services must comply with such court orders, otherwise the probation staff will set the goals also based on the interviews with the person. The probation staff will also encourage the person to address any potential identified issues in the person's life, for example in the person's domestic environment and make necessary referrals to the social services. Or present the person with the possibilities regarding the available psychosocial support – although this may not be part of the court's instructions, if the person agrees, these activities will be included in his/her personal plan, which is then signed by the person[163]

3.2. National policy framework

3.2.1. National policy framework concerning deprivation of liberty

The Resolution on the National Mental Health Programme 2018–2028 is addressing the "Rehabilitation of people with recurrent mental disorders".[164] One of the specific objectives of the Resolution is to establish integrated and effective treatment for people with mental health problems and dangerous behaviour, offering continuous, safe and effective care. Measures in this area include:

- Setting up multidisciplinary community-based treatment for people with mental health problems and dangerous behaviour. Developing protocols and standards for the implementation of psychosocial rehabilitation programmes.

[162] Interview with representatives of the Probation Agency.
[163] Ibid.
[164] Slovenia, Resolution on the National Mental Health Programme 2018–2028 (*Resolucija o nacionalnem programu duševnega zdravja 2018–2028*), 27 March 2018.

- Establishing rehabilitation after the expiry of a compulsory psychiatric treatment measure. Develop protocols and standards for the implementation of rehabilitation programmes.
- Establishing specialised treatment for persons with the most severe forms of mental health disorders who are at risk of (re)committing a criminal offence (heteroaggressive behaviour).

The authorities that are responsible for these measures are the ministries competent for health, education, labour, family and social work, justice and of the interior.

3.2.2. National policy framework concerning alternatives and probation

No policies or programmes could be identified. Prior to the establishment of the Probation Agency, an Action plan for the establishment of probation services was adopted. However, it is not publicly available. As indicated by the name of the document, it is possible that its goal was achieved with the adoption of the Probation Act in 2017 and the establishment of the Probation Agency in 2018.

4. Conclusions

The conducted research shows that the Slovenian national framework concerning deprivation of liberty and alternatives/probation does not have the concept of vulnerability incorporated. It seems that the Commission Recommendation of 27 November 2013 on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings has had no impact in the Slovenian criminal justice system, including the cross-border proceedings.

Cross-border proceedings

The national legal framework concerning the application of cross-border instruments does not contain any provisions regarding the applicability or the manner of application of EAW to persons with intellectual and/or psychosocial disabilities or in general persons in a situation of vulnerability.

Little is known about the position of persons with psychosocial and/or intellectual disabilities in cross-border proceedings. While it seems that there are few cases of persons with psychosocial and/or intellectual disabilities subjected to cross-border proceedings as indicated by the absence of caselaw and also cases reported by our interviewees, there are reasons for concern that this may also be the result of insufficient identification and assessment mechanisms.

The absence of concrete safeguards for persons with psychosocial and/or intellectual disabilities may result in excessively formalistic approaches of the authorities that are incapable of recognising the risks for the fundamental rights of the persons in cross-border proceedings.

However, our research shows that there is a general lack of knowledge vis-à-vis the four framework decisions and their application, particularly the framework decisions concerning Transfer of Prisoners, European Supervision Order, and Probation and Alternative Sanctions. It seems that practitioners – individual lawyers, judges and prosecutors only rarely deal with cross-border cases as there is no central authority. This lack of specialisation, not only of lawyers but also judges and prosecutors, could present an issue when it comes to the protection of rights of the requested persons in general.

National framework

During trial, psychosocial and/or intellectual disabilities are only considered when an assessment needs to be made whether the person is fit to stand trial or is criminally responsible (assessment of the mental capacity when the crime was committed).

When it comes to deprivation of liberty for persons who cannot be held criminally responsible, there are many issues regarding the implementation of the security measure of compulsory psychiatric treatment and confinement in a medical institution.

Currently, there is only one institution where this measure is implemented -Forensic Psychiatry Unit of the University Clinical Centre Maribor (Enota za forenzično psihiatrijo UKC Maribor) The forensic psychiatric unit is a hospital by nature, and as such can provide only limited therapeutic activities. It therefore often is not an appropriate facility once the person's mental health has stabilised, as the unit has no capacities for further therapeutic and rehabilitation treatment.

There is also an absence of solutions for the treatment and follow-up of forensic patients after the expiry of the decision. There are reports of cases of persons who remain in the forensic psychiatry unit even after the expiry of the maximum of five years, which is a clear violation of the law.

Due to the lack of assessment mechanisms, criminally responsible defendants with psychosocial and/or intellectual disabilities may not be identified as such. But there are also no procedural accommodations for defendants with psychosocial and/or intellectual disabilities that have been considered as fit to stand trial and criminally responsible.

This can also be attributed to the fact that neither the European Commission Recommendation of 27 November 2013 on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings nor the UN Convention on the Rights of Persons with Disabilities (CRPD) have had no impact on the Slovenian criminal justice system.

5. Recommendations

Vulnerability

- Commission Recommendation of 27 November 2013 on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings should be implemented in the Slovenian national legal framework concerning deprivation of liberty and cross-border mechanisms.
- There should be a presumption of vulnerability for persons with psychosocial and/or intellectual disabilities.

Rights of persons with disabilities

- National legislation should be amended to correspond to the wording of the CRPD in general and abolish discriminatory language/terminology in (criminal) legislation.
- Strengthen support mechanisms within the community and the general health care systems for persons with intellectual and/or psychosocial disabilities to prevent them from ending up in the criminal justice systems.

Identifying disabilities

- Initial assessment of mechanisms for judges, prosecutors, medical and detention and prison staff should be developed. The aim should go beyond assessment of fitness to stand trial and mental capacity in relation to establishing criminal responsibility and focus on the needs and accommodations during the proceedings. This should be done by setting up checklists and guidance at all stages of the criminal proceedings.
- Establish a multidisciplinary approach in assessments of intellectual and/or psychosocial disabilities. Besides psychiatrists and psychologists, this multidisciplinary team should also include e.g. a social worker or NGO representatives, who has a paramount role in making a thorough social study about the person and their life situation.

- Ensure that all professionals and actors involved are educated and trained to apply properly the UNCRPD standards.

Procedural safeguards and accommodations

- Appropriate safeguards and measures should be foreseen for persons who are identified as persons with psychosocial and/or intellectual disabilities and are vulnerable.
- These measures should include provision of accessible information, access to a (free of charge) lawyer (that is trained in communication and other needs of persons with psychosocial and/or intellectual disability), and accompaniment by a person of trust. For example, "letter of rights" so that the information is presented in a simplified and comprehensible manner.
- Representatives of NGO representing and supporting persons with psychosocial and/or intellectual disabilities should be allowed to act as persons of trust. This advocacy should be integrated in the criminal justice system and adequately supported with necessary staff and funds.

Deprivation of liberty

- Deprivation of liberty should be a measure of last resort, including in the context of pre-trial detention, and allowed only in compliance with international human rights standards in accordance with States' obligations.
- The possibility of unlimited deprivation of liberty for persons with intellectual and/or psychosocial disabilities after the expiry of the security measure (once they are transferred under the civil law regime) should be abolished.
- Sufficient and effective remedies during the execution of the deprivation of liberty should be provided, including appeals and regular automatic reviews that include mandatory hearing of the person.
- The law should be amended so that (pre-trial) detainees in forensic psychiatry unit can access all the rehabilitation activities – implementation of rehabilitation activities should take place as soon as possible.

- Therapeutic community approaches and open forensic psychiatry units should be considered for the implementation of the security measure of compulsory psychiatric treatment in a medical institution.
- Solutions for the treatment and follow-up of forensic patients after the expiry of the security measures should be established – striving towards community-based support.

Material conditions

- When deprivation of liberty cannot be avoided, appropriate accommodation should be provided. National rules must provide that detention facilities and custodial institutions provide adequate accommodation for persons with psychosocial and/or intellectual disabilities.
- Conditions of detention should be in line with international human rights standards.
- Measures to decongest overcrowded facilities should be taken, where possible, through the application of non-custodial measures and outpatient treatment.
- Adequate support and accommodations (physical, informational, attitudinal, medical, and other) should be available and accessible in all facilities where persons with intellectual and/or psychosocial disabilities are detained.
- Cooperation with CSOs and other extramural services should be established to ensure that detainees with intellectual and/or psychosocial disabilities have access to support, treatment, and care.

Treatment

- Adequate numbers of specialised staff (medical staff, psychologists, psychiatrists) should be ensured in all facilities that detain persons with intellectual and/or psychosocial disabilities, as well as mandatory training for prison staff and other institutional staff interacting with persons with intellectual and/or psychosocial disabilities deprived of liberty.
- All health and medical professionals (including psychiatric professionals) should obtain the free and informed consent of persons with intellectual and/or psychosocial disabilities, if needed through supported decision-making mechanisms, prior to any treatment; ensure there is a possibility to withdraw consent.

- Detainees with intellectual and/or psychosocial disabilities should be continuously informed of their treatment, medication, condition, etc. in a comprehensible manner.

Cross border proceedings

- Increase awareness and knowledge framework decisions regarding transfer of prisoners, European Supervision Order and probation and alternative sanctions to avoid overuse of the European Arrest Warrant and ensure the framework decision used is the one adapted to the specific situation of the concerned individual.
- Include Framework Decisions and their purpose in the curriculum of judges' trainings.
- Consider the establishment of national centralized authorities or setting up a department within the Prosecutor's Office with the mandate to apply all cross-border framework decisions.

Consent

- Ensure the informed consent of the concerned individual:
- Establish formal procedures to ensure the free and informed consent of suspected or sentenced persons at the national level, in particular in the context of consent for medical treatment in cross-border proceedings and in the context of *in absentia* hearings. The concerned individual must understand the proceedings they are currently in as well as the consequences of their given consent.
- Ensure interpretation and translation in EU languages, when necessary, in particular during hearings and when seeking medical treatment.
- Ensure that persons with psychosocial and/or intellectual disabilities in criminal proceedings are involved in the process.

Safe transfer

- Ensure prompt assessment of the suitability of a person to be subjected to transfer, taking into account particular needs and circumstance, notably the

country where they have the strongest social ties or medical accommodation during the transfer.

- Ensure accommodations of support (e.g. company of a person of trust) throughout the transfer to avoid possible deteriorations of the situation of the person concerned.
- Ensure continuity of care in case of transfer (including by providing necessary documentation of services/therapy received).

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ANNEX I: NATIONAL CASE STUDY - An open forensic and social psychiatry unit in Ljubljana

"*What is essential is invisible to the eye! And the essential is love. Now, how do you love someone who killed another person? It is necessary to understand this man and the circumstances from birth onwards... and to understand his illness*." (dr. Žagar 2023)

To determine, whether a person can be held criminally responsible, the judge may order a psychiatric examination. If it is found that the defendant was at the time of the offence incapable to be found criminal responsible**,** proceedings for the application of security measures will be carried out. This may result in imposing of the security measure of compulsory psychiatric treatment and confinement in a medical institution. Since 2012 there is only one such facility in Slovenia, where such measure can be carried out – (a closed) Forensic Psychiatry Unit of the University Clinical Centre Maribor. **However, in the past there was an open forensic psychiatry ward in Slovenia – and it seems that such a ward was a unique practice in Europe.**

Although this facility does not exist anymore, the experiences and its elements seem to be a promising practice, which is why we chose **the Department of Forensic and Social Psychiatry of the University Psychiatric Hospital in Ljubljana, Slovenia** (hereinafter: **DFSP**) for the Slovenian national case study. **The Department was (for a certain period) an open institution organized as a therapeutic community (TC) and which had a psychotherapeutic and rehabilitative orientation.** The DFSP offered "treatment for psychotic offenders, prisoners, and people with socially accentuated psychiatric disorders" (Kobal and Žagar 1994). However, there was a selection of forensic patients that were to be treated within the DFSP and those who were assessed as too much of a risk, were still referred to a closed ward of a psychiatric hospital.[165] Nevertheless, the experience showed that rehabilitation of many of the forensic patients can be achieved with alternative approaches such as TC.

The DFSP was founded on 15 August 1967 by the University Psychiatric Hospital founded DFSP and the first head the Department was first dr. Kobal who was later replaced by dr.

[165] The Law on Execution of Penal Sanctions in force at that time, led to the establishment of a commission (two judges and two psychiatrists) which decided on the most appropriate institution for each offender (Kobal and Žagar 1994, 266–267).

Žagar.[166] Both were psychiatrists who beforehand had experience as prison psychiatrists. They were also among the main protagonists of this development, and we could say that if it was not for them, an open forensic psychiatry ward would never have existed. But to be precise, the true initiator was Joco Kondža, senior medical technician. Dr. Žagar (2023) explained in our interview: "*He took the initiative and said to professor Kobal... This was a closed department in the beginning and there were many patients, probably 30 of them or more. And some could go home, some couldn't go home, because they still had the measure issued by the court) and were new and aggressive and so on... and they weren't allowed to go out. Then he said to professor Kobal "Well, they know who can go out and who can't go out anyway, what if we try to leave the door open?". And when they opened the ward, nothing happened. Everything went well, according to a program that had been planned before*." However, as written by Kondža and Kobal (2014): "*The department became open. But not mindlessly and without control. Safety inside and outside the ward was the basic rule. After the bars were removed, we started to open the doors gradually*."

According to Kobal and Žagar (1994, 266) there was a general tendency to organize also other departments as TCs at that time, which helped the DFSP to become a true therapeutic, rehabilitative and environment-oriented TC (for a certain period).[167]

In 1994, there was room for 15[168] patients[169] and the department was not hospital like and had open door and non-barred windows. DFSP also provided out-patient services – at that time 20 patients were in family care.[170] Not all admitted patients at the DFSP were criminal offenders – the group was mixed, comprised of major offenders (offences such as murder, manslaughter or other grave violent acts), minor offenders (offences involving

[166] Due to limited amount of information, we do not have names of all the heads of the department.
[167] According to Kobal and Žagar (1994, 266) there was an opposition to these ideas and plans, and they point out three groups that had to be persuaded not to prevent the developments: psychiatrists (and other staff) of the University Psychiatric Hospital, staff of the DFSP "who had to change their basic attitudes and many deeply-ingrained habits", and the authorities (medical as well as legal).
[168] In his article *Svoboda in nesvoboda na oddelku za forenzično in socialno psihiatrijo* from 1976 Kondža wrote that this unit had room for 51 patients at the beginning. Later on, the number of patients was reduced to around 15 (Kondža and Kobal 2014).
[169] Patients admitted to DFSP were all male, due to the fact that female forensic patients were only few and it was not possible to create a mixed ward; female forensic patients were admitted to the neighbouring mixed ward or other wards of the hospital or were in an out-patient care (Kobal and Žagar 1994, 267).
[170] In case of family care – especially for the individuals with most severe disabilities– the DFSP staff provided support in the sense of medical and social aid (Kobal and Žagar 1994, 269). According to dr. Žagar (2023) their medical technical staff visited these patients once a month and gave them therapy (medicine) prescribed by the psychiatrist. They were doing a supervision of that patient's life, how he is doing, how the family accepts him, if there are no conflicts etc. These patients were not involved in any group therapy after they left the hospital. According to Kondža and Kobal (2014) this program of family care was established in 1969.

property for example) and patients with no criminal background (no conviction). Also, their diagnoses varied from schizophrenic psychoses, other psychoses to (severe or minor) personality disorders, sometimes in combination with alcohol or drug addiction (Kobal and Žagar 1994, 266–267).

The DFSP staff consisted of one psychiatrist, one social worker, one senior medical technician and three nurses.[171] Every patient was received by the head of DFSP and the team. First, the Therapeutic Pact was to be signed, which defined inappropriate behaviour, including excessive drinking, drug-taking and absconding. In case patients breached the Therapeutic Pact, all circumstances were investigated and specific treatment plans could be made. According to Kobal and Žagar (1994, 268–269) it was only rarely necessary "to proceed to discharge, transfer into one of the closed hospital units, further intensive hospital treatment or return to the prison". According to Kondža and Kobal (2014) each patient had an individual rehabilitation plan. The goal was to rehabilitate the patient and return him to his home environment as soon as possible.

Dr. Kobal started TCs and dr. Žagar continued them – and added even more TCs: music therapy, art therapy, recreational therapy, analytical group. Multidirectional communications were established between the offenders and the medical staff, among the medical staff and among offenders themselves. In various groups they met daily or several times a week. There was an analytically oriented group[172] for inmates, some patients were part of music therapy or psychodrama, occupational and recreational therapy groups, there was one group led by the social worker and one led by medical staff. Together, staff and patients discussed and agreed on how the ward should function. The staff also met with relatives or patients' other relevant persons discussing about "the circumstances that should be taken into account in their future contact with the offender" (Kobal and Žagar 1994, 268). During their regular weekly meetings "*we also determined*

[171] In an interview dr. Žagar (2023) said they also had 1/3 psychologist, 1/3 music therapist, 1/3 occupational therapist, 1/5 or maybe even 1/8 of a recreational therapist.

[172] "At the time, I was also doing education in group analytical psychotherapy and we also practiced this for them, 3 times a week. We sat down together and sat for an hour and a half. It is important that the therapist encourages the positive that is in the person. It is in everyone, even in these patients. And that we respected them. You know, this respect, as I looked around abroad... what we were supposed to observe abroad, we were better than them. They could come here to learn from us. Abroad, the emphasis was on guarding, protection. But this stank to us, security, because we are not policemen. We are doctors." (Žagar 2023).

who goes home and who doesn't. And whoever doesn't go doesn't go, he stayed there. He didn't need a cop to guard him" (Žagar 2023).

Most patients got to use shorter or longer breaks over the weekends (except if assessed that contacts would not be beneficial for either patients or their relatives or both), they could go for walks in pairs or small groups and some were also allowed to go out for walks alone. The team even organized shorter and longer trips – to the cinema, museums, events, including other cities. Sometimes they rented a bus or even drove the patients in their own cars (Kondža and Kobal 2014). Obviously, the effort was made to help patients "establish the contact with the outside world". After the patients concluded their stay in DFSP they could receive out-patient treatment and continued to be monitored. In case the deterioration of the patient's condition was detected, rehospitalization could be required (Kobal in Žagar 1994, 268).

In 1992–1993 the average stay of the patients in DFSP was 62 days (at that time an average stay in Slovenian psychiatry was 55 days) while the longest stay could last also up to a year (Žagar 2023). In the period 1984 – 1994 there have been no suicides, despite the fact that DFSP often cared for extremely suicidal inmates transferred there from prisons[173] (Kobal and Žagar 1994, 269–271). Looking back, dr. Žagar (2023) still considers the DFSP to be successful. The rules were rarely broken and violence among the patients or against the staff was hardly ever detected. The DFSP's success is attributed to the atmosphere of the TC, but also to the fact that lower-risk patients were selected, the small number and homogeneity of the Slovenian society, the socio-cultural tendencies of the population to self-aggressiveness rather than to violence, and the adequate provision of psychiatric and social services (Kobal and Žagar 1994, 269–271).

Looking back now, Žagar (20023) says the key was "an agreement and trust" between the staff and the patients. He took upon himself the risk (of potential incidents) when allowing patients to go outside and/or to go home over weekends or holidays. "*But if I estimated that someone was really dangerous, I sent him to a closed ward – for a certain period of time*." Žagar (2023) also said: "*There should be a forensic open part and a forensic closed part. I don't really like what's there (in Maribor) now because it's mostly a closed part, and*

[173] However, there were two tragic events: in one case, »a paranoid patient on the visit at home injured his wife« and then, thinking that he had killed her, he committed suicide; in another case, a patient killed his ex-wife while he went for a walk in the town alone (Kobal and Žagar 1994, 269). However, that obviously happened some time before 1985, as dr. Žagar in his interview (on 11.4.2023) reassured that during more than ten years when he was working there no such incidents occurred.

they don't have the courage for an open part, like I had. Well, you don't have to praise me, but you have to be self-confident and work with some risk. I worked with risk and I was aware of it."

On the reasons for moving (actually closing) the department in 1998 dr. Žagar (2023) said: "*I have to say that since the department was opened, since it was formed, colleagues started saying 'this doesn't belong here, these are criminals, they need to go somewhere else, as far away as possible. There are teenagers here, what if someone attacks a teenage girl' and I don't know what else. But nothing ever happened.*" Until 1998 he DFSP was part of a Mental Health Centre, however as explained by Kondža and Kobal (2014): "*the ward was a stranger in the dynamic Center for Mental Health. The organizers, therapists and staff were aware of this and constantly looked for opportunities for its independence from other units of the hospital, so that it would not physically and emotionally disturb those who were doing different work. They overtook us and in 1998 the department was abolished, and the remaining patients were placed in the secured ("intensive") department of the psychiatric clinic in Polje in Ljubljana*." The "open door" policy was no longer there.

When asking dr. Žagar (2023) about the potential for re-establishing such an open forensic and social psychiatry ward, he said: "*The main question is who would work there. Who would want to work there and for what amount of money?*" As he further explained: "*You know, a working team is very important. We were considered to be the most harmonious team. We got along well and respected each other, and we also respected the patients, because if there was any disrespect, I couldn't stand it. Even if you killed someone in a certain situation in your life, that did not stop you from being a person who deserves respect. /…/ If there is no harmony, then fighting and incidents occur. /…/ But back then this wasn't the case. Why wasn't it? Probably also because of our relationship. Attitude is important. Punishment... in 500 years, not even in 500 years... they will be appalled by the punitive policies we (now) have*."

The forensic unit as such (be it closed or semi-closed or open) is a specific place and the following quote best describes it: "*It is difficult to draw a line between freedom and non-freedom in the department. Here, two completely different institutions meet: medical and judicial, which have quite different points of view and different approaches to solving the same issues. The court enforces the principle that people living in a social community must follow valid social norms, which also applies to mental patients - and psychiatry enforces*

the principle that a patient is just a patient, regardless of possible legal measures against him. With mutual tolerance, we can carry out all the therapeutic activities that are necessary in the ward (therapeutic communities, occupational therapy, recreational activities, contacts of the patients with their relatives, free exits, etc.), although we have to agree to the closed-door system and the fact that the approval and consent of the court is required for the permanent discharge of the patient. The partial restriction of freedom therefore applies not only to patients, but also to the therapeutic team. This is a reality that must be considered" (Kondža 1976, 59).

As Kondža and Kobal (2014) pointed out, the collection "Challenges in forensic psychiatry" was published in 2014, which completely ignored the long-term practice, experience and successes of the DFSP, "*which worked for over 30 years at high humane, social and professional level*". To conclude with, dr. Žagar (2023) said: "*In our society, everything in retrospect, even what was positive, is forgotten, and we start all over again*."

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