



**FAIR TRIAL DENIED:**

**DEFENDANTS WITH DISABILITIES FACE**

**INACCESSIBLE JUSTICE IN THE EU**

## ENABLE project introduction

This report titled *Fair Trial denied: Defendants with disabilities face inaccessible justice in the EU*, was developed by Validity Foundation (Validity Alapítvány – Központ a Mentális Sérültek Jogaiért) within the project “Enabling Inclusion and Access to Justice for Defendants with Intellectual and Psychosocial Disabilities” (ENABLE – 101056701 – JUST-2021-JACC).

The project seeks to promote access to justice and fairer criminal proceedings for defendants with intellectual and psychosocial disabilities in 8 EU countries (Bulgaria, Czechia, Lithuania, Portugal, Romania, Slovakia, Slovenia, Spain), and it is implemented by the following consortium of 9 experienced NGOs:

- Validity Foundation – Project coordinator, Hungary
- Centrul de Resurse Juridice, Romania
- Fenacerci - Federação Nacional de Cooperativas de Solidariedade Social, Portugal
- Fórum pro lidská práva, Czechia and Slovakia
- The International Commission of Jurists – European Institutions
- KERA Foundation, Bulgaria
- PiC – Pravni center za varstvo človekovih pravic in okolja, Slovenia
- Confederación Plena Inclusión España, Spain
- Mental Health Perspectives, Lithuania

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# EXECUTIVE SUMMARY

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## Project Findings

*“The justice system and its symbols are scary. In most places, courts are not about justice, they are about power. For anyone, facing these symbols of power is disabling. Start with thinking about de-focusing the power; the focus should be on justice. It is really about the humanisation of the justice system itself and making it accessible for all. (Gábor Gombos, former member of the United Nations Committee on the Rights of Persons with Disabilities and former Senior Adviser to Validity)”<sup>1</sup>*

In the ENABLE project, we found that the odds are stacked against people with disabilities seeking access to justice in eight EU countries as suspects or accused of a crime. The barriers to participating in criminal procedures in Bulgaria, Czechia, Lithuania, Portugal, Romania, Slovakia, Slovenia, and Spain are significant. Barriers that interact with a person's impairment, preventing them from leading a fulfilling life and making decisions in their case. This encompasses societal, legal, health, economic, and/or gender-based barriers. Many persons who do not receive disability-appropriate support find these obstacles overwhelming. Many defendants with intellectual and/or psychosocial problems do not receive all or any of the support they require throughout criminal procedures. They have had terrible experiences with the criminal justice system. They were afraid for their lives and physical integrity, frightened, humiliated, patronised, ashamed, and embarrassed as a result of denial of liberty, discriminatory and/or aggressive behaviour by criminal justice officials. Their right to legal capacity and supported decision-making was not respected. As demonstrated in this report, the majority of interviewees and participants believe that criminal justice system is disempowering, designed to penalise defendants rather than seeing them as rights holders. The situation is exacerbated with the involvement of mental health systems. The perception on how defendants with intellectual or psychosocial disabilities are treated is well captured by Maria Krasteva, a human rights lawyer from Bulgaria, KERA Foundation:<sup>2</sup>

***“The general attitude toward defendants with disabilities is that they are a "problem" for the psychiatric care system. The justice system considers their job done as long as they are provided with a lawyer and psychiatric intervention.”***

At the core of this situation is how disability is conceptualised and interacts with the formal or traditional operation of the criminal justice system. This is the case both at national and EU level. Disability should be seen as the result of external barriers that hinder participation in life, society and legal proceedings, as explained by the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD).<sup>3</sup> Disability does not need to be fixed or treated with a medical approach. What needs to be removed are barriers with supported decision-making and accessibility measures that are respectful of a person's will and preference.

Unfortunately, data and evidence collected throughout the ENABLE project suggests the opposite. Disability in suspects or accused of committing a crime is confused with either dangerousness, or something to be treated in psychiatric institutions. Other professionals or legislation sees persons with disabilities as “vulnerable” person that cannot understand or follow proceedings, without consideration of procedural adjustments that need to be adopted to enable persons with disabilities to overcome barriers. A view that is perpetuated both by national practice and EU legislation.

***"We have already taken giant steps forward, but as long as we do not change the philosophy that it is not the person who has to change, but the context itself. [I]n the judiciary context, is the same."***

**(Psychologist, Portugal, male)**

Guardianship schemes hinder how defendants with disabilities may exercise their right to fair trial. There have been intersecting experiences from defendants with disabilities, support workers, and lawyers that reveal that persons under guardianship do not receive the support they require. Criminal justice agencies do not communicate directly with them, and the guardian at times may even replace their will. In Lithuania, for example, there is no system in place for persons with disabilities to seek remedies from their guardians who run the institutions where they live when there is a conflict of interest. Member States are obligated to adopt supported decision-making systems that allow them to make choices concerning their cases based on their own will and preferences. Some Member States, especially Portugal,<sup>4</sup> Spain,<sup>5</sup> Slovenia and Bulgaria have enacted legislation for supported decision making, although in the latter two there is no consistent practice or policy to replace guardianship schemes. In Czechia, Lithuania, Romania, and Slovakia, whether in law or in practice, there have been reports of communication and decisions about the case made without the involvement of persons with disabilities. This left them feeling ignored, patronised, disempowered, or unable to understand what is happening in proceedings. Persons with disabilities' legal capacity must be acknowledged and respected throughout the justice system, both in practice and in law. Unsupportive or discriminatory behaviour taking the form of violence, verbal abuse, finding someone untrustworthy, insulting and humiliation fuels distrust by persons with disabilities in the system.

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<sup>1</sup> Validity Foundation, [Marking the legacy of Gábor Gombos](#), June 2024

<sup>2</sup> KERA Foundation, [Briefing paper on barriers faced by defendants with intellectual and/or psychosocial disabilities in the Criminal Justice System in Bulgaria](#), Veliko Tarnovo, ENABLE Project, 2023, p. 43.

<sup>3</sup> See Article 1.

<sup>4</sup> See *Lei do Maior Acompanhado* [Law of the Accompanied Adult];

<sup>5</sup> Royal Decree 193/2023, of March 21, 2023, supporting decision-making for persons with disabilities, in alignment with the United Nations Convention on the Rights of Persons with Disabilities (CRPD), Spain. Published in the Boletín Oficial del Estado (BOE), No. 69, March 22, 2023

***“She asked for a lawyer at the police [because she wanted to complain about another situation], but they said they couldn't get lawyers there. (...) [I] saw that I had no help, and I withdrew the complaint. (...) I stopped trusting ... I felt that everyone rejected me”.***

**(Defendant with psychosocial disability, Portugal, female)**

In all eight EU countries, the criminal justice system treats defendants with intellectual and/or psychosocial problems with a medicalised and/or punitive-based approach. Approximately half of the suspects or accused of a crime interviewed in six EU countries were subjected to compulsory treatment, protective detention, and/or forensic psychiatric institutionalisation after being deemed dangerous, unfit to stand trial, or unfit to plead. Women with intellectual or psychosocial disabilities are overrepresented among interviewees, with the majority being sent to psychiatric institutions. These decisions were made as a result of capacity-based individual assessments deeming defendant unimputable. Reports show that once a ruling is made declaring a person unimputable, defendants do not benefit from the same procedural rights on an equal basis with others. There have been multiple reports of persons with disabilities being sent to protective detention or psychiatric facilities without being informed or involved in the decision. Furthermore, once inside, individuals have struggled to contact family members or lawyers, as well as receiving information about their case, limiting their ability to exercise their right to a fair trial. The UNCRPD explains that capacity assessments of fitness to stand trial as well as institutionalization on the basis of disability are discriminatory and a breach of their right to independent living under the UNCRPD. Individual assessments in criminal processes should focus on identifying procedural accommodations and supportive decision-making procedures that will enable defendants with intellectual or psychosocial disability to exercise their rights.

***“According to the lawyers interviewed, law enforcement authorities have often failed to provide access to justice for persons who are found not criminally responsible (...). It can be encountered that in such cases the authorities do not care much because the proceedings will be closed anyway, and they do not see protective treatment as a great punishment.”<sup>6</sup>***

Less than half of defendants with intellectual or psychosocial disability interviewed confirmed they were informed about their rights, with a particular emphasis on the right to a lawyer across all 8 EU countries. Even among those that have been informed, information

<sup>6</sup> FORUM, [Briefing paper on barriers faced by defendants with intellectual and/or psychosocial disabilities in the Criminal Justice System in Czechia](#), Praha, ENABLE project, 2023, p. 75

was not always accessible. Information was largely shared in standardised format and practices, such as requesting to read and sign bill of rights which are either too technical or long to be understandable. All information imparted must be accessible, with, where needed adjustments, especially by criminal justice authorities and lawyers to ensure it is easy-to-understand in an appropriate manner. These may take several formats and mediums as appropriate to a person's disability. Information about rights in an accessible manner only occurred on occasion in Portugal, Spain, Romania and Lithuania.

Directive 2013/48/EU on access to a lawyer has driven positive developments that reinforced access to legal assistance for all. There is legislation in place in all 8 EU countries requiring representation of a lawyer in proceedings, including changes to account for the "needs of vulnerable persons" in Slovenia.<sup>7</sup> Access to legal assistance is supported by different systems of legal aid that assure legal representation to those that cannot afford one in all 8 EU countries. Practice shows there are several barriers to finding, reaching and communicating with one. This is especially the case for defendants that are sent to psychiatric institutions, where becomes difficult to obtain information from outside. Furthermore, there are several accounts of defendants with disabilities only meeting their public defender for the first time during a hearing, without having a chance to communicate privately beforehand. There are also cases where lawyers do not communicate with their clients or make decisions without their involvement. This report recommends further capacity building for lawyers on disability and communication and for there to be further tools at their disposal to support communication with their clients with disabilities. Indeed, for legal aid schemes to be effective for persons with disabilities, they should cover costs of interpretation services, facilitators and/or, when appropriate, communication aids/devices. Directive (EU) 2016/1919 on legal aid does not assure for such costs to be covered.

Defendants with disabilities right to presumption of innocence is also endangered in practice due to misunderstanding and stereotypes about disability. Behaviour connected to a person's disability is confused with uncooperativeness, aggressiveness and/or suspicious behaviour, especially when they are in crisis. Defendants with disabilities have also been forced to wear restraints or handcuffs at trial, which further reinforces bias against them. In a few countries, such as Bulgaria and Lithuania, there has been practice of defendants being forced to wear handcuffs in public hearings or in public view.

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<sup>7</sup> PIC, [Briefing paper on barriers faced by defendants with intellectual and/or psychosocial disabilities in the Criminal Justice System in Slovenia](#), Ljubljana, ENABLE Project, 2023, p. 28.

***“He felt tense and depressed (at the court hearing). His ears were buzzing. His father was at the courtroom but he was not allowed to speak to him. He had shackles around his ankles but they were very tight and his leg got swollen. He told this to the escorting police officers but they said, “when the hearing ends we will loosen them.”<sup>8</sup>***

(Defendant with intellectual disability, Bulgaria, male)

There are contrasting accounts between criminal justice authorities that defend a coercive approach during an arrest to ensure security of all, whereas defendants with disabilities and lawyers claim that police (mis)uses force to deal with crisis situations of persons with disabilities inappropriately. This contrast is particularly captured in Czechia by Kristýna Šulková, Denisa Kramářová & Maroš Matiaško, representatives of Forum for Human Rights, a Central European NGO working in the field of human rights:<sup>9</sup>

***“Some interviewees [claim] they had not witnessed [...] use of force or coercion based on disability. The goal of the police is not to force someone to confess to something they did not do (...). [I]f a police officer violated the rules during an interrogation, for example, the results of that investigation could not be used as evidence. Lawyers, on the other hand, claim that when defendants with disabilities refuse to cooperate or are in a state of crisis, police use mechanical restraints and, in some cases, taser weapons.”***

All persons with disabilities have the right to any necessary age-, gender- and disability-appropriate modifications or adjustments in criminal proceedings. This is to ensure their participation on an equal basis with others in their case.<sup>10</sup> Neither EU legislation nor almost all EU countries investigated have legislation establishing explicitly a right to procedural accommodations. The sole exception is Spain, although it requires further regulation.<sup>11</sup> Only a few interviewees recall being informed about a right to procedural accommodations in

<sup>8</sup> KERA Foundation, [Briefing paper on barriers faced by defendants with intellectual and/or psychosocial disabilities in the Criminal Justice System in Bulgaria](#), Veliko Tarnovo, ENABLE Project, 2023, p. 112.

<sup>9</sup> FORUM, [Briefing paper on barriers faced by defendants with intellectual and/or psychosocial disabilities in the Criminal Justice System in Czechia](#), Praha, ENABLE project, 2023, p. 69.

<sup>10</sup> United Nations Human Rights Council, *Report of the Special Rapporteur on the rights of persons with disabilities*, A/HRC/34/26, para. 35 (2017)

<sup>11</sup> Plena Inclusión, [Briefing paper on barriers faced by defendants with intellectual and/or psychosocial disabilities in the Criminal Justice System in Spain](#), Madrid, ENABLE Project, 2023, p. 30.

Romania,<sup>12</sup> Spain<sup>13</sup> and Portugal<sup>14</sup>, thanks to the collaboration of NGOs specialised in the disability field working with the police. The lack of regulation creates a vacuum which makes the adoption of procedural accommodations rare and inconsistent.

***“The level of state structures, the activity is extremely timid, not to say non-existent. Rather, the steps forward are ensured by means that are supposed to be collateral and complementary to a state system (...). Specifically, the intervention of NGOs that compensate for the inaction or absence of the state.”***

**(Lawyer, Romania, male)**

The most positive experiences reported occurred when procedural accommodations were adopted across the proceedings. Examples of procedural accommodations include foregoing the adoption of speedy trials to ensure guarantee of rights,<sup>15</sup> adjusting communication and questioning to simple language or easy to understand, allow defendant to be supported emotionally, and communication supported by third-parties, such as intermediaries and family members. Across all 8 EU countries, only two male defendants with disabilities in Spain benefitted from procedural accommodations across all the proceedings, unlike female defendants where none did in no country. The successful implementation of these in Spain was due to the intervention of third-parties, namely social assistants, family members and intermediaries. The latter (also known as facilitators), as independent professionals, supported criminal justice authorities to assess and adopt procedural accommodations, including adjustments to information and communication. This made communication easier and more accessible between defendants with disabilities and criminal justice authorities and to follow and understand proceedings. Intermediaries is a good practice that has been recommended as well by the international Principles and Guidelines on Access to Justice for Persons with Disabilities. This practice is being promoted in different countries thanks to ENABLE’s work, in Bulgaria and Romania. Not only this enables defendants with intellectual and/or psychosocial disabilities to effectively exercise their rights, it also supports criminal justice authorities to more efficiently and effectively secure evidence in hearings.<sup>16</sup>

<sup>12</sup> Centre for Legal Resources, [Briefing paper on barriers faced by defendants with intellectual and/or psychosocial disabilities in the Criminal Justice System in Romania](#), Bucharest, ENABLE Project, 2023, p. 53.

<sup>13</sup> Plena Inclusión, [Briefing paper on barriers faced by defendants with intellectual and/or psychosocial disabilities in the Criminal Justice System in Spain](#), Madrid, ENABLE Project, 2023, p. 64.

<sup>14</sup> FENACERCI, [Briefing paper on barriers faced by defendants with intellectual and/or psychosocial disabilities in the Criminal Justice System in Portugal](#), Lisbon, ENABLE Project, 2023.

<sup>15</sup> Plena Inclusión, [Briefing paper on barriers faced by defendants with intellectual and/or psychosocial disabilities in the Criminal Justice System in Spain](#), Madrid, ENABLE Project, 2023, p. 56.

<sup>16</sup> An example provided Paula Backend, whereby an intermediary was able to ensure effective communication with defendant with disability to conclude evidence hearing in 1 day, while past unsuccessful attempts by criminal justice authorities last for 4 days.

*“It would have been preferable if someone had assisted me in understanding what I didn't understand, as happened later with Plena Inclusión. However, I didn't know anyone who could assist me. They didn't seem to be paying attention to me. [...] There were words I'd never heard before. They wouldn't let me say anything.”*

(Defendant with intellectual disability, Spain, male)

## Key Recommendations

All 5 EU Directives<sup>17</sup> and Recommendation<sup>18</sup> should be amended to reflect human rights model of disability, whereby legal capacity of suspects or accused of committing a crime is guaranteed. To that end:

- Explicitly guarantee the right to legal capacity in criminal proceedings. They should ensure that all defendants are able to access and directly participate in all stages of the justice process according to their will and preferences.
- Access to supportive measures and procedural accommodations should not be dependent on assessment of vulnerability or condition that person cannot follow or understand proceedings or restricted to “needs”. There is a need of binding legislation setting procedure for determination of support, reasonable and procedural accommodations found in Article 1 of the UNCRPD. The non-binding process found in the European Recommendation is insufficient. Assessments must be done in dialogue with defendants, of the barriers that need to be removed, and the accommodations to be put in place for them to access their rights under the multiple Directives on procedural rights. The procedural accommodations must cover the ones listed in the International Principles and Guidelines on Access to Justice, including access to communication and information rights, intermediaries and support of third-parties. Overall, procedural accommodations must ensure defendants’ rights to a fair trial, including the right: to understand and be understood, to receive information, remain informed and have third-parties informed, to be provided with interpreters and facilitators, to be heard, protected during proceeding;

<sup>17</sup> Directive 2010/64/EU of the European Parliament and of the Council 2010/64/EU on the right to interpretation and translation; Directive 2012/13/EU on the right to information in criminal proceedings; Directive 2013/48/EU on the right to access to a lawyer in criminal proceedings; Directive (EU) 2016/343 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings; Directive (EU) 2016/1919 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings

<sup>18</sup> Commission Recommendation of 27 November 2013 on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings, OJ C 378, 24.12.2013, p. 8.

- All Directives should establish remedies for contesting discriminatory assessments of capacity or violate fair trial rights;
- All Directives should implement and monitor police and judicial training, based on UN Access to Justice Principles, training to build the skills of organisations of people with disabilities regarding the rights of defendants with disabilities and adjusting procedures to accommodate them in an age-, gender- and disability- appropriate manner.

The European Commission and European Parliament should:

- Create a platform to facilitate direct dialogue between people with disabilities and the European Commission in relation to the multiple procedural rights directives, including review, amendment and monitoring processes.
- Support for research and feasibility studies appropriate information-sharing, throughout the criminal justice process, such as case management systems and how they can become a source of real-time information of their rights, case and proceedings for defendants.
- In partnership with persons with disabilities, the Commission should carry out a full review of the extent and use of guardianship orders and capacity assessments on fitness to stand trials or to plea, involving defendants with disabilities, assess the violations of the right to legal capacity, and develop plans and recommendations to cease and prohibit the use of guardianship orders and bring policy and practice into line with the UN CRPD. The practice of discriminatory assessments of either credibility or fitness to stand trial or plead, linked with impairment or disability, should be identified as a type of secondary victimisation and prohibited.

Criminal justice authorities and lawyers must improve how information about rights, proceedings and case is communicated in an accessible manner. Professionals must be aware that participation in criminal proceedings is challenging for defendants with intellectual or psychosocial disabilities on account of information, legal and social barriers. Defendants have communicated that they are often too stressed or fearful to be able to process information during hearings, questioning or upon arrest. For the right to information to be effectively exercised, information shared has to be repeated continuously across proceedings, and in a manner that enables them to make decisions for the particular procedural act. This can be done with the support of specialised professionals, such as intermediaries (a.k.a facilitators) who can support justice professionals to adapt their communication in an easy-to-understand manner.

EU Directive on right to information in proceedings should establish diversity of communication mediums to make information accessible. As well as obligation to make adjustments whenever information and communication devices, channels or mediums are not accessible and a duty to inform of this possibility.

- The Directive should be amended to include the right to forms of support which enable effective communication, including describe ways that access to information can be ensured, including through the provision of sign language, video and audio guides, telephone-line advice and referral services, facilitated communication, braille, etc;
- Information about the criminal justice system — including defendant's and victims' rights — must be easily and publicly accessible at the national level.
- Any limitation to physical accessibility or information and communication, must be addressed by providing accommodations and access to a range of support services, as well as informal supports that a person chooses, which might include remote support and hearings;
- All digital devices or remote technology deployed to facilitate access to information or communication must be accessible and conform with principle of universal design;
- EU funding and resources should ensure that all states have disability sensitive and accessible support services.

EU Directive on Access to a Lawyer and Legal Aid should be amended to ensure accessible access to lawyers and resources and funds to cover the costs for effective communication facilitation between them and clients outside the court room.

- Ensure establishment of specific communication channels for access to lawyers in residential and psychiatric institutions;
- Accessibility of legal representation includes ensuring the availability of meaningful and accessible information about rights to legal aid and to a lawyer including through support services with reasonable or procedural accommodations.
- Clarify conditions under which legal representation would be an automatic right and ensure that defendants are fully informed about their rights, options of representation and its availability. This should be provided both before any hearings and proceedings where their capacity might be assessed, as well as when are reviewed decisions to remain confined in psychiatric institutions.

- All legal aid lawyers should have the skills, knowledge and experience to represent defendants with disabilities.
- Develop the necessary training and capacity-building infrastructure for specialist lawyers. For example, all lawyers would have to undergo a training on how to communicate with clients with various disabilities.

There is a need for an EU strategy on defendants with disabilities that articulates a vision for and framework of equal access to justice for people with disabilities, which can be implemented at the national level.

- Guidance, training courses and curricula based on UN Access to Justice Principles should be developed for Member States in partnership with people with disabilities.
- The innovative practices of individuals and NGOs creatively supporting defendants with disabilities in accessing their rights to participate must be actively nurtured and supported.
- All Member States must fully transpose and implement the 5 EU Directives and European Recommendation in line with the goals and spirit of the UNCRPD and International Principles and Guidelines on Access to Justice. It is important, just as we recommended for victims,<sup>19</sup> that the European Commission exercises its responsibilities for oversight, monitoring and the initiation of infringement proceedings. This includes developing a data collection framework that allows an understanding of defendants' experiences of proceedings and, gaps in access to justice.

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<sup>19</sup> Validity Foundation, [Humanising Justice, International report from Voices for Justice: Communicating with Victims of Crime with Disability](#), 2022, p. 86

# 01

INTRODUCTION

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The ENABLE project was initiated to promote access to justice and fairer criminal proceedings for defendants with intellectual and psychosocial disabilities in 8 EU countries. It is the counterpart to other past initiatives that sought to promote access to justice for adult victims with disabilities (Voices for Justice)<sup>20</sup> as well as child victims and perpetrators with disabilities (CFJ-DCSCP).<sup>21</sup> It provides the missing piece to obtain a more accurate picture on how well the right to access to justice is respected across the EU for persons with disabilities.

The group suspected and proved that the odds are stacked against people with impairments when they seek justice in the eight EU countries studied. The barriers to involvement in Bulgaria, Czechia, Lithuania, Portugal, Romania, Slovakia, Slovenia, and Spain are substantial, as are the criminal processes. Barriers that, when combined with a person's incapacity, prohibit them from leading a fulfilling life and making decisions about their situation. This encompasses societal, legal, health, economic, and/or gender-based hurdles. Many people who do not receive disability-appropriate help find these obstacles overwhelming. As it will be demonstrated in this report, the majority of interviewees and participants believe that criminal processes are a disempowering and biased system designed to punish defendants rather than recognise them as rights holders. The situation increases with the involvement of mental health systems

All defendants have the right to have their dignity protected. This is also the case when the State aims to interfere with their right to fair trial and liberty through coercive powers to investigate, prosecute and/or punish. Stigma, stereotypes and lack of understanding around disability creates negatively biased perception of defendants with intellectual or psychosocial disability on their capacity and dangerousness. This ableist approach is driven by both in-group and out-group bias as well as ableist legislation that does not see persons with disabilities as rights holders with legal capacity like any person without disabilities. EU Legislation on procedural safeguards further perpetuate this.

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<sup>20</sup> Voices for Justice project, Communicating with Victims of Crime with Disabilities, Validity Foundation, 2020-2022, <https://validity.ngo/projects-2/voices-for-justice/>

<sup>21</sup> Child-Friendly Justice project, Developing the Concept of Social Court Practices, Validity Foundation, 2020-2022, <https://validity.ngo/projects-2/child-friendly-justice/>.

***“it's ignorance and people are afraid of what they don't know. It's a more hasty retention. And there's the idea that being “mentally ill” is dangerous. Everyone thinks that way, because the legislation is that way. That's where the discrimination starts.”***

(Prosecutor, Romania, male)

Criminal proceedings are widely inaccessible to persons with disabilities on account of multiple barriers they face.<sup>22</sup> These barriers may be physical or digital. For example, when remote systems or video-conferencing equipment is used. The existence of these barriers makes adoption of modifications to how criminal proceedings operate essential to enable persons with disabilities to exercise their fair trial rights on an equal basis with others. Without these reasonable and procedural accommodations, defendants with disabilities cannot exercise their rights, especially the ones protected in EU law establishing right to information, interpretation, translation, presumption of innocence, be present at trial, access to a lawyer and legal aid. As it will be shown, there is an accountability vacuum in the criminal justice system. There is a belief that, as long as a defendant has a lawyer, their rights will be secured. The burden falls solely on lawyers to take measures/explain rights, proceedings, case and request accommodations. This belief among justice professionals is further reinforced by lack of legislation and regulation on adoption of reasonable and procedural accommodations.

***“Having a lawyer, he has to make sure that the person really understands what is happening to him and that all his rights are respected. Of course, the prosecutor has this interest too. Now it also depends on how effective the defence is, it depends on the professionalism of each person.”***

(Prosecutor, Romania, male)

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<sup>22</sup> See following sections for details.

Practice suggests that adoption of supportive measure or procedural accommodations generally does not happen across procedural stages. When it does, it relies on the good will of the individual police, prosecutor, judge and/or lawyer handling the case. Criminal justice actors neglect to consider that involvement in the criminal justice system is a “disempowering” experience for defendants with disabilities and before involvement in the justice system they tend not to have control over decisions they make in their daily lives. An effective criminal justice system is one that promotes, protects and respects the rights of defendants and provides support to overcome multiple barriers they face. Reports in 8 EU countries suggest overwhelmingly, defendants were unaware that they had a right to request procedural accommodations. Nor professionals knew in general about concept of procedural accommodations and how to accommodate them. There are promising practices lead by civil society that are overcoming this gap that should be encouraged. (e.g. Facilitators by Plena);

Core to this situation is how both legislation, practice and persons see persons with disabilities as right holders and acknowledging their right to legal capacity and fair trial. Their rights to defence and procedural accommodations tend to not be assured whenever there is a belief that because of their disability, the person is unfit to stand trial or because “insanity defence” is used, or even unable to communicate or act without a guardian that does not have disabilities. Misconceptions and understanding of legal capacity has prevented the design or implementation of individual assessment processes for adoption of procedural accommodations and supported-decision making processes. Furthermore, assessments of person’s capacity has led to termination of proceedings along with reduction of procedural safeguards for defendants, as it will be shown below. Nonetheless, there are also promising and inspiring initiatives across the different EU countries, which show it is possible to ensure effective participation of defendants with disabilities, including by relying on innovative and digital tools.

This report will conclude with recommendations that promote and are based on recommendations of persons with disabilities. Justice reforms have to be done with their participation (“nothing about us without us principle”). By taking an intersectional approach to the analysis, it will enable this report to make evidence based policy recommendations that align with diverse groups of persons with disabilities, regardless of gender.

# 02

METHODOLOGY

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This international report is a comparative synthesis of findings in ENABLE, written based on mixed methods, especially qualitative methods. The methodological approach covered both desk research and fieldwork component. The desk research component included international literature review of relevant journal articles and human rights reports, as well as analysis and synthesis of national briefing papers from the different 8 EU countries<sup>23</sup> and the Model disability bench book<sup>24</sup>. National briefing papers produced within ENABLE project:

- Mapped the national legal and political framework (laws, policies, strategies, orientations, or others) about access to justice for defendants with disabilities, mainly focusing on the provision of reasonable and procedural accommodations;
- Examined the experience of different stakeholders – current or former defendants with intellectual and psychosocial disabilities, criminal justice professionals, support services professionals, Non- Governmental Organisations and National Human Rights Institutions – about the access to justice of defendants with disabilities, identifying barriers, challenges and areas of improvement they envision in it;
- Collected recommendations - from the different stakeholders - on how to promote inclusion and access to justice for defendants with intellectual and psychosocial disabilities, explicitly identifying the main support and procedural accommodations needed.

The fieldwork carried out in this project took the form of semi-structured interviews and focus groups. These were carried out between December 2022 and March 2023. A total of 125 individuals participated in this research, with 72 participants identifying as male, 53 as female and none as non-binary across the 8 EU countries. In each country, it was completed between 9 and 22 semi-structured interviews, for a total of 117 interviews. One focus group was conducted in Bulgaria with 4 members. Responses were collected in writing in Slovakia, for 4 defendants. Decision on specific number of interviews per country took into account knowledge gaps, country demographics and feasibility to reach different target groups. To achieve triangulation of findings, the Consortium targeted three different sets of stakeholders to obtain different perspectives:

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<sup>23</sup> ENABLE project, *National Briefing Papers: Enabling Inclusion and Access to Justice for Defendants with Intellectual and Psychosocial Disabilities*, 2022, <https://validity.ngo/projects-2/enabling-inclusion-and-access-to-justice-for-defendants-with-intellectual-and-psychosocial-disabilities/national-briefing-papers/>

<sup>24</sup> ENABLE project, *Model Disability Benchbook on the Rights of Persons with Disabilities in Criminal Proceedings*, 2024, in <https://validity.ngo/projects-2/enabling-inclusion-and-access-to-justice-for-defendants-with-intellectual-and-psychosocial-disabilities/>

- Defendants with intellectual and/or psychosocial disabilities: 43 defendants with intellectual or psychosocial were interviewed in 8 EU countries. 29 defendants identified as male, while 10 as female.
- Criminal justice professionals: 36 were interviewed or included in a focus group across all 8 EU countries, encompassing police, prosecutors, judges and two prison directors. 13 interviewees identified as female while 23 as male.
- Lawyers, support service, health and human rights professionals: 50 were interviewed across all 8 EU countries, comprising of lawyers, psychologists, psychiatrists, social workers, ombudsperson. 31 interviewees identified as female while the other 29 as male.

To achieve project goals as well as considering transposition deadlines of the 6 EU Directives it was given priority to interviewees with experience/contact with the criminal justice system from 2019. The consortium followed a non-probability purposeful sampling and snowball techniques, as well as convenience sampling to identify and recruit the participants of this project. The identification of the interviewees was possible with the help of the national partners of the project. The data was analysed using content and thematic analysis. The data collected cannot be considered representative considering its quantity, especially concerning experiences of female defendants with intellectual or psychosocial disabilities, which warrant further exploration and focus. All interviews were conducted per ethical guidelines developed in the project and guidance. All consortium members have significant experience of working and communicating with persons with disabilities, especially through previous initiatives together or have an organisational mandate to fulfil the rights of persons with disabilities. All data was collected upon securing, as appropriate, written or oral consent, with permission for findings to be disseminated in the communication materials of the project. All data processed by the 7 consortium partners, working and/or based in each country, was transferred securely and encrypted to the project coordinator, Validity Foundation.

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# 03

TRANSFORMING EQUALITY  
IN CRIMINAL JUSTICE  
THROUGH UNCRPD

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This section sets out the legal and international intersectional<sup>25</sup> framework that will be used as analysis of legislation, practices and experiences on access to justice for defendants with intellectual and/or psychosocial disabilities. It will have a particular focus on procedural accommodations, while highlighting any contextual factors or situations that have a repercussion on particular defence rights. This includes right to information, translation, interpretation, presumption of innocence, to a lawyer and legal aid.

The following subsections will identify where these different treaties and legislation intersect. By adopting an intersectional focus, we will reduce chances of fragmentation, while setting guidance that meets the goals of each treaty with the participation of persons with disabilities and their autonomy. This approach also provides insights how various aspects of a person's disability is interdependent with gender, social-economic factors and other protected grounds.<sup>26</sup> It accepts that law and society have symbiotic relationship and discrimination in the form of ableist practices may take many forms.<sup>27</sup>

Under the aegis of the United Nations, the most relevant is the United Nations Convention on the Rights of Persons with Disabilities. This treaty sets core rights and obligations in connection to persons with disabilities worldwide. The right to access to justice, including to procedural accommodations, can be found in Article 13, which combined with Article 5, 6 and 12 provides important legal guidance to transform justice systems and make them inclusive for men and women, and respectful of their will and preference, to exercise their rights on an equal basis with others. The content of these rights are further expanded in the International Principles on Access to Justice for Persons with Disabilities and General Comments, developed by the Committee on the Rights of Persons with Disabilities. The United Nations Convention on the Elimination of Discrimination against Women further clarify requirements for women to have access to justice without discrimination on an equal basis with men (Article 2 and 5).

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<sup>25</sup> Intersectionality is a term coined by Kimberlé Crenshaw

<sup>26</sup> See for example Doyin Atewologun, "Intersectionality Theory and Practice", 2018,

<https://deltaalphapsi.com/wp-content/uploads/2023/06/Intersectionality-Theory-and-Practice.pdf>

<sup>27</sup> Kimberlé Crenshaw, "Intersectionality as Method: A Note" (*Trying to Thrive Not Just Survive*, 2013), p. 1023-1024, <https://tryingtothriveandnotjustsurvive.wordpress.com/wp-content/uploads/2014/07/intersectionality-as-method-a-note-2013.pdf>.

As for regional treaties, both the Council of Europe and the European Union include further important legislation and guidance to guarantee fair trial rights of defendants, with and without disabilities (Article 6 and 13). The European Convention on Human Rights, through its Court, has important binding and enforcement powers over EU Member States. Furthermore, the EU will accede to the European Convention on Human Rights, and as such it has a duty to cooperate and align its standards with the ones sets out by the European Court of Human Rights. The European Union has created a procedural rights Roadmap to ensure mutual trust and recognition of cross-border judicial decisions by ensuring minimum standards. From this Roadmap, 5 EU Directives were adopted, alongside a European Recommendation on procedural safeguards for Vulnerable defendants. These are:

- Directive on **right to interpretation and translation** (Directive 2010/64/EU);
- Directive on **right to information in criminal proceedings** (Directive 2012/13/EU);
- Directive on **right to access a lawyer in criminal proceedings** (Directive 2013/48/EU);
- Directive strengthening certain aspects of the **presumption of innocence and the right to be present at the trial** in criminal proceedings (Directive (EU) 2016/343);
- Directive on **Legal aid for suspects and accused persons** in criminal proceedings and for requested persons in European arrest warrant proceedings (Directive 2016/1919);
- **Commission Recommendation of 27 November 2013 on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings;**<sup>28</sup>

This report will use as foundation for the analytical framework the UNCRPD and the International Principles and Guidelines on Access to Justice when synthesizing and analysing EU and national legislation and practices. The UNCRPD sets out universal values which aims at ensuring persons with disabilities may fully participate in society at same level as others, including in the justice system, based on inclusive equality. It also acknowledges that to achieve equality there is a need to address systemic barriers. It embraces intersectionality and recognises women with disabilities face double disadvantages compared to men, both on account of gender and disability (see Article 6). It is one of the treaties that benefited from widest participation, especially groups with diverse disabilities.<sup>29</sup> Finally, the UNCRPD sets out important goals, standards and principles for inclusion, diversity and participation which are

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<sup>28</sup> European Commission, *Council Recommendation of 20 December 2013 on Effective Roma Integration Measures in the Member States*, CELEX No. 32013H1224(02), <https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A32013H1224%2802%29>

<sup>29</sup> Validity Foundation, [Marking the legacy of Gábor Gombos](#), June 2024.

necessary to follow to achieve fair criminal justice proceedings, drawing from Social and Human Rights Model of disability.

## **A. Transforming Equality and Dignity in Criminal justice system through UNCRPD**

Both the social and human rights model of disability based on UNCRPD provide important lessons to achieve inclusion that accounts for the diversity of persons with disabilities and their unique realities. The rights-based or dignity-based framework of the UNCRPD in particular adopts the notion of inclusive equality, which has important repercussions for the design, operation and reform of criminal proceedings. It abolished any conceptions of disability based on deficits or view as medical conditions that need to be fixed, vulnerable or in need of welfare.<sup>30</sup> Convention acknowledges that there are both systemic and individual-level barriers that hinder participation in justice systems which must be removed, and through Human Rights model of disability has established different rights which are inherent to a person's dignity to make effective access to justice for all persons with disabilities on an equal basis with others.

The UNCRPD envisages that to achieve full participation there can be no barriers. In other words, systems need to be designed based on principles of universal design and must be accessible, without the need for adaptations. Procedural accommodations become relevant when in practice, systems are not accessible, persons require individual-level adjustments to exercise their rights. This is an innovation of the UNCRPD and the transformative potential of notion equality, which states as a duty the need to adopt reasonable and procedural accommodations. The International Principles on Access to Justice for Persons with Disabilities flesh out the content of these articles aiming for their operation in criminal proceedings in 10 different principles.

Under the UNCRPD justice systems must:

- Be accessible and enable access to equal opportunities (Article 5) as well as equality of outcomes among persons without disabilities, by requiring that rights are effectively exercised on an equal basis with others;
- Enable support decision-making and acknowledge persons with disability legal capacity and autonomy to make decisions (Article 12). Thus, States must provide

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<sup>30</sup> United Nations Committee on the Rights of Persons with Disabilities, General Comment No. 1 on Article 12: Equal Recognition before the Law, UN Doc. CRPD/C/GC/1 (2014).

measures and tools to enable persons with disabilities to make decisions independently about their case, without their will and preference being substituted by another person (whether guardian, carer or parent);

- Access to justice (Article 13): provide measures, including accommodations for persons with disabilities to adjust proceedings whenever measures under Article 5. These procedural measures must be individualized, not subject to judgements of proportionality in the determination of their adoption. This is an obligation of all state actors to prevent, protect and promote this right. While Convention does not establish further details, it is implied in it and further explained in Principle 3 that there should be enacted legislation in place to enable consistent application of accommodations in criminal proceedings. Participation must be effective through adoption of different measures to achieve this, with range from accessible materials and information to legal assistance;<sup>31</sup>
  - Such measures also have to be age-appropriate and gender-appropriate (Article 6 and 7). As such contribute to elimination of gender-based stereotypes or barriers that prevent women with disabilities to access justice who face multiple and intersecting forms of discrimination, both on account of gender and disability;
  - Any support services must also be accessible or, when not, guarantee adoption of reasonable accommodations (Article 2);
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<sup>31</sup> Centre for Disability Law and Policy (CDLP), *Access to Justice for Persons with Disabilities: A Detailed Account*, 2019.

## **B. The Relationship of UNCRPD with EU Law and its limitations**

The European Union has become a State Party to the UNCRPD on account of accession to the treaty on 23 December 2010. The EU has a special relationship with the CRPD and has established horizontal conditions for its implementation<sup>32</sup>. Its legal framework guarantees important rights, which some have argued incorporates rights and obligations under Article 13 of the UNCRPD. Indeed, FRA argues that right to access to justice under the UNCRPD is encompassed by article 48 of the EU Charter of Fundamental Rights.

EU formed a roadmap of 5 EU Directives that focus on certain procedural safeguards, as well as two Recommendations to guarantee certain minimum rights of defence to promote mutual trust in the enforcement of cross-border decisions. This includes in particular:

- Right to translation and interpretation
- Right to information
- Right to access a lawyer
- Right to presumption of innocence
- Right to legal aid
- Recommendation to safeguard vulnerable persons

These Directives have to be read in line with EU Charter Article 48 and Article 6 and 13 of ECHR that provide right to fair trial and access to remedy. Indeed, across all Directives its Recitals mention the need for interpretation to be based on the ECHR.

- These extend to the implementation of the multiple Directives and Recommendations; Section 4 will present how well Member States are complying with and how conducive are the Directives to promote implementation of UNCRPD obligations, using the International Principles as analytical framework, taking intersectional perspective, with a particular focus on right to access to justice and procedural accommodations;

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<sup>32</sup> European Union Agency for Fundamental Rights, *EU Framework for the CRPD*, accessed August 30, 2024, <https://fra.europa.eu/en/cooperation/eu-partners/eu-crpd-framework>.

## **C. An Intersectional Rights-based approach to humanize justice for defendants**

This report will seek to propose a recommendation and approach that both synthesize the findings of project ENABLE's, while setting out a critical policy framework and analysis for alignment of UNCRPD with EU law. Especially for defendants with disabilities, including with intellectual or psychosocial disabilities, in all their diversity may exercise their right to access to justice on an "equal basis with others".<sup>33</sup> It follows concept of inclusive equality under Human Rights Model of Disability, purported by the UNCRPD. According to it: "Inclusive equality is a new model of equality developed throughout the Convention. It embraces a substantive model of equality and extends and elaborates on the content of equality in: (a) a fair redistributive dimension to address socioeconomic disadvantages; (b) a recognition dimension to combat stigma, stereotyping, prejudice and violence and to recognize the dignity of human beings and their intersectionality; (c) a participative dimension to reaffirm the social nature of people as members of social groups and the full recognition of humanity through inclusion in society; and (d) an accommodating dimension to make space for difference as a matter of human dignity. The Convention is based on inclusive equality."<sup>34</sup>

The information in the report is then analysed under analytical framework at the intersection of different articles foreseen at the UNCRPD, and right to fair trial and access to remedy adopting a gender mainstream lens. One that understands the relationship between impairment and disability, as one where a person is disabled due to barriers in society that prevent them from fully participating in society and exercising their rights.

The rights-based approach adopted in the analysis includes:

- Legal capacity – all suspects or accused with intellectual or psychosocial disabilities have legal capacity and are entitled to exercise their rights on an equal basis with others. To that end, it will examine how effectively can exercise their rights:
  - o Laws or practices which enable or deny defendants with disabilities to exercise their rights and have a say on decisions that affect them;

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<sup>33</sup> United Nations, *Convention on the Rights of Persons with Disabilities* (2006), Articles 5, 12, and 13.

<sup>34</sup> United Nations Committee on the Rights of Persons with Disabilities, *General Comment No. 6 on Equality and Non-Discrimination* (2018), para. 11

- Law or practices which enable or not the adoption of measures to support decision-making for defendants to exercise their rights to fair trial;
- Inclusive equality:
  - Law or practices that consider multiple or intersecting disadvantages that defendants with intellectual or psychosocial disabilities face when exercising their legal capacity – bearing in particular socioeconomic, gender, age and disability statuses;
  - Additional measures that recognise and combat stigma and discrimination, prejudice, violence and recognition of human dignity of defendants with disability, including women;
  - Promotion and participative nature in adoption of measures, which promote full inclusion of the person in society as a whole;
  - Accommodating differences between individuals in each case, in recognition of their human dignity and unique realities – This includes their socio-economic status, intersection between gender and disability
- Access to justice:
  - Law or practices that promote or deny direct or indirect participation of defendants with disabilities in criminal proceedings;
  - Law or practices that guarantee or deny right to procedural accommodation across different stages of proceedings to ensure individualized adjustments that are appropriate to the defendant;
  - Law or practices that facilitate or not access to support to services, legal aid or lawyer to enable defendants to exercise their rights;
  - Practices and measures of awareness-raising and training for professionals

It uses as a springboard the International Principles and Guidelines on Access to Justice, along with binding guidance and recommendations from UNCRPD, UNCEDAW, ECHR, Istanbul Convention.

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# 04

INTERFACE BETWEEN UN  
AND EU ACCESS TO JUSTICE  
STANDARDS

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Procedural rights of suspects or accused persons of committing a crime are found in a series of EU Directives and European Recommendation on Vulnerable Defendants. An analysis of the EU legislation against the International Principles and Guidelines on Access to Justice suggest several shortcomings in guaranteeing the rights of persons with disabilities.

Only the European Recommendation (*the Recommendation*)<sup>35</sup> makes an explicit reference to the UNCRPD, in spite of the EU's obligation to abide by the Convention in line with its competencies. None of the directives make an explicit reference or acknowledge that persons with disability have right to legal capacity nor recognise they have a right to exercise their rights on an equal basis with others. Disability is only alluded to in the European Recommendation by reference to "vulnerability". This conception is further referenced in at least 3 other directives.

In the Recommendation, persons with disabilities are persons that are unable to understand or exercise their rights. This does not align with conception of disability in mind if the UNCRPD which has abolished deficit based understanding of disability (Article 1). Nor it acknowledges the multiple and diverse barriers that persons with disability face. Indeed, any conception of disability must recognise that at the heart of what disables a person is the result of external factors that form a barrier for impairment. Although it is acknowledged that the concept may enable development policy that is more focused on rights of diverse persons who are at a disadvantage.

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<sup>35</sup> European Commission, *Commission Recommendation of 27 November 2013 on Procedural Safeguards for Vulnerable Persons Suspected or Accused in Criminal Proceedings*, CELEX No. 32013H1224(02), <https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A32013H1224%2802%29>

## **A. Principle 1. All persons with disabilities have legal capacity and, therefore, no one shall be denied access to justice on the basis of disability**

The multiple EU Directives adopt vulnerability as a catch -all concept to refer to persons who might have “specific needs”. None of the Directives set out detailed guidance to enable professionals to know how to adopt disability -appropriate accommodations. To be sure, everyone is vulnerable in their own way.<sup>36</sup> Vulnerability can only be understood within particular social context. When this concept is used to refer to persons with disabilities as vulnerable, it further stigmatises and disempowers this group. It exacerbates stereotypical, discriminatory and/or paternalistic perceptions that they are powerless, needy or not capable to participate in public life autonomously.<sup>37</sup>

Within the field of access to justice, professionals are obliged to understand what may form a barrier in a particular context of criminal proceedings and what procedural accommodations need to be adopted to make the process inclusive and enable exercise the right to fair trial. To that end, it is important that any decision on procedural accommodations accounts in full the personal situation, needs and context that person lives in and what barriers they might encounter specifically in criminal proceedings. Barriers which can be disability, age and gender specific.

It should not be the focus nor a precondition for access to procedural accommodations to be dependent on an assessment if a person is vulnerable. Such is the guidance of the UN Committee on the Rights of Persons with Disabilities to push all Parties, including the EU, to repeal any laws or practices that replicates charity-based models, that preclude persons with disabilities to be seen as holders of rights. That hampers the understanding that all persons

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<sup>36</sup> Martha Fineman, *Vulnerability and Social Justice*, 2019, <https://scholarlycommons.law.emory.edu/faculty-articles/116/>

<sup>37</sup> See for example Lisa Waddington, “EU Criminal Law and Persons with Disabilities: Reflections on “Vulnerability” and the Influence of the CRPD”, 2022, <https://www.cambridge.org/core/journals/american-journal-of-international-law/article/eu-criminal-law-and-persons-with-disabilities-reflections-on-vulnerability-and-the-influence-of-the-crpd/3201177EEAF8BA22AB74C77661FABCB6> ; Catalina Devandas Aguilar & John H. Knox, “Introduction to the Symposium on William I. Pons, Janet E. Lord, and Michael Ashley Stein, “Disability, Human Rights Violations, and Crimes Against Humanity”, 2022, <https://www.cambridge.org/core/journals/american-journal-of-international-law/article/introduction-to-the-symposium-on-william-i-pons-janet-e-lord-and-michael-ashley-stein-disability-human-rights-violations-and-crimes-against-humanity/7E0CFDBF55A3FD063422D187DDB00E6E>

with disabilities have the right to exercise their legal capacity on equal basis with others. To achieve this goal, State Parties must introduce supported decision-making systems and replace substitute decision-making systems based on guardianship that prevents persons with disabilities from enjoying their rights equally. Unfortunately, as it will be shown below, these systems are still active in several EU countries, with important repercussions on how meaningfully they can exercise their right to access justice on an equal basis with others.

None of the legislation described how individual assessments should be conducted and used. Some of the directives mention that their purpose is to ensure their right to a fair trial. They do not go as far as determining that vulnerability assessment must not encompass functional or mental assessments that determine that a person is cognitively incapable participate in criminal proceedings. Or disability based assessment that aims to determine a person's fitness to stand trial or to plea. As the UNCRPD clarified, these assessments are discriminatory since they exclude persons with disabilities from proceedings and prevent them to exercise rights further. As it will be shown, in several EU countries, criminal proceedings are terminated due to use of insanity defence or held unimputable.

The existing EU legislation on procedural rights establishes important minimum procedural rights and safeguards. To comply with its obligations under the UNCRPD, legislation and strategy must go beyond this minimum for its standards to be in line with the Convention. Assessments should be done in a multidisciplinary manner, without medical professionals being the sole “experts” opining or determining capacity. Supported decision-making must be adopted, including through individual assessments processes to ensure safe, fair and effective engagement and the opportunity to fully participate in legal processes.

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## **B. Principle 2. Facilities and services must be universally accessible to ensure equal access to justice without discrimination of persons with disabilities**

Criminal justice system must take at a minimum the following action to ensure universal design. This includes making accessible facilities and services in all court buildings, including information, communication and other services. None of the EU Directives establish a specific right to accessibility, or mention the principle of universal design, although most require a right to information in an accessible manner.<sup>38</sup>

Principle of universal design is an important concept to be integrated in EU law since it defines both direction and goals for administration of justice, including for allocation the necessary resources and funds to make this possible. This extends as far as ensuring there are accessible means of transportation and creating funds for physical accessibility. The UNCRPD acknowledges that achieving accessibility happens gradually. This emphasizes the importance of guaranteeing procedural accommodations when facilities and services fail to ensure access to existing physical environment, transportation, information and communications for persons with disabilities.

It also establishes a focus that ICT should be accessible and can be effectively used by persons with disabilities to guarantee access to communication and information.

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<sup>38</sup> European Parliament and Council of the European Union, *Directive 2012/13/EU on the Right to Information in Criminal Proceedings*; *Directive 2010/64/EU on the Right to Interpretation and Translation in Criminal Proceedings*; *Directive 2013/48/EU on the Right of Access to a Lawyer in Criminal Proceedings and in European Arrest Warrant Proceedings*; *Directive 2016/343/EU on the Presumption of Innocence and the Right to Be Present at Trial*

### **C. Principle 3. Persons with disabilities, including children, have a right to procedural Accommodations**

As Model Bench book specifies “[p]rocedural accommodations are vital in providing for access to justice for persons with disabilities and realising such rights as the rights to legal capacity, participation, information, interpretation, effective assistance of legal counsel and legal aid. It is not possible to outline all possible accommodations for persons with disabilities, as these are case specific and depend on individual situations.”<sup>39</sup>

As described under Principles 3.1, “encompass all the necessary and appropriate modifications and adjustments needed in a particular case, including intermediaries or facilitators, procedural adjustments and modifications, adjustments to the environment and communication support, to ensure access to justice for persons with disabilities. [...]” Finally, Principle 3.1 states that “To the fullest extent possible, accommodations should be organised before the commencement of proceedings.”<sup>40</sup>

Under article 12(3) UN CRPD State Parties must “create an actionable and enforceable right to receive the individually determined procedural accommodations, including support, necessary to enable persons with disabilities to participate effectively in all proceedings in any court, tribunal or forum”.<sup>41</sup>

None of the EU Directives set out a right to procedural accommodations explicitly. They do acknowledge the need to adapt how information and communication should be made at times, considering the needs of the defendants. Directive 2012/13/EU sets out an obligation for criminal justice authorities to inform defendants of their rights in an accessible manner, either orally or in writing, “taking into account any particular needs of vulnerable suspects or vulnerable accused persons.”<sup>42</sup> Written documents, such as Letters of Rights should be drafted “in simple and non-technical language so as to be easily understood by a lay person without

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<sup>39</sup> ENABLE project, Model Disability Benchbook on the Rights of Persons with Disabilities in Criminal Proceedings, 2024, [https://validity.ngo/wp-content/uploads/2024/08/Model-Disability-Bench-Book-Last-version\\_30-July.pdf](https://validity.ngo/wp-content/uploads/2024/08/Model-Disability-Bench-Book-Last-version_30-July.pdf)

<sup>40</sup> Ibid. Principle 3, Guideline 31, p.15.

<sup>41</sup> Ibid. 42.

<sup>42</sup> United Nations, *Convention on the Rights of Persons with Disabilities* (2006), Article 3(1) and (2); European Parliament and Council of the European Union, *Directive 2012/13/EU on the Right to Information in Criminal Proceedings*,

any knowledge of criminal procedural law”.<sup>43</sup> Annex I provides a template of Letter of Rights that is to be commended by setting out a description of different rights in a manner that a lay person may understand, in simple and non-technical language. This however does not extend to easy to read language, which may be necessary for certain persons with learning disabilities. Directive specifies a heightened “duty of care” by “taking into account any potential vulnerability that affects their ability to follow the proceedings and to make themselves understood, and by taking appropriate steps to ensure those rights are guaranteed”.<sup>44</sup>

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<sup>43</sup> European Parliament and Council of the European Union, *Directive 2012/13/EU on the Right to Information in Criminal Proceedings*, Recital 38.

<sup>44</sup> European Parliament and Council of the European Union, *Directive 2010/64/EU on the Right to Interpretation and Translation in Criminal Proceedings*, OJ L 280, 26.10.2010, p. 1-7.

## **D. Principle 6 – Persons with Disability have the right to free or affordable legal assistance**

There are 2 EU Directives in particular that have a prominent role in ensuring access to legal assistance in the EU, as required in Principle 6. Directive 2013/48/EU on access to a lawyer, which seeks specifically to prescribe minimum standards for suspects or accused to have access to a lawyer. Complementary, Directive (EU) 2016/1919 on Legal aid which also sets minimum standards for a system of legal aid as a service to secure defendant's right to legal assistance. The different reports have shown that they had positive impact through different legislative reforms. This includes leading to changes of legal aid system to enable more defendants without resources to benefit from a lawyer.

The Directive on Access to a Lawyer sets out standards to enable suspects or accused of committing a crime to secure a lawyer in a timely manner to exercise their rights to defence.<sup>45</sup> These standards are specific to criminal proceedings and European Arrest Warrant Proceedings.<sup>46</sup> The Directive goes further and lists critical moments in criminal proceedings by when a lawyer should be present for a person's defence or their fundamental rights, such as before being questioned by the police.<sup>47</sup> When in contact with the lawyer, Member states must respect the confidentiality of communication between suspect or accused and their lawyer, including meetings, correspondence, telephone conversation and other forms of communications.<sup>48</sup> Furthermore, they also have a right to have a third person informed of deprivation of liberty as well as to communicate with third persons while deprived of liberty and access to a remedy when Member State is in breach.<sup>49</sup>

While both Directives set out the importance of accessing legal assistance, they do not go further to describe what access might entail in practice. Indeed, the UNCRPD ensures a right for all suspects or accused with disability to exercise their right to legal assistance on an "equal basis with others". To that end, the will and preference of suspects or accused of committing

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<sup>45</sup> European Parliament and Council of the European Union, *Directive 2013/42/EU*, Articles 2 and 3(1) and (2)

<sup>46</sup> European Parliament and Council of the European Union, *Directive 2013/42/EU*, Article 1.

<sup>47</sup> *Ibid.* 53. Article 3 para. 2.

<sup>48</sup> *Ibid.* 53. Article 4.

<sup>49</sup> *Ibid.* 53. Article 5, 6 and 12.

a crime must be respected and any practices or laws that impose substituted decision-making must be repealed.

To be effective and meaningful, several measures are necessary, which can be drawn from International principles and Guidelines on access to Justice. They must be:

- free or affordable in all judicial and quasi-judicial proceedings regardless of the person's role.
- available on terms that are no less favourable as persons without disabilities, including by adopting individual procedural accommodations.
- legal advice should be accessible by making it widely available through series of mediums telephone, digital gateway services, paralegal services, online services, including using assistive technology.
- communication with clients should be effective by making available interpreters, assistive technology, intermediaries and facilitators.

Through these two Directives, Member states are required under both directives to ensure that the particular needs of “vulnerable” suspects or accused are taken into account while applying the Directive.<sup>50</sup> Contrasting both legislation reveals the need for further integration of EU law with the UNCRC to make it effective.

Legal capacity and supported decision-making need to be at the heart of this legislation. Especially by demanding repeal of legislation that enable lawyers to be appointed against the will of suspects or accused of committing a crime, or by the guardian. Both Directives are silent on an obligation for the rights to be exercised on an equal basis with others.<sup>51</sup> This does nothing to stop the perpetuation of the ongoing practice of defendants with disabilities not having a choice on their legal representative nor how their will should be protected, as it will be shown below.

Scope of the legislation needs to widen to account for the diversity of situations that defendants with disabilities face. Indeed, experience collected in this project shows that procedural guarantees of defendants are weak whenever criminal proceedings intersect with

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<sup>50</sup> European Parliament and Council of the European Union, Directive 2013/48/EU, Article 13; Directive (EU) 2016/1919, Article 9

<sup>51</sup> European Parliament and Council of the European Union, Directive 2013/48/EU, Recital 52; Directive (EU) 2016/1919, Recital 29.

mental health system. As it will be shown further below, defendants with intellectual or psychosocial disabilities have been found arrested during situation of mental health crisis and put under protective or compulsory treatment without possibility of communicating with a lawyer. Furthermore, Directives only assure guarantees insofar until final determination of a person's responsibility for an offence. It does not go further for procedural guarantees on execution of the sentence in forensic hospital, where sentence and proceedings of probation are reviewed without participation of the defendant of and minimum guarantees for a lawyer.

Further measures need to be in place to make accessible representation of a lawyer. This includes creating time, space and availability of lawyers to meet before hearings, with the support of legal aid system. Criminal justice system should cover, as well, fees and other costs of supportive measures to make communication accessible between lawyer and client, including assistive technology. Both Directives are silent on these matters, which has limited how effectively lawyers can work with their clients and how persons with disabilities may instruct their lawyers. The research reveals that experiences of persons with disabilities across 8 EU countries has been mostly negative, driven by only being able to meet lawyers for the first time during their hearings or difficulties communicating with them outside of courts. Especially when persons with disabilities are forcefully committed in psychiatric institutions.

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05

MEMBER-STATE  
IMPLEMENTATION

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## A. Right to Legal Capacity

Right to legal capacity is a “threshold right”.<sup>52</sup> It acknowledges that all persons with disabilities have personhood. They have a say in decisions affecting them. They can autonomously express their will and preference to enter into legally binding decisions. At times some persons with disabilities might require measures to support them to make decisions and overcome external barriers. Without it, it is not possible to enjoy rights under the UNCRPD as well as not exercise their right to fair trial and access to a remedy on an equal basis with others.

The right to legal capacity (Article 12) is foundational to exercise right to access to justice, since it recognizes every person with disability’s legal capacity. They are entitled to enjoy and exercise their rights on an equal basis with others. To make this effective, additional supporting measures may be required to support decision-making in the exercise of this right. Conversely, it rejects any denial of legal capacity through status-based, functional and outcome-based systems. The UNCRPD is clear that any “Denial of decision-making on the basis of disability through any of these systems is discriminatory.”<sup>53</sup>

Throughout the project, several barriers were indicated that prevented defendants with disabilities to exercise their right to fair trial. Some barriers are inherent to the traditional functioning of criminal proceedings across the EU. Others are external to them. This section will expand upon these external barriers, which have repercussions on how defendants are able to exercise this right.

### 1. Guardianship

Where it exists, guardianship is generally regulated in civil or family legislation in the assessed countries. When a person with disability is put under guardianship, their legal capacity is either partially or fully limited. These laws are in place under the flawed understanding that a person with disability is not capable of making legally binding decisions without a person without disabilities protecting their interests. It is also based on ableist conception that persons with disability cannot autonomously managed their own affairs. Some countries have different

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<sup>52</sup> United Nations Committee on the Rights of Persons with Disabilities, General Comment No. 1 on Article 12: Equal Recognition before the Law, UN Doc. CRPD/C/GC/1 (2014).

<sup>53</sup> Ibid. 59.

degrees of how legal capacity is limited. These laws have, in practice, led for the will of persons with disabilities to be substituted by those without disabilities.

Both the UNCRPD and others have pushed for repealing guardianship laws.<sup>54</sup> These laws have led to serious human rights abuse of persons with disabilities. Persons with disabilities have been committed against their will in psychiatric institutions. They have also been forced to live in residential institutions without freedom of choice to make any decisions about their life. Or even stripped of their personhood and control of any decisions that affect them.

Guardianship laws, they still exist whether in law or in practice in EU countries. Of the 8 EU countries, 6<sup>55</sup> of them still have in place some form of partial or full guardianship system with wide range implications in justice system. In Bulgaria, “Only few judges follow guidelines for supported decision-making. Supported decision-making is not a widely recognized practice in the justice system in spite of existing legislation.<sup>56</sup>” In Czechia<sup>57</sup> and Slovenia a lawyer may be selected or appointed by a guardian against the will of a person with disabilities. In Slovenia, while legal capacity of persons with disability has been recognised, guardians are still entitled to make statements and make decisions on their behalf.<sup>58</sup>

In practice, there is no guarantee that guardians will effectively act for or according to the will and preferences of persons with disabilities. There needs to be also meaningful access to remedies for a person to challenge decisions made by guardians, especially whenever there is a conflict of interest.<sup>59</sup> Stereotypes, stigma or preconception about disability has driven criminal justice professionals or support workers to communicate directly only with the guardian or lawyer.

***“I have a colleague who is a public guardian and just the way she talks about her clients with disabilities is alarming to me and I often think that***

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<sup>54</sup> United Nations, *Convention on the Rights of Persons with Disabilities (CRPD)*, Article 12 (2006); United Nations Committee on the Rights of Persons with Disabilities, *General Comment No. 6 on Article 15: Freedom from Torture or Cruel, Inhuman, or Degrading Treatment or Punishment*, UN Doc. CRPD/C/GC/6 (2018); United Nations, *Guidelines on Deinstitutionalization*, UN Doc. A/RES/64/142 (2009)

<sup>55</sup> Bulgaria, Czechia, Lithuania, Romania, Slovakia, Slovenia.

<sup>56</sup> KERA Foundation, [Briefing paper on barriers faced by defendants with intellectual and/or psychosocial disabilities in the Criminal Justice System in Bulgaria](#), Veliko Tarnovo, ENABLE Project, 2023, p. 22.

<sup>57</sup> FORUM, [Briefing paper on barriers faced by defendants with intellectual and/or psychosocial disabilities in the Criminal Justice System in Czechia](#), Praha, ENABLE project, 2023, p. 68 – 69;

<sup>58</sup> PIC, Slovenia, Ljubljana, ENABLE Project, 2023, p. 33.

<sup>59</sup> Mental Health Perspective, Lithuania, Vilnius, ENABLE Project, April 2023, p. 23.

***some people really shouldn't be working as supporters of people with disabilities."***

***(Support worker, Czechia, female)***

Portugal and Spain have mostly replaced these systems with a mechanism of support in decision-making. Notwithstanding these positive developments, progress must continue to ensure their full implementation.

## **2. Support services, Social Barriers and Independent Living**

Supported decision-making depends on the existence of support services to enable autonomous exercise of rights. This includes support, personal assistance and living in community to promote empowerment. As well as specific support services within the justice sphere to ensure suspects or accused persons can exercise their rights to fair trial effectively.

What support exists varies widely per each 8 EU countries, although for most, support services are largely non-existent, specifically beyond guaranteeing access to a lawyer and a legal aid. Whenever they do exist, they tend not be appropriate to empower persons with disabilities to make decisions independently that affects them. To empower persons with disabilities, this support must include access as well to community-based services, community-based living and access to personal assistance schemes. Indeed, persons with disabilities in several EU countries are forced to live in institutions which historically has shown to have a devastating impact on development of persons with disabilities.

***"Crimes are often due to social reasons. After treatment (in a psychiatric hospital), there is no support outside. Only protected group homes."***

***(Psychiatrist, Bulgaria, male)***

***“The state is missing when it comes to persons with psychosocial disabilities...they are either placed in institutions or in psychiatric hospitals to die.”***

(Psychologist, Bulgaria, female)

A person’s social situation may also heavily affect what measures may be applied through the justice system, which amount to discrimination on socio-economic status.

***“She asked for a house arrest (instead of prison), but she does not have a home address because she lives in a shelter for homeless people.”***

(Defendant with psychosocial disability, Bulgaria, female)

Persons with disabilities also have fewer opportunities for access to inclusive education, which further increases the need for information and communication to be imparted in an accessible manner.

***“Persons with (...) intellectual [disability] usually had little or no contact with the education system or were dropped out of school from the very beginning and this is also connected to the family environment because all their relatives have no education and did not attend school.”***

(Lawyer, Bulgaria, female)

Lack of support services to address victimisation, increases both chances of revictimisation and also risk of engagement in crime. As noted by the Disability rights expert from Lithuania, Ugnė Grigaitė *“Issues exist concerning the broader social care system and institutional services: people starting their lives at children’s homes, then potentially moving on to segregated large social care institutions (or homelessness), having a lack of needed individualised support in the community that then potentially results in offending. A similar*

*vicious circle has been observed following serving a sentence and trying to re-integrate in society: often people may end up re-offending due to the lack of needed support within the system(s)."*<sup>60</sup>

***"It should be focused not only on punishment and sentencing, but also on providing that help so that in the future we don't keep them in prisons forever, right? (...) In prisons, they say if they leave, they won't know how to live."***

(Police, Lithuania, female)

Another case experienced by a social worker in Czechia further demonstrates the importance of these service: *"his client was abused by his mother as a child, so he has difficulty communicating with women. [At the unemployment office], he committed a crime against a female official who raised her voice at him. He threatened the officer because it reminded him of his abusive mother. She then proceeded to file a criminal complaint against him. The interviewee was in a very difficult situation in his life, and only a social worker could help him, such as by arranging for another visit to a psychiatrist. He would not have had contact with a social worker if not for the Probation and Mediation Service."*<sup>61</sup>

When support services do exist for defendants with disabilities it is due to initiatives maintained by NGOs: *"Concerning support services, we inquired whether there were services for persons with disabilities to access legal assistance, information, or psychological support. [We] were told that there are only those provided by NGOs working on the issue, and that in Spain, only Plena Inclusión and its associated entities work with persons with disabilities in legal proceedings and in prison. There are no other organisations known to provide these services. However, NGOs lack the resources to be present in all cases involving persons with*

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<sup>60</sup> Mental Health Perspectives, [Briefing paper on barriers faced by defendants with intellectual and/or psychosocial disabilities in the Criminal Justice System in Lithuania](#), Vilnius, ENABLE Project, April 2023, p. 9.

<sup>61</sup> FORUM, [Briefing paper on barriers faced by defendants with intellectual and/or psychosocial disabilities in the Criminal Justice System in Czechia](#), Praha, ENABLE project, 2023, p. 79.

disabilities, resulting in many persons with disabilities going through court proceedings alone.”<sup>62</sup>

### **3. Unimputability and Insanity Defence as a Fair Trial Barriers**

The research carried out in all 8 EU countries involved in the ENABLE project has shown that the Criminal Codes of all these countries establish the exemption from criminal liability of persons who are suspected of committing a crime and who were found **incapable of understanding** the wrongfulness of their actions or controlling them due to a mental health condition at the time of the commission of the act. There are multiple accounts of criminal justice authorities not respecting the will and preference of these suspects from the moment they are deemed unimputable.

*“They considered me as not responsible by decree. Not that I felt “unimputable” (...). They were in the courtroom, where they tried to listen to me but didn't pay any attention to me. They completely ignored me.”*

(Defendant with psychosocial disability, Portugal, female]

At the same time, the legislation of most countries (e.g. in Bulgaria, Slovenia, Slovakia) assess whether there were short-term and/or continued manifestations of “mental health conditions”. These have been used as sufficient grounds for pleading “insanity defence”, triggering the termination or suspension of the criminal proceedings. This is followed by compulsory protection measures, if their continued presence in society is considered dangerous.

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<sup>62</sup> Pléna Inclusión, [Briefing paper on barriers faced by defendants with intellectual and/or psychosocial disabilities in the Criminal Justice System in Spain](#), Madrid, ENABLE Project, 2023, p. 64.

The issue of termination of criminal justice proceedings and proceeding with compulsory treatment were subject to preliminary reference by the Lukovit District Court in Bulgaria to the Court of Justice of the European Union (CJEU, ECJ).<sup>63</sup> In its ruling<sup>64</sup> the ECJ confirms the shortcomings of such practice<sup>65</sup> and criticises the existence of judicial proceedings which allows for persons in cases of insanity defence to be placed in psychiatric hospitals due to therapeutical and security reasons, without the court verifying that certain procedural rights of these persons were respected.<sup>66</sup> Further, the ECJ clarifies that the presumption of innocence must be interpreted to require that the prosecutor proves within the court proceedings that the person, whose hospitalisation is requested, is the actual perpetrator.<sup>67</sup>

Similarly, most of these countries introduce also the concept of diminished/ partial criminal liability (e.g. Portugal, Spain, Czech Republic, Slovenia). These are the cases when it has been concluded that a person **could not fully assess** the wrongfulness or control their actions due to a mental health condition, thus cannot be declared as lacking responsibility. In these cases, the criminal proceedings usually continue, while the sentence is reduced or excluded. A protection measure will be applied during the sentencing, in cases when the person's continued presence in society is considered dangerous.

In all assessed countries, the court decision on the exemption from criminal liability of persons who are suspected of committing a crime is based on a forensic doctor's assessment on whether the defendants had the element of control or were capable of recognising the

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<sup>63</sup> Court of Justice of the European Union, *Judgment in Case C-568/16*, [2018] (ENG)

<https://curia.europa.eu/juris/document/document.jsf?docid=206294&mode=req&pageIndex=1&dir=&occ=firs t&part=1&text=&doclang=EN&cid=2144006> / (BG)

<https://curia.europa.eu/juris/document/document.jsf?docid=206294&mode=req&pageIndex=1&dir=&occ=firs t&part=1&text=&doclang=BG&cid=2144006>

<sup>64</sup> Court of Justice of the European Union, *Judgment in Case C-451/18*, [2019] (ENG)

<https://curia.europa.eu/juris/document/document.jsf?docid=217905&mode=req&pageIndex=1&dir=&occ=firs t&part=1&text=&doclang=EN&cid=2144006> / (BG)

<https://curia.europa.eu/juris/document/document.jsf?docid=217905&mode=req&pageIndex=1&dir=&occ=firs t&part=1&text=&doclang=BG&cid=2144006>

<sup>65</sup> The Court's Ruling confirms the deficiency of this procedure and its incompliance with Directive 2012/13/EU on the right to information in criminal proceedings and Directive 2013/48/EU on the right of access to a lawyer in criminal proceedings.

<sup>66</sup> Interpretation by the ECJ on Art. 47 of the Charter of Fundamental Rights of the European Union as well as Art. 8, para 2 of Directive 2012/13/EU and Art. 12 of Directive 2013/48/EU, point 2 of the Ruling.

<sup>67</sup> Interpretation by the ECJ on Art. 3 of Directive (EU) 2016/343 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings, and Art. 51, para 1 of the Charter of Fundamental Rights in view of Art. 427 et seq of CPC, point three and four of the Ruling.

illegality of their conduct. These circumstances are established during the pre-trial investigation or during the trial of the case.

If the forensic report establishes that the person suspected or charged with a crime was incapable of assessing the wrongfulness of their actions or controlling them due to a mental health condition at the time of the offense (or during the criminal proceedings), the criminal proceedings – whether this is in the pre-trial or during the trial phase - will be terminated. Depending on the conclusions on the dangerousness, the case will be terminated and the person will be exempt from criminal liability or a compulsory security measure will be assigned, which are custodial and non-custodial (more information about this below). If a person is diagnosed with a "short-term mental disorder" in some countries (e.g. Bulgaria ), criminal proceedings are put on hold until the defendant recovers.

**Spain is an exception** to the rule of mandatory termination or suspension of proceedings, as the criminal process involving defendants with disabilities is carried out throughout **all stages of the criminal proceedings**. However, because Spanish law still allows for partial or complete exemption from criminal liability, even if guilt is proven in committing the crime, the person can still be partially or completely exonerated from responsibility. In both cases, a security measure, whether custodial or non-custodial, is imposed as a result.

All countries involved in the analysis are imposing **security measures**, which are measures ordered by the court on defendants with intellectual and psychosocial disabilities who, according to the psychiatric evaluations, are found to pose a threat to society (i.e., risk of committing other crimes). These measures, which can be custodial or non-custodial, are ordered during criminal proceedings or in response to a court decision. Forensic experts are responsible for recommending whether the measure should be maintained, replaced, or terminated, as well as its nature. The defendant or his lawyer may object to the appointed expert on the basis of bias, the expert's expertise, or the wording of the questions posed to him.

The **non-custodial measure** is compulsory **out-patient medical treatment**, under the court's supervision (e.g. Portugal, Czech Republic, Romania and Lithuania)). They are applied to persons recognised by the court as legally incapacitated or of diminished capacity, as well as to persons who are 'mentally disturbed' after the commission of a criminal act or the

imposition of punishment. They are ordered if due to the dangerousness of the committed act and their mental health condition, persons do not need to be monitored and treated in an in-patient facility, or who can continue to receive out-patient treatment when their mental health condition improves after the in-patient treatment. At discretion of the court, the refusal to comply with the assigned treatment is converted to a custodial security measure. The implementation of these measures happens without ensuring dignity of the defendant, which has repercussions on their participation in criminal proceedings.

*“I was interned several times [in psychiatry]. Half of them I didn't want to, but they made me. (...) they tied me to the bed, I didn't even understand why. (...) I didn't want to take the injection, and the lady told the policeman to grab me and that she was going to give me the injection anyway. I was trapped, I couldn't get up, I couldn't do anything.”*

(Defendant with intellectual and psychosocial disability, Portugal, male)

**Custodial security measures** are established during pre-trial or trial phase, or after the sentence has been imposed. Temporary medical confinement can be ordered by the court, during the pre-trial phase. In some countries (e.g. Romania), these measures can last until the judgment becomes final or until the measure is lifted, due to recovery or considerable improvement of the condition, their legality being assessed by a judge every 12 months.

A prosecutor files a motion for security measures in district court, based on the forensic psychiatrist's opinion, with the mandatory participation of the prosecutor and the lawyer of the person against whom the measure is requested (please see below the Chapter Right to Legal Assistance – Access to a lawyer and legal aid 36). Most countries' legislation allows the hearing to be conducted without the person's participation if his or her health condition prevents it (e.g. Bulgaria, Lithuania ). The court's decision is subject to appeal.

The period of **security measures** ordered by the court as a result of the discontinuation of the case due to non-imputability varies among the researched countries. While legislation of some countries allows for a custodial security measures for a maximum period of five years,

imposing a proactive revision of the necessity of these measures by the court every 6 months (e.g. Slovenia , Bulgaria ), other specify an upper limit that cannot be longer than the penalty for the offense (e.g. Portugal, Spain ). In practice, however, these measures can exceed the maximum allowed prison time (25 years, Portugal).

For other countries (e.g. Czech Republic, Lithuania, Portugal, Slovakia) legislation does not impose a definite maximum period of time, specifying that it can last as its purpose requires - rehabilitation and elimination of his social dangerousness of the defendant. The court, however, must decide regularly (every 6 months in Lithuania and Bulgaria) on the issue of extending the application of compulsory medical measures. This leads to situations where defendants may be deprived of liberty longer than the maximum penalty imprisonment allowed by law.

***“But many do not have any support. And they are hospitalised: minimum 3 years. And then it is revised, and can be almost indefinitely until you are considered rehabilitated, (...) you can stay forever in a psychiatric establishment. In Portugal, we say that the maximum prison time is 25 years, but in the case of hospitalisation, it is reviewed ... I am not aware of any that have stayed for many years, but they may stay.”***

(Judge, Portugal, male)

The security measures are carried out in specially assigned mental health facilities or in prisons units designed to provide mental health care. According to research, due to a lack of available space within mental health facilities or units, defendants exempt from criminal liability are frequently placed in penitentiaries for extended periods of time, which are not suited to the needs of this group (Portugal Lithuania, Czech Republic).

***“The defendants exempt from criminal liability (“unimputable”) are all placed in mental health units, but in these cases, the system is very bad... because they stay a long time in prison waiting for a vacancy in mental health units. I have two or three situations at the moment (...)”***

(Judge, Portugal, male)

Despite security measures involving indefinite detention in psychiatric institutions and forced medical treatment of persons whose guilt was not duly proven, the interviews conducted with some Criminal Justice Actors during the research showed that some of them are not always concerned about the failure to provide access to justice for persons who are found criminally irresponsible due to their disability because the proceedings are terminated anyway, and that they do not regard security measures as a severe punishment<sup>68</sup>. At the same time, others recognize that confinement in psychiatric hospital for years and can be a harsher punishment than if they had been tried for the acts for which they were investigated<sup>69</sup>

***“[S]ometimes it is even heavier to have a security measure than a prison sentence because they are always based on medical criteria, (...) the court does not interfere either...”***

(Prosecutor, Portugal, female)

Despite these troubling findings, the reforms in this field stagnate in all 8 researched countries, while the number of people considered exempt from criminal liability ("unimputable") is in significant increase<sup>70</sup>. There needs to be a shift to community-based interventions to ensure the rights of persons with disabilities under the UNCRPD.

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<sup>68</sup> FORUM, [Briefing paper on barriers faced by defendants with intellectual and/or psychosocial disabilities in the Criminal Justice System in Czechia](#), Praha, ENABLE project, 2023, p. 75.

<sup>69</sup> Centre for Legal Resources (CLR), [Briefing paper on barriers faced by defendants with intellectual and/or psychosocial disabilities in the Criminal Justice System in Romania](#), Bucharest, ENABLE Project, 2023, p. 57.

<sup>70</sup> Expresso, "Em 2022, a criminalidade violenta e grave subiu 14,4% em Portugal," 27 March 2023 (available at <https://expresso.pt/sociedade/justica/2023-03-27-Em-2022-a-criminalidade-violenta-e-grave-subiu-144-em-Portugal-2e146b0b>)

As Patrícia Neca states, *“An alternative should be a community-based intervention that promotes empowerment and recovery (not in the sense of the cure of the disease, but the acceptance and learning on how to live with certain mental health conditions).”*<sup>71</sup>

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<sup>71</sup> FENACERCI, [Briefing paper on barriers faced by defendants with intellectual and/or psychosocial disabilities in the Criminal Justice System in Portugal](#), Lisboa, ENABLE project, 2023, p. 65

## B. Right to Legal Assistance – Access to a Lawyer and to Legal Aid

All 8 EU countries<sup>72</sup> have legislation in place establishing access to a lawyer as a mandatory right in criminal proceedings. However, there are clear differences between when this is guaranteed, to what extent and the quality of it and views of lawyer's role in relation to persons with disabilities. Indeed, there are jurisdictions where the moment of attribution of status of suspect or accused is not clear enough and persons may be treated as witnesses or citizens, without the procedural guarantees connected to this status. Client and lawyer meetings before hearings are rare. There are complaints about quality of representation of public defenders, as well as legal aid available from them. There are barriers for accessing lawyers when a person is sent to psychiatric institution. This section will include an analysis of the Directive itself, and implementation by Member-States.

The experiences of suspects or accused of committing a crime, and have an intellectual or psychosocial disabilities, in securing legal assistance has been mixed across the 8 EU countries. Negative experiences seem to have been driven by discriminatory legislation, practices or attitudes. Six interviewees with disabilities in Portugal, Romania, Bulgaria and Czechia were not able to have access to a lawyer at all. Positive experiences by persons with disabilities are owed to professionals that have taken extra steps to ensure inclusion of their clients through legal advice, respectful treatment and adjusting their behaviour or proceedings in support of their client. In this section, these situations will be described. Only some interviewees had positive experiences with their lawyers in 6 EU countries.<sup>73</sup>

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<sup>72</sup> ENABLE project, *National Briefing Papers: Enabling Inclusion and Access to Justice for Defendants with Intellectual and Psychosocial Disabilities*, 2022, <https://validity.ngo/projects-2/enabling-inclusion-and-access-to-justice-for-defendants-with-intellectual-and-psychosocial-disabilities/national-briefing-papers/>

<sup>72</sup> Mental Health Perspectives, *Briefing paper on barriers faced by defendants with intellectual and/or psychosocial disabilities in the Criminal Justice System in Lithuania*, Vilnius, ENABLE Project, April 2023, p. 57; FENACERCI, *Briefing paper on barriers faced by defendants with intellectual and/or psychosocial disabilities in the Criminal Justice System in Portugal*, Lisbon, ENABLE Project, April 2023, p. 22.

<sup>73</sup> ENABLE project, *National Briefing Papers: Enabling Inclusion and Access to Justice for Defendants with Intellectual and Psychosocial Disabilities*, 2022, Bulgaria, Czechia, Lithuania, Portugal, Romania and Spain, <https://validity.ngo/projects-2/enabling-inclusion-and-access-to-justice-for-defendants-with-intellectual-and-psychosocial-disabilities/national-briefing-papers/>

## **1. Barriers by investigatory authorities to access a lawyer**

In certain jurisdictions, such as Bulgaria, suspects or accused of committing a crime with disabilities may be subjected to investigatory acts without procedural guarantees. Police and lawyers confirmed in Bulgaria a practice whereby suspects or accused are only informed about rights of the Directives, including access to a lawyer, once they are indicted or formally communicated the status of accused. This increases the risk of self-incrimination and abuse in criminal justice system, which is illustrated by an account of an interviewee with disabilities:<sup>74</sup>

***“They didn't tell me why they arrested me. [They told me]: “[w]e have no evidence against you but if you confess, we will let you go so you won't have to stay 24 hours (in detention).” They did not provide me with a lawyer during the interrogation and did not inform me of my right to remain silent. (...) I didn't ask for a lawyer at the time because I didn't think they were going to interrogate me.”***

(Defendant with psychosocial disability, Bulgaria, male)

***“Persons usually get informed about their rights when they become ‘accused’. Exactly upon serving the indictment, when perpetrators might have already incriminated themselves. A very serious problem. Very often the authorities explain the rights with “you know them already”.***

(Lawyer, Bulgaria, male)

Although any confession or evidence collected in Bulgaria in such a situation does not and should not have any procedural value, it contributes to diminishing trust in criminal justice authorities and negative feelings about criminal justice system.

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<sup>74</sup> KERA Foundation, [Briefing paper on barriers faced by defendants with intellectual and/or psychosocial disabilities in the Criminal Justice System in Bulgaria](#), Veliko Tarnovo, ENABLE Project, 2023, p. 41-43.

## 2. Information and Communication barriers to access a lawyer

In all 8 EU countries, there is no systematic practices or policy on how to inform suspects or accused of committing a crime with a disability to have right to a lawyer, as well as how to find one. There are general practices in some countries where information about rights is shared in a standardized document with a list of rights that is applied formally and equally even for persons without disabilities. Proof of having read the document tends to be done by way of signature.

*“No one here does such things, about rights. No one says ‘read it’. (...) They give you papers to read; they want you to sign it. I don’t read. I can’t be bothered to read a few papers, a lot written on those. (...) I didn’t call; nobody said such things to me. They didn’t say that you can call someone there. (...) And no one will ever inform you who your lawyer is. You have to go and ask the investigator yourself.”*

*(Defendant with psychosocial disability, Lithuania, male)*

*“They didn’t even tell me that I could get in touch with my family. Because my phone was taken away and everything else, there wasn’t much information about my rights: that I had a right to a private lawyer, talk with my family, I don’t know.”*

*(Defendant with psychosocial disability, Lithuania, female)*

Less than half of suspects or accused with disabilities interviewed recalled having been informed about their rights, especially right to have a lawyer. Only in Czechia all interviewees confirmed to have been informed either directly by police or lawyer, largely with the aid of a standardized bill of rights. In all other countries persons with disabilities declared that they were not informed in an accessible manner.

***“I think that in all other areas of law and official procedures, [persons] with disabilities basically do not understand what is supposed to be happening. And nobody even tries to explain it to them. All instruction is so brief and formal, just like towards people who don't have disabilities. So, people with disabilities are all the more disadvantaged.”***

(Lawyer, Czechia, male)

Information available or provided in writing or orally is largely not accessible. While a written document may be helpful to support understanding, this document needs to be adjusted in accordance with a person's disability. To accommodate the diversity of types of disability, this information needs to be accessible, in a variety of formats, including plain language, braille, digital and compatible with assistive technologies.

Nor there is guarantee that it is provided in a manner accommodating to different impairments, even though this a duty for all criminal justice professionals involved. Having a lawyer present, does not automatically fulfil obligation to communicate and explain information in an accessible manner.

***“They read it to me and informed me of my rights. A lawyer was called in [name of a town], I didn't even understand it, I can't see without glasses, I just signed it. I didn't realise that it was a warning for me not to go anywhere. (...) Well, the lawyer read it. But I probably didn't understand it that well, I was stressed. (...) There were piles of papers, I say I can barely see to sign, I didn't read it, I simply believed in people. Such institutions will not deceive you.”***

(Defendant with psychosocial disabilities, Lithuania, male)<sup>75</sup>

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<sup>75</sup> Mental Health Perspectives, [Briefing paper on barriers faced by defendants with intellectual and/or psychosocial disabilities in the Criminal Justice System in Lithuania](#), Vilnius, ENABLE Project, 2023, p.36.

There are nonetheless examples of ad hoc practices where criminal justice and lawyers take the time to inform and ensure defendants with disabilities can understand. They do this by explaining information either in plain language or in easy-to-understand manner,

### **3. Quality of legal aid and Effective Training**

Experiences of suspects or accused with lawyers were, as well, very mixed. Persons with disabilities, lawyers and criminal justice professionals were particularly critical on the performance and communication with lawyers, especially by public defenders. Respondents revealed mistrust in public aid system, viewing lawyers as less invested, communicative, participatory in proceedings and, overall, passive. In Czechia for example, “[l]awyers said that not all their colleagues properly represent clients with disabilities. They are passive, have no experience with clients with disabilities and do not try to explain everything to them.”<sup>76</sup> This was felt as well by persons with disabilities, for example in Lithuania:

***“A very big difference. The government lawyer didn’t speak with me.. (...) And the private lawyer, he communicated with us, he was more reassuring, provided more information. And maybe helped me to better understand what was happening, what to say, for example, what I shouldn’t be saying.”***

(Defendant with psychosocial disability, Lithuania, female)

There are as well, in Portugal good examples of public defendants:

***“The state paid for the lawyer. And I had a good lawyer, by the way. (...) The lawyer did a great job. As a matter of fact, he did. He explained things to me. He advised me not to speak at the first interview (...) and then to speak when I went to court. (...) he explained to me that it had to act like that so that justice would give me justice.”***

(Defendant with psychosocial or intellectual disability, Portugal, male)”

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<sup>76</sup> FORUM for Human Rights, [Briefing paper on barriers faced by defendants with intellectual and/or psychosocial disabilities in the Criminal Justice System in Czechia](#), Praha, ENABLE project, 2023, p. 75.

There are also multiple recommendations to contribute to an effective implementation of the access to a lawyer and Legal Aid Directive. These must ensure that legal assistance can be secured in all stages of proceedings that involve deprivation of liberty of suspect or accused of committing a crime, including ones connected to Mental Health system.

Criminal justice training academies, including bar associations, should continuously implement training on disability: what it means, how to communicate, respect their legal capacity and how to adjust proceedings for the benefit of their client.

Lawyers must respect their clients' will and preference and ensure its fulfilment without it being replaced by a guardian.

***"Lawyers must also have this concern before the participation of the defendants in the proceedings to explain to them what is going to happen in a clear way and in a way that they understand"***

(Lawyer, Portugal, female)

***"A lawyer must have other strengths to be able to defend his constituent. And this dimension of his personal narrative, what he/she did, managed to do, who is that person"***

(Psychologist, Portugal, female)

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## C. Right to Procedural Accommodations

All persons with disabilities have the right to any necessary age-, gender- and disability-appropriate modifications and adjustments in the context of access to justice, where needed in a particular case, to ensure their participation on an equal basis with others. Unlike reasonable accommodations, procedural accommodations are not limited by the concept of “disproportionate or undue burden”.<sup>77</sup> Neither EU legislation, nor almost all EU countries investigated have legislation establishing explicitly a right to procedural accommodations. The sole exception is Spain, although it requires further regulation.<sup>78</sup>

This situation limits the possibility of procedural accommodations being adopted in a systematic manner due to a lack of process for their adoption. Indeed, this process must be multidisciplinary and not medicalised. It also must be conducted in dialogue with defendants with disabilities, respecting their will and preferences.

*“But what I see, with enormous frequency, is a lack of procedures on the part of the court itself to (...) properly inform them, adapt their language, adapt their modus operandi (...) Fortunately, we see attempts to adapt the speech to the understanding capacity of the person in front of us, but I would say that this effort is minimal compared to the needs we encounter.”*

(Lawyer, Portugal, female)

### 1. Individual Assessment Processes

Individual assessment processes, whenever they existed in the 8 EU countries, have largely focused on capacity assessments. The focus was on whether the defendant could understand proceedings or not or participate autonomously, taking a medical view. Instead of the focus being on understanding the context that person with disability lives in and what may form a

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<sup>77</sup> United Nations Human Rights Council, *Report of the Special Rapporteur on the rights of persons with disabilities*, A/HRC/34/26, para. 35 (2017)

<sup>78</sup> Pléna Inclusión, [Briefing paper on barriers faced by defendants with intellectual and/or psychosocial disabilities in the Criminal Justice System in Spain](#), Madrid, ENABLE Project, 2023, p. 30.

barrier in criminal proceedings to determine appropriate supported-decision making measures and procedural accommodations.

***“Psychosocial reports are very diagnosis-based, and lack the personal narrative, people's capabilities and contextualisation that allow for a deeper look to explain what happened in a given situation”***

(Psychologist, Portugal, female)

This process needs to be regulated to ensure it seeks improve accessibility of proceedings, including and participation of defendants. As stated in section above, capacity assessments, such as the ones that aim at assessing fitness to stand trial or plea are discriminatory. They exclude defendants from proceedings on the basis of disability and also have a stigmatising effect to the defendant. This is particularly well captured in an interview by a judge in Bulgaria:<sup>79</sup>

***“[There is a] risk of over-significance of the forensic expertise, for which I do not think we have sufficient legal framework (standardisation and requirements). (...) [T]his sometimes allows for arbitrary expert conclusions which untrained magistrates cannot effectively control.***

***[A] diagnosis can become something more stigmatising than a court sentence. Disability can be called by psychiatrists “defensive behaviour” when confusing it with uncooperativeness. The diagnosis itself together with the forensic expertise can totally eliminate the person as a participant. If any attention is paid at all, it is only to answer the question whether the person acted with sanity or not, but not to look from the perspective of what the person needs in order to effectively participate in the process.”***

(Judge, Bulgaria, female)

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<sup>79</sup> KERA Foundation, [Briefing paper on barriers faced by defendants with intellectual and/or psychosocial disabilities in the Criminal Justice System in Bulgaria](#), ENABLE Project, 2023, p. 50.

This process must be participatory and voluntary on account of potential to be used against the defendant, especially by leading to commitment in psychiatric institutions. The process must be accessible to enable full participation and allow for development of a relationship built on trust and respect, since persons with disabilities may be uncomfortable sharing information about their disability due to past discriminatory behaviour.

***“[They] summoned me to the police station for a forensic examination by a psychologist and a psychiatrist. They dragged me down the hall (at the police station) and dumped me on the floor. "Let's talk," said the psychiatrist above. What was there to talk about? I was handcuffed, cold, and naked.”***

***(Defendant with intellectual and psychosocial disabilities, Bulgaria, male)***

## **2. Disability disclosure**

For procedural accommodations to be disability and gender appropriate, the adjustments have to align with particular impairment that a person has. This implies that professionals need to know and proactively identify may form a barrier considering the person's characteristics and situation. In practice however, in all of 8 EU member states, there is neither practice nor established practice on how to handle sensitive data. This leaves it open for assessments to be based on preconceptions, stereotypes or what people believe to be “common sense” or visible, or whether they have a guardian.

***“We act according to our empirical experience. The person seems imputable to us, is capable, and understands what is happening (...). In our city we know everyone. But if it's a big city, you get no different treatment”.***

***(Police, Portugal, male)***

***“[If] defendant does not say anything about their disability, and in this situation, from my experience, there is no investigation whether the person has a disability. The second situation is when the person says that they have a guardian. There are some people who take this into account and have an inclination to try to adapt the (...) but here are very few.”***

(Lawyer, Romania, female)

On account of pervasive discrimination that persons with disabilities face, especially women, in their daily lives, there are those that might be reluctant to share information about their impairment for being afraid of being discriminated.<sup>80</sup> Of paramount importance is that this determination is based on dialogue with defendants with disabilities. Especially since some disabilities are invisible.

***“This person comes to court, (...) and I talk to the person and realise that something is not right here. Probably because of some lack of awareness in the police forces, in the investigation.”***

(Judge, Portugal, female)

***“They can go unnoticed. And it's already happened to me. I mean, this young man (...) I had heard him a month before at another enquiry, (...) I spoke to him for an hour, and with the lawyer, and nothing, nothing indicated to me that he had this schizophrenia problem. There are things that you can't get out of an hour-long conversation”***

(Prosecutor, Portugal, female).

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<sup>80</sup> Validity Foundation, [Disability-based Connected Facilities and Programmes for Prevention of Violence against Women and Children](https://validity.ngo/projects-2/dis-connected/national-reports/), Bulgaria, Hungary, Lithuania, Portugal, Slovakia available at <https://validity.ngo/projects-2/dis-connected/national-reports/>

There are accounts in a few EU countries where disclosure or informing of disability is misconstrued of looking for more favourable treatment, such as in Bulgaria.

*“Three criminal police officers put me in a room and said: “Now tell us what you know about the case”. The director entered the room and started: “You're lying to us, you don't have any illnesses, you have committed the crime, we know it was you.”*

(Defendant with intellectual and psychosocial disabilities, Bulgaria, male)

### **3. Cooperation, Sharing of Information and Case Management Systems**

Individualised determination of procedural accommodations must be done in a multidisciplinary manner. There are different disciplines and persons involved in this two-step process, requiring first a determination or assessment of the person's situation and barriers, following by a second determination on what measures are appropriate. There is also a need of expertise available to ensure defendants with disabilities can be benefit of procedural accommodations even before the process is concluded to achieve UNCRPD accessibility goals. Moreover, Principle three requires for procedural accommodations to be available across multiple criminal proceedings stages, which is under control of different criminal justice authorities, especially, police, prosecutors and judges. In none of the 8 EU countries there is a systematic process or case management approach that enables a coordinated approach for adoption of procedural accommodation. There are nonetheless pilot practices and proposals by professionals which can be initiated:

*“I would recommend modifying the legislation to make it more accessible for people with disabilities and creating a separate chapter. Providing [...] an*

*inter-institutional communication in this sense between the Ministry of Justice, the Ministry of Health and the [Supreme Council of Magistrates]. [...] [There is a need to provide a person specialised in communicating with people with disabilities on various types of intellectual or psychosocial disabilities, who would constantly collaborate with the criminal or civil justice system, and this person would be present throughout the process with the judge, prosecutor, investigating body, suspect or defendant. To make sure that the person understands absolutely everything that is happening there and to communicate with the lawyer and the prosecutor to explain what is going on and to have transparency in communication. This is also necessary for a person without a disability.]*

(Lawyer, Romania, female)

*“The courts should have multidisciplinary teams capable of responding to any citizen or question. It would be a proximity service for the people (...) and also would help the magistrates. (...) this was going to be a more plural, more inclusive justice, which is what we should be looking for”.*

(Psychologist, Portugal, male)

In most countries, knowledge of a person’s disability is based on their personal assessment, which may then be recorded in the case file. Knowledge across the proceedings is dependent on what is written in the case file at the earliest stage of proceedings. In Czechia, information about disability is not recorded in the case file.

The privacy of persons with disabilities must be respected, and information request of such a nature must be based on principles of informed consent. While multiple justice actors noted that it may be useful for digital case management system to ensure coordination and efficiency, they have also mentioned that General Data Protection Regulation or Police

Directive<sup>81</sup> may not allow this. As long as information and data collection is used for legitimate purpose, only to the extent necessary, such as adoption of procedural accommodations, with the due safeguards such as ensuring access to the data is limited to as few people as possible a system such as this can be developed.<sup>82</sup>

***“Personally, I would have benefited from a channel of communication with the prosecutor or the judge, outside the courtroom. It would have helped me if they had been involved in investigating the person's disability and obtaining documents to that effect, because we had to investigate on our own. The prosecutor has to give evidence both in favour and against.”***

**(Lawyer, Romania, female)**

There is a need for further guidance on individual assessment to enable determination of procedural accommodations in a multidisciplinary manner. Guidance that is being designed in the Model and National Bench books designed in this project.<sup>83</sup>

Cooperation can be even more difficult if there's no means for all persons involved to convene and share information, such as during COVID-19 pandemic.

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<sup>81</sup> Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA

<sup>82</sup> ENABLE project, Model Disability Benchbook on the Rights of Persons with Disabilities in Criminal Proceedings, 2024, in <https://validity.ngo/projects-2/enabling-inclusion-and-access-to-justice-for-defendants-with-intellectual-and-psychosocial-disabilities/>

<sup>83</sup> ENABLE project, Model Disability Benchbook on the Rights of Persons with Disabilities in Criminal Proceedings, 2024, in <https://validity.ngo/projects-2/enabling-inclusion-and-access-to-justice-for-defendants-with-intellectual-and-psychosocial-disabilities/>

*“We speak different languages, there is not much cooperation and it is not being very easy. This dialogue has not been easy. Several training actions were carried out. There is a monitoring committee specifically for compulsory hospitalisations, but in the last two years, after the pandemic, things have gotten much worse. Doctors find it difficult to follow court orders; courts sometimes question medical opinions, which is a bit complicated.”*

*(Prosecutor, Portugal, female)*

#### **4. Information about Procedural Accommodations**

Only a few interviewees recall being informed about a right to procedural accommodations in Romania,<sup>84</sup> Spain<sup>85</sup> and Portugal<sup>86</sup>. This was due to the collaboration of NGOs specialised in the disability field working with the police. The lack of regulation creates a policy vacuum which makes the adoption of procedural accommodations rare and inconsistent.

*“The level of state structures, the activity is extremely timid, not to say non-existent. The steps forward are ensured by means that are supposed to be collateral and complementary to a state system, but at this moment in Romania we can say that they are the main ones. [T]he intervention of NGOs compensate for the inaction or absence of the state.”*

*(Lawyer, Romanian, male)*

#### **5. The Effects of Procedural Accommodations**

The most positive experiences of defendants with disabilities in the justice system reported occurred thanks to adoption of procedural accommodations across the proceedings. There are some examples, which include foregoing the adoption of speedy trials to ensure guarantee

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<sup>84</sup> Centre for Legal Resources, [Briefing paper on barriers faced by defendants with intellectual and/or psychosocial disabilities in the Criminal Justice System in Romania](#), Bucharest, ENABLE Project, 2023.

<sup>85</sup> Plena Inclusión, Spain, Madrid, ENABLE Project, 2023.

<sup>86</sup> FENACERCI, [Briefing paper on barriers faced by defendants with intellectual and/or psychosocial disabilities in the Criminal Justice System in Portugal](#), Lisbon, ENABLE Project, 2023.

of rights,<sup>87</sup> adjusting communication and questioning to simple language or easy to understand, allow defendant to be supported emotionally, involve communication by third-parties, such as intermediaries and family members.

***“I went to the court [...], and they treated me very well. They opened the shutters and showed me the sea so I could calm down. They were nice and told me to sit down. I didn't understand what they told me, and they just said the case was closed (...). I liked the people at the court. They were very polite, put me at ease and treated me very well.”***

(Defendant with psychosocial disabilities, Portugal, female)

***“The procedural adaptations in the case I handled came about because I worked with the CLR team to ensure that communication was accessible to him. This seemed essential to me and was a constant communication adapted to his needs throughout the criminal process, taking into account his intellectual disability. Other than procedurally, we provided him with a lawyer which, again, criminal justice failed to provide.”***

(Lawyer, Romania, female)

Across all 8 EU countries, only two male defendants with disabilities in Spain benefitted from procedural accommodations across proceedings, unlike female defendants where none did. The successful implementation of these in Spain was thanks to the intervention of third-parties, namely social assistants, family members and intermediaries. Intermediaries are independent professionals who support criminal justice authorities to assess and adopt procedural accommodations, including adjustments to information and communication that is easier to communicate with criminal justice authorities and follow proceedings. Intermediaries is a good practice that has been recommended, as well, in the international

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<sup>87</sup> Plena Inclusión, [Briefing paper on barriers faced by defendants with intellectual and/or psychosocial disabilities in the Criminal Justice System in Spain](#), Madrid, ENABLE Project, 2023, p. 56.

Principles and Guidelines on Access to Justice for Persons with Disabilities. This practice is being promoted in different countries in the ENABLE's work, in Bulgaria and Romania. Not only this enables defendants with intellectual and/or psychosocial disabilities to effectively exercise their rights, it also supports criminal justice authorities to more efficiently and effectively secure evidence in hearings.<sup>88</sup>

***“It would have been preferable if someone had assisted me in understanding what I didn't understand, as happened later with Plena Inclusión. However, I didn't know anyone who could assist me. They didn't seem to be paying attention to me. [...] There were words I'd never heard before. They wouldn't let me say anything.”***

(Defendant with intellectual disabilities, Spain, male)

The participation of a person they trust, which can be a family member, friend or another person may make a great beneficial impact for the defendant and whether they feel safe to participate in proceedings.

***“She was completely in a panic. She was crying, saying, I didn't do anything, apologising, (...) the fear was enormous, and she didn't quite understand where she was (...) we suggested the mother (who was in the audience) to sit next to her (...) What we are doing in the courts is occasionally and depending on the sensitivity of each one, (...) but this shouldn't be like this.”***

(Prosecutor, Portugal, female)

***“My parents were there, in the court, to accompany me. However, they weren't allowed to enter the courtroom ... I went by ambulance ... I was forced to go to court as if I had been arrested, committed a crime, as if I was a prisoner, really. (...) They did not listen to my parents, nor did they***

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<sup>88</sup> See for example Paula Backend, whereby an intermediary was able to ensure effective communication with defendant with disability to conclude evidence hearing in 1 day, while past unsuccessful attempts by criminal justice authorities last for 4 days.

***know what happened inside the courtroom. (...) they didn't enter.***

***Nobody called them.”***

(Defendant with psychosocial disabilities, Portugal, female)

How to communicate is also an important adjustment in order to ensure the information is accessible. These may vary according to how a person may prefer to communicate and their disability. Some persons may prefer communication to be done in an easy to understand manner. This might be the case for persons with learning disabilities. While others might rely on assistive technology or communication aids to communicate, where speech is done through the instrument.

***“Some magistrates use extremely formal language, even when reading the sentence ... it is perfectly clear that people did not understand anything, (...) [the magistrate then states], look later talk with your lawyer. They are not open to this dialogue.”***

(Prosecutor, Portugal, female)

***“There was no one to explain anything to me, they just put me in the room and that's it, at the central arrest.”***

(Defendant with intellectual disabilities, Romania, male)

## **6. Gender-Appropriate Procedural Accommodations**

As per the UN Committee on the Rights of Persons with Disabilities, this report acknowledges multiple discrimination that women with disabilities face and historically neglected. Discrimination which intersects on account of sex, gender and disability. These barriers are as diverse as the heterogeneity of this group, which encompasses women with different types of impairments, women in detention and LGBTQI+.<sup>89</sup>

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<sup>89</sup> United Nations, *Report of the Committee on the Rights of Persons with Disabilities*, A/71/56, paras. 4-5 (2016).

In this report we look at how gender and disability intersect and have an impact on the experiences of how women with disabilities, who are defendants, access to justice. How gender roles and power relations lead to negative perceptions and discriminatory beliefs, fewer opportunities for empowerment and possibilities to exercise their rights. How harmful stereotypes influence communication and exercise of rights in the public sphere. Dismissal or disbelief by police, prosecutors and courts.

This report will also rely upon global, EU and UN reports and journal articles to add contextual information to support explanation of the experiences of women with disabilities as defendants.

### *Gender and Disability Barriers*

On account of gender, women face multiple barriers in different areas of life. From an economic and employment perspective, women are paid less compared to men and discriminated on account of pregnancy across the EU. Women still tend to be primary caregivers of children or relatives that depend on them. Women are confronted in their day to day life with gender norms that have been established by men, which view of women based on reproductive potential and their role in caregiving.

These barriers are even greater for women with disabilities. Ortoleva and Lewis have found that women with disabilities had their privacy underestimated, and that society perceives them as less marriageable, asexual or hypersexual, too frail or fragile for societal life, or even unsuitable parents. Indeed, in countries where women with disabilities are perceived as less eligible for marriage, they are more likely to be in abusive or unstable marriages, limiting their access to social, economic, and legal opportunities. Misconceptions about the sexuality of people with disabilities impede access to sexual health and reproductive services by presuming they do not require them.<sup>90</sup> Women with disabilities are viewed as overly vulnerable by justice actors, leading to a lack of engagement due to misconceptions about their ability to withstand the rigours or formality of the process. Or even judging them as unfit parents or unsuitable for parenthood. These compounding impediments, combined with society's perception of role lessness, contribute to a disempowering atmosphere in which

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<sup>90</sup> Stephanie Ortoleva & Hope Lewis, 'Forgotten Sisters - A Report on Violence Against Women with Disabilities: An Overview of its Nature, Scope, Causes and Consequences', 2012

many women with disabilities feel invisible, estranged, or even helpless.<sup>91</sup> In the EU, women with disabilities are also at higher risk of poverty and social exclusion, with lower percentage of employment, especially full-time employment.<sup>92</sup>

Women with disabilities are also repeatedly exposed to violence and discrimination from partners or other family members, guardians, caregivers or intruders.<sup>93</sup> Violence that can be based on gender and disability. This includes wilful negligence by service providers, family members, guardians, home helpers, and those in institutions responsible for providing assistance.<sup>94</sup> It also covers any type of captivity, isolation, or exclusion from human contact. Women with intellectual or psychosocial disabilities are frequently threatened or denied liberty in institutions, and seclusion worsens their mental, psychological, and emotional well-being owing to deprivation.<sup>95</sup> Withholding aids is a particular form of disability-based violence, whereby assisting devices are interfered or withheld.<sup>96</sup> Institutionalization itself, especially when forced, is a form of discrimination. In psychiatric institutions they are forced to take drugs and undergo psychiatric treatment.

These barriers interact with how justice system and its actors operate. Paternalistic or patriarchal attitudes may lead justice professionals to “infantilise” women with intellectual or psychosocial disabilities or not findings their testimony credible, especially in sexual offenses.<sup>97</sup> Stereotypes about women's sexual health and reproductive rights lead to dismissal

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<sup>91</sup> Fine, M., & Asch, A., *Disabled Women: Sexism without the Pedestal* (University of Illinois Press, 1988)

<sup>92</sup> European Disability Forum (EDF), *The Rights of Women with Disabilities: A Review of EU Legislation and Policy*, 2022.

<sup>93</sup> Ortoleva, S., & Lewis, H., *Women and Disability: The Role of Gender in the Experience of Disability*, 17 *International Journal of Human Rights* 128 (2012)

<sup>94</sup> For example, when a woman with disability is purposely left in bed without the necessary help. Other examples include utilizing a wheelchair without help for extended periods of time to “punish” or manipulate her.

<sup>95</sup> Validity Foundation, [Poor Her, for Having Dreams – Monitoring report on Torture and Ill-treatment of Persons with Disabilities in Bulgarian Institutions, including small group homes](#), 2024

<sup>96</sup> UN Women, *Disability-Inclusive Development: A Critical Review of Policies and Practices*, UN Doc. E/2020/55 (2020); Ortoleva, S., & Lewis, H., *Women and Disability: The Role of Gender in the Experience of Disability*, 17 *International Journal of Human Rights* 128 (2012)

<sup>97</sup> United Nations Committee on the Rights of Persons with Disabilities, *General Comment No. 1 on Article 12: Equal Recognition before the Law*, UN Doc. CRPD/C/GC/1, para. 37 (2014); Committee on the Elimination of Discrimination against Women, *General Comment No. 33 on Women's Access to Justice*, UN Doc. CEDAW/C/GC/33, paras. 16-18 (2015)

of any sexual or reproductive health complaints or the denial of access to gender-responsive support services.<sup>98</sup>

These factors and barriers help to contextualize the experience of women with disabilities in this report. While the number of interviewees is modest, they provide vital examples of how gender and disability barriers interact in the court system to impede their right to access justice.

Building on conception of inclusive equality, procedural accommodations must be provided that are gender-appropriate.<sup>99</sup> For procedural accommodations to be gender-sensitive or appropriate, they must address socioeconomic disadvantages that women with disabilities face, acknowledge the stereotype and prejudice they face in an intersectional manner, promote their participation on an equal basis with others, especially men, in full recognition as members of society, along with individual measures that accommodate and make space for gender-related differences in operation in criminal proceedings as a matter of human dignity.

#### *Sexual and Reproductive Health and Support Services*

All eight EU countries highlighted a lack of support services for defendants with disabilities as a barrier to access to justice. According to a few accounts, access to legal assistance and legal aid are the only types of support that are guaranteed. This further limits defendants' ability to engage in criminal processes, and it disproportionately affects women who rely on others to ensure their sexual and reproductive rights.

Indeed, recent reports<sup>100</sup> in 5 EU countries have found that not all women with intellectual or psychosocial disabilities in institutions have adequate understanding of their sexual and reproductive health rights. Especially in institutions, there is a dependency on others to have access to these. As reported by a person with a disability, the label of defendant may cause

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<sup>98</sup> Ortoleva, S., & Lewis, H., *Women and Disability: The Role of Gender in the Experience of Disability*, 17 *International Journal of Human Rights* 128 (2012); Brown, L., *Disability and Gender: A Historical Overview*, 39 *Disability Studies Quarterly* 34 (2007); Benedet, J., & Grant, R., *The Intersection of Gender and Disability: An Analysis of Legal Responses to Violence*, 20 *Canadian Journal of Women and the Law* 123 (2007).

<sup>99</sup> United Nations, *International Principles and Guidelines on Access to Justice for Persons with Disabilities*, Principle 3 (2018)

<sup>100</sup> DIS-CONNECTED Project, [Disability-based connected facilities and programmes for prevention of violence against women and children in Bulgaria](#), 2024, Portugal, Lithuania, Slovakia.

family members and others who provide support to desert them.<sup>101</sup> There may also be a conflict of interest between the defendant and the institution, which further restricts access to gender-specific support services.

Women with disabilities may experience severe period pains, or menopausal symptoms during hearings, which can have a negative impact on their participation and on how they give evidence.<sup>102</sup> Good practice on how to adjust hearings necessarily involves not drawing attention to this. It is important for professionals to not necessarily conclude that any signs where a person is “sweating, goes red, or appears overly-anxious, emotional or vague in her evidence may be attributable in certain cases to menopausal symptoms rather than anything to do with the case or the content of her evidence”.

in respect of their privacy, accommodations include:

- Working air conditioning or opening windows;
- Availability of cold water;
- Frequent breaks;
- Easy access to accessible toilet facilities
- Take as a general approach looking for signs if a person might be uncomfortable (e.g. lack of concentration, abrupt mood changes, fanning themselves) without making assumptions on their reproductive health by offering suggestions of changes that might help. E.g. in UK Equal Treatment Bench book - “It is rather hot in here. Would it help to open the window?”

### *Child Caregiving*

Across the EU, women tend to be seen as primary caregivers and sharing of parental responsibilities or caretaking responsibilities is uneven, including for women with disabilities. To ensure participation of women with disabilities it is important for justice professionals to understand the full personal situation of the person, including if they have children or dependent persons in their care. Criminal justice professionals should not neglect to inquire

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<sup>101</sup> KERA, Plena Inclusión, [Briefing paper on barriers faced by defendants with intellectual and/or psychosocial disabilities in the Criminal Justice System in Bulgaria](#), Veliko Tarnovo, ENABLE Project, 2023.

<sup>102</sup> Judicial College, *Equal Treatment Bench book* (UK, 2024), <https://www.judiciary.uk/wp-content/uploads/2023/06/Equal-Treatment-Bench-Book-July-2024.pdf>

about a defendant's caregiving responsibilities based on assumptions that persons with disabilities are unlikely, cannot or are unfit to be parents.

Model Bench book and other bench books<sup>103</sup> recommend for justice professionals to adjust hearings for those with caregiving responsibilities:

- Adjust hearings and times, considering among others, school timetables, existence of personal and care support for children during a parent's absence, as well as sensitive timetables for new mothers;
- Allow regular breaks throughout the day;
- If longer hearings are unavoidable, scheduling parent's participation in alternative or non-consecutive days;
- Video hearing could be an appropriate supportive measure for those with caregiving or support responsibilities at home, depending on the personal situation and in dialogue with the defendant;
- Breaks should be allowed for breastfeeding;
- Parents should be allowed to bring their baby as long as the content of the hearing is appropriate for the child to hear and see by not causing anxiety, distress or harm;

These measures will have a particular impact for women but also benefit men with and without disabilities with parental responsibilities. It is crucial to highlight that video hearings may not be an appropriate alternative for women who are caring for their children alone. Women with disabilities should have an equal opportunity to participate in hearings in person, in accordance with their wishes, will and preferences.<sup>104</sup>

#### *Support Network and Support Services*

Women with intellectual or psychosocial disabilities may have a relationship of dependence on their parents, institution staff, or others, which can manifest in a variety of ways. They may depend on them for day-to-day living, finances, and emotional support. To overcome this dependency and empower women with disabilities to live and participate independently in justice systems, there is a need for support services, including personal assistance, to be available to them.

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<sup>103</sup> Ibid. 146.

<sup>104</sup> Ibid.146.

For support to be effective, it must be done in dialogue with women with disabilities in consideration of their personal support network. This support and adjustment, just as for men with disabilities, may take the form at times of family members being allowed to sit next to them.

***"She was completely in a panic. She was crying, saying, I didn't do anything, apologising, (...)the fear was enormous, and she didn't quite understand where she was (...) we suggested the mother (who was in the audience) to sit next to her (...)What we are doing in the courts is occasionally and depending on the sensitivity of each one, but this shouldn't be like this".***

(Prosecutor, Portugal, female)

These services must be properly offered to women with disabilities, especially those who are deprived of liberty. Indeed, women's jails may be too geographically dispersed and too remote from community-based resources suitable for women with disabilities.<sup>105</sup> In almost all countries it was defined a need for community-based support for persons with disabilities.

### *Gender-based Violence*

Many women with disabilities in the EU face various forms of gender-based violence, such as domestic violence, rape, sexual assault, and coercive control. These are more likely to occur in institutions or at home by individuals who are meant to support them, as well as family members or partners. Women and girls with disabilities are twice as likely as other women to face marital violence, as well as types of violence particular to their condition, such as isolation, institutional violence, and denial of medication, mobility, vision, and hearing aids.<sup>106</sup> In particular, women and girls with disabilities are more likely to be subjected to forced medical treatment and reproductive health procedures without their consent.<sup>107</sup> This includes forced use of contraception and forced sterilisation.<sup>108</sup>

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<sup>105</sup> Ibid. 146.

<sup>106</sup> Ortoleva, S., & Lewis, H., *Forgotten Sisters: A Report on Violence against Women and Disabilities* (National Council on Disability, 2012).

<sup>107</sup> Frohmader, C., & Ortoleva, S., *The Sexual and Reproductive Rights of Women and Girls with Disabilities* (Women With Disabilities Australia, 2013).

<sup>108</sup> United Nations Secretary-General, Report of the Secretary-General on the Rights of Persons with Disabilities, UN Doc. A/72/305, para. 17 (2017); Judicial College, *Equal Treatment Bench book* (UK, 2022); European Union Agency for Fundamental Rights (FRA), *Thematic Report: Forced Sterilisation of Women with Disabilities*, FRA Report (2020).

it is important for justice professionals to build a relationship of trust with women with disabilities considering they may have experienced or exposed to multiple types of violence throughout their lives. Furthermore, women with disabilities may be involved in the justice system as both defendant and victim, and their complaints and testimony should be heard regardless of their role. Not giving importance may further reinforce feelings of isolation and powerlessness.

***“She asked for a lawyer at the police [because she wanted to complain about another situation], but they said they couldn't get lawyers there. (...) [I] saw that I had no help, and I withdrew the complaint. (...) I stopped trusting ... I felt that everyone rejected me”.***

***(Defendant with psychosocial disability, Portugal, female)***

By factoring in history of victimisation, criminal justice professionals will also be in a better position to determine if sex of police officer, prosecutor and other authority should be considered. Indeed, victims of gender-based violence by male perpetrators may struggle to communicate or trust male criminal justice authorities.

#### *Patriarchal Attitudes and Discrimination*

Experiences of women with disabilities compared to men was mixed across the different 8 EU countries. Two main problems arose. On the one hand, a matter of formal equality. In all countries there was no consistent practice of adoption of procedural accommodations in proceedings, including gender-appropriate, which is a systemic and discriminatory barrier. Kristýna Šulková, Denisa Kramářová & Maroš Matiaško describe the situation in Czechia by “defendants [with disabilities] seem to be treated equally harshly, regardless of gender”.<sup>109</sup> Formal application of procedural rules without assessment and determination of adjustments on the basis of both gender and disability is discriminatory.

Furthermore, women with intellectual or psychosocial disabilities did not have generally positive interactions with police personnel.

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<sup>109</sup> FORUM, [Briefing paper on barriers faced by defendants with intellectual and/or psychosocial disabilities in the Criminal Justice System in Slovakia](#), Praha, ENABLE project, 2023, p. 63

***“She was running away from the police and they chased her. They were angry. She was lying on the ground and they put handcuffs on her. They took pictures of her while they were putting the handcuffs on her. In her opinion this was not right. “***

(Defendant with intellectual and psychosocial disabilities, Bulgaria, female)

Women with intellectual or psychosocial disabilities described they had better experiences with professionals that showed they listened, explained what happened and explained options to make decisions about the case.

***“She knew what she wanted to happen and it happened. She is satisfied with the trial. She was able to explain what she wanted. The lawyer explained the options. She knew she wanted the plea bargain.”***

(Defendant with intellectual and psychosocial disabilities, Bulgaria, female)

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## **D. Right to Presumption of Innocence and be Present at Trial**

Throughout this project, we have found that all Member States have set out in legislation a right to presumption of innocence for all defendants. Although there are some measures that have yet to be implemented in some Member States, Directive 2016/343 has played an important role to ensure all defendants are presumed innocent until proven guilty and have a right to be present at trial. All 8 EU countries establish both a right to presumption of innocence and to be present at trial, although not all countries have adopted additional legislation to transpose the Directive, such as Spain and Portugal.<sup>110</sup>

When looking at implementation of Directive for defendants with disabilities, additional challenges were discovered. This includes some defendants with disabilities being present at trial with physical restraints or handcuffs, few were not able to physically attend their trial, misinterpretation of disability-related behaviour with uncooperativeness or suspicious behaviours, as well as mixed impressions of use of remote video-link to follow trial. Furthermore, defendants with disabilities detained in compulsory treatment are perceived as guilty or given a label that risks of prejudicing criminal proceedings. Physical barriers to access courts is also additional hurdle that defendants must overcome to exercise their right to be present at trial.

### **1. Unfair and coercive treatment**

Criminal justice professionals in Czechia, Portugal, Slovakia and Slovenia reaffirmed that all evidence needs to be secured without coercion. Evidence collected in such a manner cannot be used against the defendant, thus respecting defendants' right not to self-incriminate. Nonetheless, there are worrying claims, particularly in Bulgaria of coercive police techniques aimed at securing confessions of defendants with disabilities:

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<sup>110</sup> Pléna Inclusión, [Briefing paper on barriers faced by defendants with intellectual and/or psychosocial disabilities in the Criminal Justice System in Spain](#), Madrid, ENABLE Project, 2023, p. 22 ; FENACERCI, [Briefing paper on barriers faced by defendants with intellectual and/or psychosocial disabilities in the Criminal Justice System in Portugal](#) , Lisbon, ENABLE Project, 2023, p. 23.

***“I was afraid of dying, that my life was in danger, so I confessed to the crime. I confessed to committing the crime because I realised that they would not let me go and they would keep me for 24 hours (in detention). Furthermore, they did not provide you with food, water, or anything else. They release you once you confess. They used the computer to create the document (the confession statement). I signed without even reading it.”***

***(Defendant with intellectual and psychosocial disabilities, Bulgaria, male)***

A judge in Slovenia highlighted, any confessions by persons with disabilities may warrant further scrutiny to ensure it was not secured by exploiting a defendants’ disability.<sup>111</sup>

## **2. Physical restraints at trial**

To prevent bias against defendants, measures need to be in place to prevent perceptions that a person may be guilty on account of being forced to wear physical restraints, handcuffs or kept in a glass box or a cage, unless required for security-specific reasons.<sup>112</sup> Also, when feasible, defendants should not be present at trial with prison clothes.<sup>113</sup> Although the focus of this report was not on presumption of innocence, both in Bulgaria and Lithuania were accounts of defendants that were forced to wear handcuffs in public, thus affecting their perception.

***“He felt tense and depressed (at the court hearing). His ears were buzzing. He had shackles around his ankles but they were very tight and his leg got swollen. He told this to the escorting police officers but they said: “when the hearing ends we will loosen them”.***

***(Defendant with intellectual and psychosocial disability, Bulgaria, male)***

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<sup>111</sup> PIC, Slovenia, Ljubljana, ENABLE Project, 2023, p. 64.

<sup>112</sup> European Parliament and Council of the European Union, *Directive (EU) 2016/343 on the Strengthening of Certain Aspects of the Presumption of Innocence and the Right to be Present at the Trial in Criminal Proceedings*, Recital 20 (2016).

<sup>113</sup> *Ibid.* 161.

***“They put handcuffs on, my legs hurt, and they shoved them underneath... I couldn’t put my shoes on and they took me outside and then into detention. And my roommate thought that I had a problem with my head, you know?”***

(Defendant with psychosocial disability, Lithuania, male)

These measures have a particular negative impact on defendants with disabilities’ perception of the proceedings themselves.

### **3. Uncooperativeness**

In 6 out of 8 EU countries,<sup>114</sup> criminal justice professionals, human rights NGOs and lawyers noted that lack of understanding of disability has led to misinterpretation or inappropriate or inadequate action of a defendants’ behaviour either as uncooperative, suspicious or dangerous.

When in contact with suspects with disabilities, there have been cases of police officers confusing behaviour of persons with disabilities while in a crisis states as dangerous or resistance. This signals the need to review arrest or engagement protocols with suspects or accused of committing a crime to accommodate a wider diversity of situations where both the security of persons with disabilities and police officers can be secured.

***“The [police officers] who arrived did not realise that he was an autistic young man, who was disturbed, and the procedure we had with him - and they didn't know - increased his aggressiveness. They tried to grab him, which is our procedure with an aggressive person (...).”***

(Police officer, Portugal, male)

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<sup>114</sup> ENABLE Project, [Briefing paper on barriers faced by defendants with intellectual and/or psychosocial disabilities in the Criminal Justice System](#), 2022, Bulgaria, Czechia, Romania, Slovakia, Spain and Portugal.

***“I locked myself in my room as 5-6 police officers [...] arrived. They didn't believe I had any problems. One of them grabbed my leg and dragged me to the ground. They handcuffed me and dragged me out. I was on the verge of losing consciousness. They dragged me into the police car, and the three officers began insulting me. They saw me as a sick person who was aggressive.”***

*(Defendant with intellectual and psychosocial disabilities, Bulgaria, male)*

In Czechia,<sup>115</sup> Slovakia<sup>116</sup> and Romania<sup>117</sup> for example, there are accounts by lawyers indicating that police officers are likely to use physical restraints, taser weapons or threaten with guns to ensure compliance of defendants with disabilities of orders, including during a crisis situation that a person with disability is enduring.

***“I think in the case I worked on, when the person was coerced and taken away by the police. I don't know if force was used, but from what he said, he was threatened with a gun and they used coercion. Without him showing any dangerousness, this was their way of communicating that he had to come and give a statement.”***

*(Lawyer, Romania, female)*

Lack of understand of disability and behaviour stemming from it also has implications of how defendants with disabilities are perceived throughout proceedings. In Spain, there is also accounts where lack of cooperation by defendants with disabilities is seen as suspicious, when

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<sup>115</sup> FORUM, [Briefing paper on barriers faced by defendants with intellectual and/or psychosocial disabilities in the Criminal Justice System in Czechia](#), Praha, ENABLE project, 2023, p. 69.

<sup>116</sup> FORUM, [Briefing paper on barriers faced by defendants with intellectual and/or psychosocial disabilities in the Criminal Justice System in Slovakia](#), Praha, ENABLE project, 2023, p. 67.

<sup>117</sup> Centre for Legal Resources, [Briefing paper on barriers faced by defendants with intellectual and/or psychosocial disabilities in the Criminal Justice System in Romania](#), Bucharest, ENABLE Project, 2023, p. 52.

the reason lies on lack of support for defendants to understand proceedings.<sup>118</sup> As a judge noted in Bulgaria, psychiatric reports that are medical based can mislabel a person's behaviour as "defensive", without relating it to a disability, thus further promoting perception of uncooperativeness and bias against the defendant.<sup>119</sup> "This way a diagnosis can become something more stigmatising than a court sentence."<sup>120</sup>

#### 4. Physical and Institutional Barriers to be Present in Hearings

A necessary precondition for any defendant to exercise their right to be present at trial or in other court buildings is access to the physical environment without barriers. Indeed, all building must conform with principles of universal design to ensure access for all. In some reports, particularly in Czechia,<sup>121</sup> Portugal,<sup>122</sup> Slovakia<sup>123</sup> and Slovenia<sup>124</sup> highlighted there is either legislation or policy in place to ensure that all courts buildings and police stations are physically accessible, including for defendants with disabilities. In practice, not all buildings in these countries meet accessibility standards yet. In Czechia, according to Czech Ombudsperson, not all court buildings, police stations entry points are accessible, as well as there is a need for "barrier-free toilets and appropriate width of doors in the building, as well as adaptations for the orientation of people with hearing or visual impairments (suitably placed signs in Braille or induction loops)."<sup>125</sup> In Slovakia, in the report by the Ombudsperson

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<sup>118</sup> Pléna Inclusión, [Briefing paper on barriers faced by defendants with intellectual and/or psychosocial disabilities in the Criminal Justice System in Spain](#), Madrid, ENABLE Project, 2023, p. 72.

<sup>119</sup> KERA Foundation, [Briefing paper on barriers faced by defendants with intellectual and/or psychosocial disabilities in the Criminal Justice System in Bulgaria](#), Veliko Tarnovo, ENABLE Project, 2023, p. 50.

<sup>120</sup> KERA Foundation, [Briefing paper on barriers faced by defendants with intellectual and/or psychosocial disabilities in the Criminal Justice System in Bulgaria](#), Veliko Tarnovo, ENABLE Project, 2023.

<sup>121</sup> Act No. 292/2013 Coll., *On the Provision of Legal Aid to Persons in Material Need and on Amendments to Certain Acts*, Slovakia (2013).

<sup>122</sup> Portugal, *Decree-Law No. 163/2006*, available at <https://dre.pt/dre/detalhe/decreto-lei/163-2006-538624>; Ministry of Justice of Portugal, *Strategic Plan for Requalification and Modernization of the Courts Network 2018-2028* (2018).

<sup>123</sup> FORUM, [Briefing paper on barriers faced by defendants with intellectual and/or psychosocial disabilities in the Criminal Justice System in Slovakia](#), Praha, ENABLE project, 2023 p. 38.

<sup>124</sup> PIC, [Briefing paper on barriers faced by defendants with intellectual and/or psychosocial disabilities in the Criminal Justice System in Slovenia](#), Ljubljana, ENABLE Project, 2023, p. 45.

<sup>125</sup> Eliška, *Ombudsman: Access to Justice under Article 13 of the Convention on the Rights of Persons with Disabilities. Can't Get Any Better Than That?* (Brno, 2021), ISBN 978-80-7631-050-6. Available at: [https://www.ochrance.cz/dokument/lide\\_s\\_postizenim\\_jako\\_nova\\_mensina\\_pravni\\_vyzvy\\_a\\_souvislosti/lide\\_s\\_postizenim\\_jako\\_nova\\_mensina.pdf](https://www.ochrance.cz/dokument/lide_s_postizenim_jako_nova_mensina_pravni_vyzvy_a_souvislosti/lide_s_postizenim_jako_nova_mensina.pdf); FORUM, [Briefing paper on barriers faced by defendants with intellectual and/or psychosocial disabilities in the Criminal Justice System in Czechia](#), Praha, ENABLE project, 2023, p. 41.

from 2016, three of the thirty assessed buildings were completely unsuitable for entry, inoperable accessibility devices (such as wheelchair lifts) and no guidance for persons with sensory disabilities.<sup>126</sup> In Portugal, 55 first instance court builds are not accessible at all for persons with reduced mobility, and 74 others do not meet all accessibility requirements that are necessary.<sup>127</sup>

When persons with disabilities are compulsory committed to psychiatric institutions they may also be prevented from being present at trial. Both in Lithuania and Slovenia,<sup>128</sup> there were accounts from interviewees that defendants with intellectual or psychosocial disabilities are not always able to be present at their trial from being placed in institutions. In Lithuania in particular, “defendants are not always given opportunity to attend the court hearings as the decision whether to invite the defendant to the court is made by the judge based on the report provided by the healthcare experts. If the defendant is in a remote medical treatment facility, they often do not get updates about their case nor opportunities to express interest [to participate] in the proceedings”.<sup>129</sup>

***“The final trial took place without me at all. I was in the hospital at that time. (...) I would have liked to participate but it didn’t work.”***

**(Defendant with intellectual and psychosocial disabilities, Lithuania, female)**

For the right to be present at trial to be effectively fulfilled and not illusionary, more accessible opportunities need to be provided to defendants with disabilities. If a defendant does not wish to be present at trial, it must be result of their own choice, not due to external barriers. This may include adoption of different procedural accommodations to adapt to the physical

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<sup>126</sup> Slovak National Centre for Human Rights, *Accessibility and Police: Ensuring Barrier-Free Access to Police Services* (2021) ; FORUM, [Briefing paper on barriers faced by defendants with intellectual and/or psychosocial disabilities in the Criminal Justice System in Slovakia](#), Praha, ENABLE project, 2023, p. 38.

<sup>127</sup> Ministério da Justiça, *Plano Estratégico Plurianual de Requalificação e Modernização da Rede de Tribunais 2018 – 2028* (2018)

<sup>128</sup> PiC, [Briefing paper on barriers faced by defendants with intellectual and/or psychosocial disabilities in the Criminal Justice System in Slovenia](#), Ljubljana, ENABLE project, 2023, p. 64.

<sup>129</sup> Mental Health Perspectives, [Briefing paper on barriers faced by defendants with intellectual and/or psychosocial disabilities in the Criminal Justice System in Lithuania](#), Vilnius, ENABLE project, 2023, p. 9.

environment and overcome any physical barriers, such as through use of remote or video-link systems to enable participation.

## 5. Remote hearings, video-links and COVID-19

COVID-19 triggered a shift in operation of criminal justice systems to reliance of e-justice measures. Video-link systems have been used to actors in the system to conduct hearings remotely to overcome COVID-19 related restricted measures and ensuring health safety of all participants. The use of video conferencing and impact varied widely in the 8 EU countries, from the limited accounts that shared this experience. There were actors that appreciated having at their disposal more measures to ensure participation of persons with disabilities. There were others that did not appreciate remote hearings due to lack of possibility of face to face contact and opportunity to have direct contact with the person from which evidence was being collected. Few defendants with disabilities that participated in remote hearings did not have a positive experience on account of either lack of accessibility or support during it. The use of remote hearing rules brought as well legal questions in Spain<sup>130</sup> and Slovakia<sup>131</sup> of whether a trial conducted with a defendant attending remotely is considered or not a trial in absentia.

In all countries aside from Bulgaria and Slovakia, there is legislation enabling criminal justice actors to conduct hearings remotely for defendants. In Bulgaria,<sup>132</sup> use of video-link is seen as protective measure for victims of crime and witnesses. In Slovakia, there are no specific rules establishing the possibility of remote hearings for defendants, and an interview by a judge suggests that defendants must be present in the courtroom.<sup>133</sup> There seems to be a preference by judicial professionals as well to be able to assess if defendant understand proceedings and their rights.

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<sup>130</sup> Pléna Inclusión, [Briefing paper on barriers faced by defendants with intellectual and/or psychosocial disabilities in the Criminal Justice System in Spain](#), Madrid, ENABLE Project, 2023, p. 32.

<sup>131</sup> FORUM, [Briefing paper on barriers faced by defendants with intellectual and/or psychosocial disabilities in the Criminal Justice System in Slovakia](#), Praha, ENABLE project, 2023, p. 39.

<sup>132</sup> KERA Foundation, Bulgaria, Veliko Tarnovo, ENABLE Project, 2023, p. 32.

<sup>133</sup> FORUM, [Briefing paper on barriers faced by defendants with intellectual and/or psychosocial disabilities in the Criminal Justice System in Slovakia](#), Praha, ENABLE project, 2023, p. 39

***"I demand that the defendant goes to the courtroom, also so that I can see if that person understands or not". (...)***

**(Judge, Portugal, female)**

Some legislation enabling defendants to participate in hearings is stricter than others. Czechia establishes broad rules, allowing its use whenever necessary to protect the rights of persons with due regard of their age, health state, security or other compelling reasons.<sup>134</sup> Similarly, Slovenia allows remote hearings if there are any legitimate reasons which would make in-person hearings not desirable or possible, or for cross-border cases, per request of different country.<sup>135</sup> In Lithuania<sup>136</sup> and Romania<sup>137</sup> remote hearings are allowed, although there are questions about its accessibility. Spain on the other hand establishes in-person hearings as the rule, unless there are exceptional reasons for a judge to allow it, and provided procedural guarantees can be assured.<sup>138</sup> In Portugal<sup>139</sup> the law requires for hearings to be conducted face-to-face as a rule, although there is narrow exception, within the scope of procedure to determine compulsory treatment for defendant to participate from hospital centre according to an interviewed judges.<sup>140</sup> With restrictions related to COVID-19 being lifted, in countries such as Lithuania, operations of criminal justice system remotely seems to have become commonplace.

***"Actually, now after the quarantine, it's remote work. We really have little in-person contact. It's wrong. I meet sometimes with a person only in court."***

**(Prosecutor, Lithuania, male)**

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<sup>134</sup> FORUM, [Briefing paper on barriers faced by defendants with intellectual and/or psychosocial disabilities in the Criminal Justice System in Czechia](#), Praha, ENABLE project, 2023, p. 42.

<sup>135</sup> PIC, Slovenia, Ljubljana, ENABLE Project, 2023, p. 45.

<sup>136</sup> Mental Health Perspective, Lithuania, Vilnius, ENABLE Project, April 2023, p. 28.

<sup>137</sup> Centre for Legal Resources, [Briefing paper on barriers faced by defendants with intellectual and/or psychosocial disabilities in the Criminal Justice System in Romania](#), Bucharest, ENABLE Project, 2023, p. 33.

<sup>138</sup> Plena Inclusión, [Briefing paper on barriers faced by defendants with intellectual and/or psychosocial disabilities in the Criminal Justice System in Spain](#), Madrid, ENABLE Project, 2023, p. 32.

<sup>139</sup> Article no. 194 and 318 of the Code of Criminal Procedure; [https://validity.ngo/wp-content/uploads/2023/06/Fenacerci\\_National-briefing-paper\\_-English.pdf](https://validity.ngo/wp-content/uploads/2023/06/Fenacerci_National-briefing-paper_-English.pdf) p. 30

<sup>140</sup> FENACERCI, [Briefing paper on barriers faced by defendants with intellectual and/or psychosocial disabilities in the Criminal Justice System in Portugal](#), Lisbon, ENABLE Project, 2023, p. 56.

The use of video-links, where appropriate, must conform with principles of universal design as well as respect defendants' right to fair trial and legal capacity. This means that equipment used must be accessible to all. Two defendants with disabilities that described their experience in Spain and Romania. In Spain, the defendant "recalls seeing someone sitting on the screen but not knowing who it was, and being told at that point that he would speak with his lawyer. He stated that he does not want to go through another telematic trial because you cannot see faces and do not know who is speaking, which makes him feel more insecure", moreover his "lawyer was not present in person with him, but rather in court".<sup>141</sup> A judge in Spain, and Police in Czechia also echoed communication is more difficult remotely with persons with disabilities, and in the former country trials by videoconferencing have been declared null and void. In Romania, operational reasons limited defendants' possibility to participate.

***"I was heard by video-conference, but I would have preferred to go to court. I couldn't hear what the judge was saying and I told them I couldn't hear. I will even tell them at the next hearing to speak louder because I can't hear well and I couldn't understand what the judge/ prosecutor/ lawyer were saying."***

(Defendant with intellectual disabilities, Romania, male)

While the International Principles and Guidelines on Access to Justice sees the use of video-links as a potential procedural accommodation, there is not sufficient practice on how to make it accessible for defendants with disabilities. At the very least, defendants must be assured support while using it, and given the possibility to effectively participate and speak with their lawyer. Within the scope of this project, there was a promising initiative "Defence via Skype" driven by Czech Bar Association to make access to a lawyer more accessible, which allows a client deprived of his/her personal liberty to meet with his/her lawyer via Skype.<sup>142</sup>

<sup>141</sup> Pléna Inclusión, [Briefing paper on barriers faced by defendants with intellectual and/or psychosocial disabilities in the Criminal Justice System in Spain](#), Madrid, ENABLE Project, 2023, p. 48-49.

<sup>142</sup> Czech Bar Association, *Legal Aid and Representation: Guidelines and Procedures*, available at: <https://www.cak.cz/scripts/detail.php?id=22485>; FORUM, [Briefing paper on barriers faced by defendants with intellectual and/or psychosocial disabilities in the Criminal Justice System in Czechia](#), Praha, ENABLE project, 2023, p. 39.

As described in Model Bench book, the use of remote hearings has to be considered carefully, in communication with the defendant, bearing in mind their personal situation and fair trial risks. In Romania, Prison Director, referencing a case he had, noted that participation remotely could be a good alternative for defendants that do not wish to attend their trial in-person. Other persons with disabilities might feel less anxious about having their needs met in court, if they can attend it from home.<sup>143</sup> For persons with disabilities with caregiving responsibilities, it could support those that do not have opportunities to leave their dependents alone. It is important to weight risks and benefits, and respect the will and preference of defendants with disabilities in its use.

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<sup>143</sup> Validity Foundation, *Input on Technologies in the Administration of Justice*, submitted to the Office of the High Commissioner for Human Rights (OHCHR), May 2024, p. 3, available at <https://validity.ngo/wp-content/uploads/2024/05/Validity-Foundation-OHCHR-Input-on-Technologies-in-the-Administration-of-Justice.pdf>; Janet Clark, *Evaluation of remote hearings during the COVID 19 pandemic*, 2021, p. 72-73, Available at: [https://assets.publishing.service.gov.uk/media/61b71ebd8fa8f5037b09c7b1/Evaluation\\_of\\_remote\\_hearings\\_v23.pdf](https://assets.publishing.service.gov.uk/media/61b71ebd8fa8f5037b09c7b1/Evaluation_of_remote_hearings_v23.pdf)

# 06

CONCLUSION AND KEY  
RECOMMENDATIONS

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In the ENABLE project we have found that, in 8 EU countries, all odds are stacked against persons with disabilities, that want to access justice. Barriers to participation in criminal proceedings in Bulgaria, Czechia, Lithuania, Portugal, Romania, Slovakia, Slovenia, Spain are enormous. Barriers that, when they interact with a person's impairment, prevents them from having a fulfilling life and make decisions in their case. This includes social, legal, health, economical and/or gender-related barriers. For many that do not have disability-appropriate support, these become insurmountable.

We have found that many defendants with intellectual and/or psychosocial disabilities in fact have not been receiving all or any support that is required in criminal proceedings. For many, the experience in criminal justice system has been negative. They felt fearful for their life, their physical integrity, anxious, humiliated, patronised, ashamed, embarrassed due to deprivation of liberty, discriminatory and/or violent behaviour of criminal justice authorities. This, without being given the resources to defend themselves or even acknowledgement of their capacity to make decisions. As it was shown in this report, the prevailing view among interviewees and participants was that criminal proceedings are seen as a disempowering system, meant to punish defendants without treating them as rights holders.

The situation further worsens with involvement of mental health systems. The perception on how defendants with disabilities are treated is well captured by Maria Krasteva:

**“The general attitude toward defendants with disabilities is that they are a "problem" for the psychiatric care system. The justice system considers their job done as long as they are provided with a lawyer and psychiatric intervention.”<sup>144</sup>**

At the core of this situation is the way how disability interacts with how criminal justice system formally and traditionally operate. This is the case both at nationally and EU level. Disability should be seen as the result of external barriers that hinder participation in life, society and

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<sup>144</sup> KERA Foundation, [Briefing paper on barriers faced by defendants with intellectual and/or psychosocial disabilities in the Criminal Justice System in Bulgaria](#), Veliko Tarnovo, ENABLE Project, 2023, p. 43.

legal proceedings as explained by the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD).<sup>145</sup> Disability does not need to be fixed or treated with a medical approach. What needs to be removed are barriers with supported decision-making and accessibility measures that are respectful of a person's will and preference. Unfortunately, data and evidence collected throughout the ENABLE project suggests the opposite. Disability in suspects or accused of committing a crime is confused with either dangerousness, or something to be treated in psychiatric institutions or a "vulnerable" person that cannot understand or follow proceedings. Without consideration of procedural adjustments that need to be adopted to enable persons with disabilities to overcome barriers. A view that is perpetuated both by national practice and EU legislation.

*"We have already taken giant steps forward, but as long as we do not change the philosophy that it is not the person who has to change, but the context itself. [I]n the judiciary context, is the same".*

(Psychologist, Portugal, male)

### Recommendations for European Commission, European Parliament and other EU Institutions

1. All 5 EU Directives and Recommendation should be amended to reflect the human rights model of disability, whereby legal capacity of suspects or accused of committing a crime is recognised. To that end:
  - a. Explicitly guarantee the right to legal capacity in criminal proceedings. They should ensure that all defendants are able to access and directly participate in all stages of the justice process according to their will and preferences.
  - b. Determination of supportive measures and procedural accommodations should not be dependent on assessment of vulnerability or condition that person cannot follow or understand proceedings or restricted to "needs". There is a need of binding legislation setting procedure for determination of support, reasonable and procedural accommodations, found in Article 1 of the

<sup>145</sup> United Nations, Convention on the Rights of Persons with Disabilities (CRPD), Article 1 (2006).

UNCRPD. The non-binding process, found in the European Recommendation, is insufficient. Assessments of the barriers that need to be removed, and the accommodations to be put in place to access their rights, under the multiple Directives on procedural rights, must be done in dialogue with defendants. The procedural accommodations must cover the ones listed in the International Principles and Guidelines on Access to Justice, including access to communication and information rights, intermediaries and support of third-parties. Overall, procedural accommodations must ensure defendants' rights to a fair trial, including the right to understand and be understood, to receive information, remain informed and have third-parties informed, to be provided with interpreters and facilitators, to be heard, protected during proceeding;

- c. All Directives should establish remedies for contesting discriminatory assessments of capacity that violate fair trial rights;
- d. All Directives should implement and monitor police and judicial training, based on UN Access to Justice Principles, training to build the skills of organisations of people with disabilities regarding the rights of defendants with disabilities and adjusting procedures to accommodate them in an age-, gender- and disability- appropriate manner.

2. The European Commission and European Parliament should:

- a. Create a platform to facilitate direct dialogue between people with disabilities and the European Commission in relation to the multiple procedural rights directives, including on review, amendment and monitoring processes.
- b. Support for research and feasibility studies appropriate information-sharing, throughout the criminal justice process, such as case management systems and how they can become a source of real-time information of their rights, case and proceedings for defendants.
- c. In partnership with persons with disabilities, the Commission should carry out a full review of the extent and use of guardianship orders and capacity assessments on fitness to stand trials or to plea involving defendants with disabilities; assess the violations of the right to legal capacity and develop plans and recommendations to cease and prohibit the use of guardianship orders and bring policy and practice into line with the UN CRPD. The practice of discriminatory assessments of either credibility or fitness to stand trial or pleas, linked with impairment or disability, should be identified as a type of secondary victimisation and prohibited.

3. Prioritise the allocation of funds specifically designated for the procurement of accessibility tools and materials aimed to be used by providing procedural accommodations for children with mental health conditions and disabilities who are victims of crime. These resources can significantly enhance the accessibility of services and ensure that child victims of crime, regardless of their individual challenges or needs, can actively and effectively participate in legal proceedings and support programs. This includes various communication aids, including those needed for AAC users.
4. It is equally important to ensure that court staff and other professionals are adequately trained on how to use the resources outlined in the above recommendation.
5. Invest in and expand programmes aimed at reducing societal stigma associated with child victimisation and educate the public on the intricacies of dealing with such cases. These programmes could contribute to creating an environment where child victims of crime are met with compassion, understanding, and appropriate encouragement to safely report crimes.
6. Invest in the development and implementation of functioning and transparent data collection systems that capture relevant information on the number of child victims, types of crimes involved, demographics, data on their disabilities and individual needs, data on procedural accommodations provided and communication aids, and the outcomes of legal proceedings. This data serves as a crucial foundation for evidence-based policymaking and resource allocation, allowing institutions to adapt their strategies based on the on-the-ground insights.
7. Establish monitoring mechanisms to ensure that the legal services provided to child victims of crime are fully accommodating. This should include regular evaluations of the support programmes and interventions in place, assessing their effectiveness, adherence to best known and evidence-based practices, and impact on the well-being of the children who are crime victims. This ongoing quality assurance process could help identify areas for improvement, refine existing practices, and ultimately enhance the overall quality of services provided within the criminal justice system for children who are victims of crime.
8. Guarantee the provision of qualified legal representation for children who are victims of crime, including children with mental health conditions and disabilities. Ensure that legal professionals are well-versed in child rights and the nuances of child victim cases, as well as specificities of individual needs and different types of

disabilities, advocating for the best interests of the child throughout the legal process, at the same time honouring their voices and preferences.

9. Develop and enhance victim-witness support programmes tailored to the needs of child victims of crime, including children with mental health conditions and disabilities. Provide accessible and understandable information, personal assistance, and emotional support throughout legal proceedings, addressing the unique challenges faced by child victims and their families.

### Recommendations for the judiciary and criminal justice institutions

1. Criminal justice authorities and lawyers must improve how information about rights, proceedings and case is communicated in an accessible manner. Professionals must be aware that participation in criminal proceedings is challenging for defendants with intellectual or psychosocial disabilities on account of information, legal and social barriers. Defendants have communicated that they are often too stressed or fearful to be able to process information during hearings, questioning or upon arrest. For right to information to be effectively exercised, information shared has to be repeated continuously across proceedings, and in a manner that enables them to make decisions for the particular procedural act. This can be done with the support of specialised professionals, such as intermediaries or facilitators who can support justice professionals to adapt their communication in an easy to understand manner.
2. It is important to ensure that criminal justice professionals who directly or indirectly work with persons with disabilities, receive sufficient and quality training on identifying individual needs and barriers and effectively and appropriately communicate with defendants with psychosocial and/or intellectual disabilities. This is especially relevant for police officers who are often the first responders when a crime is reported.
3. A procedure should be put in place for timely and effectively identifying individual needs and barriers, assessing, and providing necessary individual support and reasonable and procedural accommodations for defendants with intellectual and/or psychosocial disabilities who participate in the justice system.
4. Systemic collection of disaggregated data on different types of disabilities in the criminal justice system is necessary to better understand the prevalence, barriers and needs of this population.

5. A channel for inquiries from criminal justice professionals should be established to ensure that they have access to information and support when working with defendants psychosocial and/or intellectual disabilities, or any type of a disability or specific individual needs and barriers.
6. Increase efforts in recruiting and deploying a greater number of trained psychologists or other background to ensure support and adoption of procedural accommodations.
7. Foster multi-disciplinary and inter-sectoral collaboration between the judiciary, law enforcement, support services, especially community-based services. Practice providing procedural accommodations, ensuring accessible communication, and coordinating services effectively in situations involving children with diverse abilities.
8. Invest in modern and accessible audio and video recording equipment to accurately document and enable defendants to follow and understand proceedings, whether in-person or remotely.
9. Develop and implement training programs that address the intersectionality of gender, age and disability. Train all personnel involved in criminal proceedings to recognise and accommodate diverse persons with disabilities, ensuring diverse and effective communication and appropriate procedures are accessible. Provide ongoing disability awareness and sensitivity training to professionals involved in cases with persons with disabilities.

### Recommendations for amendment of EU Directives

EU Directive on right to information in proceedings should establish diversity of communication mediums to make information accessible. As well as obligation to make adjustments whenever information and communication devices, channels or mediums are not accessible and a duty to inform of this possibility.

1. The Directive should be amended to include the right to forms of support which enable effective communication, including describe the ways that access to

information can be ensured, including through the provision of sign language, video and audio guides, telephone-line advice and referral services, facilitated communication, braille, etc;

2. Information about the criminal justice system — including defendant's and victims' rights — must be easily and publicly accessible at the national level.
3. Any limitation to physical accessibility or information and communication, must be addressed by providing accommodations and access to a range of support services, as well as informal supports that a person chooses, which might include remote support and hearings;
4. All digital devices or remote technology deployed to facilitate access to information or communication must be accessible and conform with principle of universal design;
5. EU funding and resources should ensure that all states have disability sensitive and accessible support services.

EU Directive on Access to a Lawyer and Legal Aid should be amended to ensure accessible access to lawyers and resources and funds to cover the costs for effective communication facilitation between them and clients outside the court room.

6. Ensure establishment of specific communication channels for access to lawyers in residential and psychiatric institutions;
7. Accessibility of legal representation includes ensuring the availability of meaningful and accessible information about rights to legal aid and to a lawyer, including through support services with reasonable or procedural accommodations.
8. Clarify conditions under which legal representation would be an automatic right and ensure that defendants are fully informed about their rights, options of representation and availability, both before any hearings and proceedings where defendant is assessed of their capacity might be assessed, as well as review of decisions to remain confined in psychiatric institutions.
9. All legal aid lawyers should have the skills, knowledge and experience to represent defendants with disabilities.

10. Develop the necessary training and capacity-building infrastructure for specialist lawyers. For example, all lawyers would have to undergo a training on how to communicate with clients with various disabilities.
11. There is a need for an EU strategy on defendants with disabilities that articulates a vision for and framework of equal access to justice for people with disabilities, which can be implemented at the national level.
12. Guidance, training courses and curricula based on UN Access to Justice Principles should be developed for Member States in partnership with people with disabilities.
13. The innovative practices of individuals and NGOs creatively supporting defendants with disabilities in accessing their rights to participate must be actively nurtured and supported.
14. All Member States must fully transpose and implement the 5 EU Directives and European Recommendation in line with the goals and spirit of the UNCRPD and International Principles and Guidelines on Access to Justice. It is important, just as we recommended for victims,<sup>146</sup> that the European Commission exercises its responsibilities for oversight, monitoring and the initiation of infringement proceedings. This includes developing a data collection framework that allows an understanding of defendants' experiences of proceedings and, gaps in access to justice and a prioritisation of action.
15. When making strategic decisions about resource allocation, consideration should be given to the individual needs and procedural accommodations required by child crime victims with mental health conditions, psychosocial and/or intellectual disabilities, as well as other vulnerable individuals.
16. Before implementing new policies or procedures, risk assessments should be conducted to identify and address any potential risks or challenges they could impose on child victims of crime who have mental health conditions, psychosocial and/or intellectual disabilities.
17. Close and regular collaboration with civil society organisations, human rights, and disability NGOs could help to design and implement quality programmes suitable

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<sup>146</sup> Validity Foundation, [Humanising Justice, International report from Voices for Justice: Communicating with Victims of Crime with Disability](#), 2022, p. 86

for the needs of children victims of crime who have mental health conditions, psychosocial and/or intellectual disabilities.

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