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Enhancing the Rights of Defendants and Detainees with Intellectual and/or Psychosocial Disabilities:

EU Cross-Border Transfers, Detention and Alternatives

National Report
Austria

LUDWIG
BOLTZMANN
INSTITUTE
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Enhancing the Rights of Defendants and Detainees with Intellectual and/or Psychosocial Disabilities:
EU Cross-Border Transfers, Detention and Alternatives

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ABBREVIATIONS

ACC
Austrian Criminal Code

ACCP
Austrian Code of Criminal Procedure

ACA
Austrian Corrections Act

CAT
United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

CJEU
Court of Justice of the European Union

CRPD
United Nations Convention on the Rights of Persons with Disabilities

FD
Framework Decision (EU Instrument)

FD 582/EAW
Framework Decision on European Arrest Warrant

FD 829/ESO
Framework Decision on European Supervision Order

FD 947/PAS
Framework Decision on Probation and Alternative Sanctions

FD 909/TOP
Framework Decision on Transfer of Prisoners

ECtHR
European Court of Human Rights

ECHR
European Convention on Human Rights

IPC
Involuntary Placement Act

NPM
National Preventive Mechanism

OPCAT
Optional Protocol to the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

StGB
(in German) Strafgesetzbuch

StPO
(in German) Strafprozessordnung

StVG
(in German) Strafvollzuggesetz

UbG
(in German) Unterbringungsgesetz

EXECUTIVE SUMMARY

Over the last two decades, the need for improved judicial cooperation between EU Member States has increased significantly. To this end, the European Commission has adopted several Framework Decisions, such as the European Arrest Warrant and the European Supervision Order, to facilitate judicial cooperation in criminal proceedings. The European Court of Justice emphasizes the importance of respecting fundamental rights in the application of these instruments, as they ensure trust between Member States and smooth cross border cooperation. In order to properly analyse cross border proceedings, it is necessary to look at the national systems and the challenges at the national level in relation to international standards.

Austria **has transposed all the examined Framework Decision into national law**. For all Framework Decisions, the Austrian law provides for grounds for refusal linked to possible fundamental rights violations; for some Member States, specific orders by the Ministry of Justice have been issued. The research revealed that the Framework Decision (FD) 2002/584/JHA on the European Arrest Warrant is used very frequently but little to no specific information on cases concerning persons with intellectual and/or psychosocial disabilities. FD 2008/909/JHA on the Transfer of Prisoners is also applied regularly, and there are various additional guidelines on the application, none of which are specific to persons with intellectual and/or psychosocial disabilities. FD 2009/829/JHA on the European Supervision Order and FD 2008/947/JHA on Probation and Alternative Sanctions, however, are applied very rarely in general, and no cases of persons with intellectual and/or psychosocial disabilities have been identified. Nonetheless, it was possible to identify some general challenges that may be equally (or even more) relevant for persons with intellectual and/or psychosocial disabilities (e.g., a lack of awareness of the specificities of the Framework Decisions and the need for more cross border cooperation at all levels and between all stakeholders to ensure continuity of care and (legal) support).

In the national Austrian context, after years of criticism both at the national and international level and repeated condemnation by the European Court of Human Rights (ECtHR) due to the shortcomings of the preventive measures ("Maßnahmenvollzug") systems, an amendment to the preventive measures system ("Maßnahmenvollzugsanpassungsgesetz") came into force in 2023. Despite the recent reform, the system of preventive measures in Austria is still in need of change. Over the last 20 years, the number of people subject to preventive measures has steadily increased.

The possibility of **indefinite deprivation of liberty** of persons with intellectual and/or psychosocial disabilities in the criminal justice context (especially when it is beyond the maximum sentence for the offense in question) continues to pose a major challenge. This possibility places persons concerned in a situation of despair and lack of prospects, which can be emotionally and mentally stressful. For people with intellectual and/or psychosocial disabilities, being subjected to preventive measures means additional stigmatization in their daily lives, even after release. At the same time, the average duration of detention (when it is far longer than the maximum sentence) appears questionable with regard to standards under the European Convention on Human Rights (ECHR) and the United Nations Convention on the Rights of Persons with Disabilities (CRPD).

During the proceedings, intellectual and/or psychosocial disabilities are only taken into account when an **assessment** is necessary to consider whether preventive measures should be applied (consisting of an assessment of the capacity in the moment when the crime was committed). For persons with psychosocial and/or intellectual disabilities

who do not meet those requirements, no specific procedural accommodations in the criminal proceedings are available. The examinations and assessments are purely medical, generally carried out by psychiatrists. Other experts with important specialist knowledge, information and insight into the particular situation of the individual concerned (e.g., social workers, the social net, psychologists, other therapists, and the person concerned) are not involved in these assessments. At the same time, (medical) expert opinions in themselves are a topic of concern in Austria. There are currently no guidelines and quality standards for experts' opinions, which in practice very often lack the necessary quality, are sometimes based on very brief discussions with the person concerned and results have not been sufficiently individualized. This has in many cases led to wrong assessments and consequently to incorrect recommendations to impose preventive measures. This **lack of quality standards** is exacerbated by a general shortage of expert witnesses and a very heavy workload. Aside from expert witnesses, actors involved in the proceedings lack necessary sensitivity and awareness of the situation of persons with intellectual and/or psychosocial disabilities, as well as the necessary training on how to interact with them.

If an intellectual and/or psychosocial disability is detected and proceedings for placement in preventive detention are initiated, there is a need for legal defence lawyers throughout the proceedings until they are concluded. In particular, the presence of the defence lawyer during police questioning of the persons concerned, as well as support in the review or release procedure, should be considered because this could contribute significantly to improving the rights of the persons concerned. Review proceedings are often perceived as hearings that are too short and lack an up-to-date independent (and possibly external) assessment of the person's situation, as well as legal representation.

As regards the **conditions of detention and treatment** of persons with intellectual and/or psychosocial disabilities, there are differences between persons who are considered criminally responsible by the court and those who are considered not criminally responsible. Overall, one of the biggest challenges is to ensure that persons have access to adequate treatment at an early stage, so that they may be discharged early. Currently, these services are often only available at the post-trial stage, particularly for persons who were considered criminally responsible. They are detained in pre-trial detention facilities, frequently locked up for up to 23 hours per day. Another topic of concern is the **lack of mechanisms available to ensure access to information** particularly about the treatment, including medication. At the same time, public hospitals are not always sufficiently equipped to care for the persons concerned, due to a lack of space and resources.

Non-custodial measures are available in law, but they are **not ordered often enough in practice**. There is a lack of aftercare facilities with sufficient and adequately trained staff. Simultaneously, the research revealed that there are currently no clear guidelines for the treatment and conditions in aftercare facilities. At the same time, it is crucial to ensure post-conviction support, once the person concerned "leaves" the criminal justice system, by way of increasing support within the community and the general healthcare system.

Finally, the current Austrian system regarding the deprivation of liberty of persons with intellectual and/or psychosocial disabilities in the criminal justice context is complex in so many ways and lacks transparency. It is difficult to understand the various proceedings and procedures, not to mention the complicated legal framework. It seems impossible for persons with intellectual and/or psychosocial disabilities who very often find themselves in vulnerable situations.

01. INTRODUCTION

BACKGROUND OF THE PROJECT

Within the EU, the need for better coordinated judicial cooperation between the Member States has increased significantly over the last two decades. In order to facilitate and simplify judicial cooperation in criminal proceedings, the European Commission (EC) has adopted a series of procedural rights instruments (2009 Procedural Roadmap), including the 2002/584/JHA on the European Arrest Warrant; 2008/909/JHA on the Transfer of Prisoners, 2008/947/JHA on Probation and Alternative Sanctions;], and 2009/829/JHA on the European Supervision Order.

The Court of Justice of the European Union (CJEU) has clarified in various judgments that the application of mutual recognition instruments must not lead to a violation of fundamental rights.[1] There is also a reference to fundamental rights in all Framework Decisions. Respect for fundamental rights is crucial to build mutual trust between Member States and ensure the good functioning of cross border cooperation. To comprehensively analyse cross border proceedings, it is necessary to look at national systems and identify challenges that arise at the national level related to international, regional and national standards (including EU standards, and those provided under the CRPD, ECHR, United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and Council of Europe), which may hinder cross border cooperation.

The project analyses the implementation of the above-mentioned EU Framework Decisions into national law with respect to the rights of defendants and detainees with intellectual and/or psychosocial disabilities. Although accused and detained persons with intellectual and/or psychosocial disabilities are in a particularly vulnerable situation, little to no attention has been paid in research to the specific challenges that defendants and detainees with intellectual and/or psychosocial disabilities may face when being subjected to cross border proceedings. At the same time, the research includes an assessment of the situation of defendants and detainees with intellectual and/or psychosocial disabilities within the national systems and measures compliance with international, regional and national standards.

At national level, the criminal justice system provides for specific proceedings for defendants and detainees with intellectual and/or psychosocial disabilities – the preventive measure system ("Maßnahmenvollzug"). This system contains provisions regarding criminal responsibility/incapacity due to a disability, procedural safeguards and deprivation of liberty in specialized institutions. The preventive measure was first introduced in 1975 and has undergone only minor changes after a long period. After many years of increasing criticism towards the preventive measure system (including criticism from the CRPD Committee)[2] and the deterioration of the situation in places of deprivation of liberty, a reform law was passed as a first part of an overall reform of the preventive measure system; it entered into force in March 2023. The reform is a response not only to ongoing criticism, but to multiple condemnations by the ECtHR with regards to the preventive measure system.[3]

METHODOLOGY

The findings presented in this report are a product of research that was conducted as part of a project co-funded by the European Commission, with the Ludwig Boltzmann Institute of Fundamental and Human Rights (Austria) leading the project in cooperation with the Bulgarian Helsinki Committee (Bulgaria), Dortmund University of Applied Sciences and Arts (Germany), Antigone (Italy), Mental Health Perspectives (Lithuania) and Peace Institute (Slovenia).

The project team conducted **desk research** covering relevant literature, national legislation, commentaries, jurisprudence and relevant policy documents. The Austrian project team is supported by a National Advisory Board which consists of the following members:

- **Bettina Caspar-Bures:** licensed attorney with a focus on criminal law and experience in cases concerning persons who are subjected to preventive measures; member of a National Preventive Mechanism (NPM) monitoring commission
- **Friedrich Forsthuber:** president of the regional criminal court in Vienna; criminal judge
- **Martin Kitzberger:** head of the forensic centre/specialized detention facility, Asten; multiple years of experience with persons with intellectual and/or psychosocial disabilities; psychologist
- **Reinhard Klaushofer:** professor of public international law; head of the Austrian Institute for Human Rights; head of the Austrian monitoring commission on detention of the NPM
- **Gudrun Strickmann:** deputy head of the legal department of Vertretungsnetz, representation of individuals with intellectual/psychosocial disabilities;

As part of the project, national consultations were conducted in the form of expert interviews with relevant stakeholders. The project team has conducted interviews with a public prosecutor, a judge, two lawyers, two representatives of the Austrian Ombudsman Board, a psychiatrist, a probation officer, a social worker, two representatives of the Ministry of Justice (for cross border cases) and a representative of an organization representing persons with intellectual and/or psychosocial disabilities.

The project team further organized a national roundtable, where around 20 experts representing all the relevant stakeholders involved participated. The event provided a platform for interdisciplinary exchange regarding challenges both in national proceedings and cases, as well as concerning cross border cooperation on the relevant EU Framework Decisions. Participants included two prosecutors, three judges, two probation officers, two lawyers, one medical expert, two representatives of NPM/CRPD oversight mechanisms, one academic, one representative of the Ministry of Justice who is also head of a forensic centre/specialized detention facility, four representatives of extra-mural/aftercare facilities, one representative of an association representing persons concerned, and three members of the project team.

STRUCTURE OF THE REPORT

The report is divided into three main chapters. Part 1 examines the implementation of the relevant Framework Decisions into national law. A particular focus was placed on those provisions that could be of relevance to persons with intellectual and/or psychosocial disabilities. In addition, the application of the Framework Decisions in practice was analysed. The aim of Part 2 is to take a closer look at the national situation for persons with intellectual and/or psychosocial disabilities, with regard to deprivation of liberty under criminal law. Following a presentation of the current legal situation (considering the latest amendments in particular), current challenges with regard to procedural rights, detention conditions and alternatives to detention and probation will be considered. Part 3 will then serve to present recommendations for strengthening the rights of defendants and detainees with intellectual and/or psychosocial disabilities.

02. NATIONAL FRAMEWORK CONCERNING EU CROSS BORDER INSTRUMENTS

2.1. GENERAL

Mutual recognition instruments, such as Framework Decisions are not directly applicable. Member States need to transpose them into national law. The Framework Decisions[4] relevant for this project were implemented into Austrian national law in the ***Federal law on judicial cooperation in criminal matters with the Member States of the European Union (EU-JZG).***[5] Additionally, provisions of the Extradition and Mutual Assistance Act (ARHG)[6] apply on a subsidiary basis, unless otherwise stipulated in the EU-JZG. Directly applicable international agreements (such as bilateral or multilateral treaties) are only applicable unless otherwise provided for in the EU-JZG.

The provisions of the EU-JZG apply to everyone equally, thus including persons with intellectual and/or psychosocial disabilities.[7] Persons concerned in EU cross border procedures receive the same treatment as persons concerned in national proceedings.[8] While there are no provisions specifically referring to persons with intellectual and/or psychosocial disabilities, some provisions refer to, for example, therapeutic measures, which are especially relevant for this specific category of accused persons/detainees.[9]

The Framework Decisions are based on the principles of mutual recognition and mutual trust between Member States. This implies that Member States, when implementing these Framework Decisions, can and may be required to presume that fundamental rights have been observed by the other Member States.[10] However, the CJEU also stated that there are limitations on these principles. In the case of ***Aranyosi and Caldararu***, the CJEU first analysed the relationship between the principle of mutual trust and the protection of fundamental rights. The question arose if and under what conditions the executing state may refuse the execution of a European Arrest Warrant (EAW) if the detention conditions in the issuing state threaten to violate the fundamental rights of the person concerned.

The CJEU has developed a two-step approach to determine whether the executing state can refuse the execution. First, the executing state must ***"rely on information that is objective, reliable, specific and properly updated on the detention conditions prevailing in the issuing Member State and that demonstrates that there are deficiencies, which may be systemic or generalised, or which may affect certain groups of people, or which may affect certain places of detention."***[11] The information may be based, inter alia, on decisions of international courts, decisions of national courts or decisions, documents and reports of bodies of the Council of Europe (e.g., reports of the Committee for the Prevention of Torture (CPT)) or the United Nations. Secondly, the judicial authority must examine to what extent ***"there are substantial grounds to believe that the individual concerned will be exposed to that risk because of the conditions for his detention envisaged in the issuing Member State".***[12]

Since then, this two-stage review approach has been used by the CJEU not only in several decisions on detention conditions,[13] but also in a case concerning serious deficiencies in the rule of law, particularly the independence of the courts.[14] Most recently, the CJEU ruled that in the absence of systemic or generalised deficiencies in the issuing State, a court of the executing State **may not refuse to execute an EAW**.[15] The Austrian Ministry of Justice adopted internal decrees, calling upon the competent authorities to take these considerations into account.[16]

2.2. FD 2002/582/JHA - EUROPEAN ARREST WARRANT

2.2.1. STATISTICS AND LEGAL FRAMEWORK

FD 2002/584/JHA (FD 584/EAW) regulates the judicial surrender of a person for the purpose of prosecution or execution of a custodial sentence or detention order. FD 584/EAW follows the purpose to guarantee that open borders and free movement within the EU is not abused by those seeking to evade justice. FD 584/EAW is implemented in **Art 3-38 EU-JZG**. Art 3-5 EU-JZG contain general provisions on the EAW. Art 5-28 concerns the enforcement of an EAW issued by another Member State. The surrender procedure and the execution of the European arrest warrant are conducted by the public prosecutor's offices while the regional courts are responsible for judicial decisions.[17] The competent judicial authority for issuing European arrest warrants are the public prosecutor's offices at the seat of the regional courts. However, the European arrest warrant must be granted by the competent court.[18] Austria has designated the Ministry of Justice and the Federal Ministry of the Interior's Directorate-General for Public Security to assist the competent judicial authorities.[19]

In the annual reports by the Ministry of Interior, the number of EAWs issued and received by Austrian authorities, as well as the number of persons surrendered from and to Austria, are published.[20] Unfortunately, no data is available on the number of persons with intellectual and/or psychosocial disabilities against whom an EAW was issued/executed.

Year	EAWs received by Austria	Conf.	Ref.	Persons surrendered by Austria based on EAW	Persons arrested under EAW in Austria	EAWs issued by Austria	Persons surrendered to Austria based on EAW
2020	**313**	215	31	162	N/A	509	136
2019	**399**	269	28	202	392	645	192
2018	**206**	193	16	109	97	662	319
2017	**211**	199	n.a.	112	110	783	337
2016	**178**	N/A	N/A	173	69	602	245

Data: Ministry of Justice[21] ; DG Just[22]

2.2.2. IMPLEMENTATION AND ASSESSMENT IN PRACTICE

Based on the feedback of experts, the EAW is efficient, especially in respect of cooperation with the police via the SIRENE bureau.[23] EAW cases are generally processed very quickly, avoiding lengthy bureaucratic procedures. Relevant documents for the EAW are available in English, also making cooperation easier.[24] As regards persons with intellectual and/or psychosocial disabilities, the research revealed there are no specific procedures or support options in practice.[25] The provisions do not specifically refer to persons with intellectual and/or psychosocial disabilities or other persons in a situation of vulnerability. Overall, there are no specific **procedural safeguards** in place for persons with intellectual and/or psychosocial disabilities during EAW proceedings. **Recommendation (2013/C 378/02)[26]** on procedural safeguards has not been transposed into national law.

Upon arrest, the person concerned has to be **informed of their rights**, including the right to informed about the content of the EAW, the right to get a written translation of the EAW, the right to a lawyer, the right to agree to surrender after conferring with a defence lawyer and the right to be represented by a lawyer in the issuing state who is supported by an Austrian lawyer with information and advice.[27] Information about these rights is usually provided by means of special (written) forms, handed out by the executive authorities. The information has to be provided in a comprehensible language; complex or very technical wording should be avoided.[28] The provision of oral information is only foreseen in exceptional cases, if the form is not available in a language the person concerned understands.[29] Additionally, provisions laid down in the Austrian Code of Criminal Procedure (ACCP) are applied on a subsidiary basis.[30] No specific references to persons with intellectual and/or psychosocial disabilities are contained in the provisions.

Every person who is arrested based on an Austrian EAW in another Member State has the **right to a lawyer**.[31] If a person wishes to make use of this right, the Austrian prosecutor has to provide the person concerned with the ability to contact an Austrian on-call defence lawyer, a right found in the Austrian Code of Criminal Procedure.[32] Generally, only the first legal advice is free.[33] However, persons who do not have the resources to pay for legal representation and who are in a vulnerable situation (including persons with intellectual and/or psychosocial disabilities) have the right to free representation in (all) interrogations.[34] In case of language difficulties, interpreters are free of charge and are usually easily available.[35]

During the hearing, the court has to inform the person concerned about the possibility of a simplified surrender without the formal surrender proceedings, including information on the waiver with regards to the speciality rule.[36] Speedy proceedings are only possible if there are no grounds for refusal that have to be considered ***ex officio*** or fundamental rights considerations.[37] If the person concerned agrees to the execution of the EAW and consents to being surrendered without formal proceedings being conducted, the court has to pronounce the decision of speedy proceedings. The persons concerned has three days to appeal against this decision.[38] Austria does not collect data on whether a person has consented to the surrender.

As regards the **detention pending surrender,** the provisions regarding pre-trial detention are applicable, however, stricter rules regarding the time limits apply.[39] If persons with intellectual and/or psychosocial disabilities are subjected to detention pending surrender, they may be temporarily transferred to forensic departments of psychiatric hospitals to have an assessment or receive treatment there.[40]

The EU-JZG provides for a number of grounds for refusing the enforcement of an EAW. Art 19(4) EU-JZG foresees a **ground for refusal** relating to the respect of fundamental rights.[41] This is in addition to the reasons (related to the general formal requirements) foreseen in the Framework Decisions.[42] The court may refuse to execute an EAW if the surrender would lead to a violation of the principles laid down in Art 6 TEU.[43] This also includes any fundamental rights guaranteed in the ECHR.[44]

Furthermore, the court may refuse the execution if there are objective indicators that the EAW was issued for the purpose of persecuting or punishing someone based on discriminatory grounds. The person concerned needs to bring objections to the attention of the court. Art 19(4) EU-JZG provides a two-fold limitation: First, the court must have objective indicators for the violation. Second, the concerned person must lack remedies in front of the ECtHR or the CJEU.[45] As the latter requirement can generally only be determined in cooperation with the issuing authority, the further information must be requested.[46] This is based on the consideration that fundamental rights violations are best determined and dealt with in the course of the proceedings in the issuing state.[47]

In case of concrete concerns regarding the human rights requirement in a specific EU Member State based on judgments, reports or other reliable sources, the Ministry of Justice has in some instances issued **decrees on how to handle cross border cases with certain Member States.** These may concern the conditions in detention as well as fair trial guarantees. For example, based on a judgement by the CJEU, the Ministry recently issued a decree concerning cases involving an EAW issued by Bulgarian authorities, where the necessary requirements regarding the judicial review of an EAW were not met. Thus, the Ministry stated that before executing the EAW of a Bulgarian Authority, the Austrian prosecutor should communicate to the Bulgarian authorities, asking for guarantees regarding the judicial review mechanisms in place in the specific case.[48]

In 2020, five refusals were based on feared violations of fundamental rights and four were based on poor detention conditions in the issuing state. No refusals of surrender were recorded with regard to the right to a fair trial.

Additionally, Art 5 EU-JZG (which is a constitutional provision, therefore of higher rank), provides that the execution of an EAW against an Austrian citizen is only possible under certain and very strict circumstances.[49]

Furthermore, the surrender may **temporarily be postponed** if there are "substantial grounds for believing that it would manifestly endanger the requested person's life or health".[50] In addition to this general ground for temporary postponement, the Austrian law provides for **postponements in case of inability to be transported.**[51] This postponement can be requested by the person concerned directly. If the court rejects the request, the person concerned can appeal against this decision. Whether or not a person is incapable of being transported needs to be determined by an expert.[52]

The CJEU recently dealt with the question of the extent to which the risk of harm to the health of the person concerned can lead to the refusal to enforce an EAW. The EDL case concerns an EAW issued by a Croatian authority for the prosecution of EDL, who suffered from psychiatric condition and was at high risk of suicide due to his condition and the possibility of imprisonment.[53] The Court of Appeal in Milan considered that transferring EDL to Croatia would worsen his health and endanger his life but found that the grounds for refusing a European Arrest Warrant did not include health grounds. The case was referred to the CJEU. The CJEU emphasized the principle of mutual trust between Member States, but introduced a reservation based on Article 23(4) of FD 584/EAW, which allows the executing state to temporarily suspend the extradition procedure if there are substantial grounds for believing that the execution of the arrest warrant would endanger the health of the arrested person. The CJEU found that transportation alone could violate the right to health (which would be tantamount to a violation of the prohibition of torture enshrined in Article 4 of the Charter of Fundamental Rights). The executing state must request the necessary information from the issuing state to ensure compliance with the Charter of Fundamental Rights and FD 584/EAW. If the guarantees are given, the arrest warrant must be executed. However, if the Court of Justice finds, among other things, that "exceptional circumstances" exist and that the risk of a violation cannot be ruled out within a reasonable period of time, the executing state may not execute the arrest warrant.

2.3. FD 2008/909/JHA - TRANSFER OF PRISONERS

2.3.1. STATISTICS AND LEGAL FRAMEWORK

FD 2008/909/JHA (FD 909/TOP) regulates the recognition of judgments imposing custodial sentences and measures involving deprivation of liberty and the transfer of prisoners. The rationale behind FD 909/TOP is to facilitate social rehabilitation by enabling sentenced persons to serve their sentences in the environment where they have the strongest social connections and support. FD 909/TOP is implemented in Art **39 - 42g EU-JZG**. Of these provisions, Art 39a - 41j EU-JZG refer to the enforcement of judgments of other Member States in Austria and Art 42 - 42g EU-JZG refer to the enforcement of Austrian judgments in another Member State.

The **Ministry of Justice is the competent issuing authority**[54] and the **regional courts are the competent executing authorities**.[55] While the Ministry of Justice collects data as the issuing authority, the regional courts do not systematically collect data. Where data is available by the Ministry of Justice, it remains nonetheless very limited. In the annual reports by the Ministry of Interior, the number of EAWs issued and received by Austrian authorities, as well as

Year	Preventive custodial measures Art 21(1) ACC	Preventive detention Art 21(2) ACC	Total
2022	15	6	130
2021	6	1	174
2020	N.a.	N.a.	132
2019	N.a.	N.a.	189
2018	N.a.	N.a.	136
2017	N.a.	N.a.	166
2016	N.a.	N.a.	196

Data: provided in the framework of the project by the Ministry of Justice.

2.3.2. IMPLEMENTATION AND APPLICATION IN PRACTICE

The provisions do not specifically refer to persons with intellectual and/or psychosocial disabilities.

Concerning Austria as the issuing state, the Ministry of Justice cooperates in close liaison with penal institutions. An **IT system** was developed to identify prisoners eligible for transfers, which is also accessible by detention facilities.[56] This tool also allows for a transfer procedure to start quickly. The transfer procedure is usually divided into various phases, from the initial interview of the person who may be transferred in the prison to the confirmation and order of the transfer by the competent court.

The **requirement of consent** (to be transferred) is regulated in Art 39 EU-JZG. Under certain circumstances, no consent of the person (or the executing state) is necessary in order to carry out a transfer (e.g., if the executing state is the country of nationality of the person concerned or if the person would be deported to said Member State after the execution of the sentence).[57]

The prison management plays a decisive role with regard to the execution of the prison sentence in another Member State. The person concerned **must be heard and given**

a form concerning the conditions governing enforcement. They are entitled to review the files and be represented by a lawyer.[58] Upon arrival in the detention facility, they receive a leaflet which is translated into all EU languages, with relevant information on the possibility of a transfer.[59] The head of the detention facility is responsible for interviewing the person concerned and providing a written document of the person's statement.[60] For this purpose, a specific form is produced with relevant information regarding social rehabilitation.[61] If interpretation is needed, the head of the facility will request an interpreter (and where necessary, video interpretation is possible). These provisions are also applied to persons with intellectual disabilities as the same standards apply nationally. This statement is consequently forwarded to the Ministry of Justice, which decides/issues the transfer certificate. **The person concerned does not have a remedy against the certificate issued by the Ministry of Justice.**[62]

In 2020, a **department within the Ministry of Justice** known as the ***Centre of competence for supervision and transfers in connection with the enforcement of sentences***[63] was set up for the practical implementation of the transfer of foreign prisoners/detainees.

Since the establishment of the specific department for the transfer of prisoners, no incidents have been recorded regarding the transfer of persons with intellectual and/or psychosocial disabilities. There is a form with questions regarding the medical situation of the prisoner. These questions shall support the determination of the medical ability of the person to be transferred and also provide for the possibility to request support for the transfer by a prisoner. As the person is usually handed over at the border, it cannot be guaranteed by the Austrian task force that the support is also continued throughout the entire transfer.[66] Some actors involved in transfers pointed out that in practice it is often **difficult to make sure that the detention facility in the executing Member State receives all the necessary information** regarding the person concerned, including, for example, their therapy plan/past achievement and the like. They usually only issue a "simple" doctor's letter, which does not include detailed information on previous treatment. It is based on individual dedication of actors involved to contact facilities in other countries.[67] This exchange is not automated. In fact, the facilities (prisons and forensic therapeutic centres) are generally not involved in cross border proceedings and transfers. They only become informed of the transfer briefly before the transfer date, which leaves little to no time to prepare adequately and contact the relevant facility. While this may apply to all detention facilities and all prisoners, it is especially concerning when it comes to persons with intellectual and/or psychosocial disabilities, as the specific (successful) treatment history can be decisive for the outcome of the continuous treatment.[68]

Austria as executing state: Art 40(12) EU-JZG provides for a (mandatory) **ground for refusal** relating to the respect of fundamental rights and fundamental principles laid down in Art 6 TEU, as well as in cases where there are objective indicators that the custodial sentence/preventive measure was issued for the purpose of persecuting or punishing this person based on discriminatory grounds.[69] While this ground for refusal is not explicitly mentioned in FD 909/TOP, it may be derived from Recital 13 and Art 3(4) FD 909/TOP, stating that the FD ***"[…] shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union. […]"***.[70] As regards the specific requirements, the same rules as laid down for the refusal of execution of an EAW apply.[71] So far, no case has been identified where a decision related to the transfer of prisoners concerning a person with intellectual and/or psychosocial disabilities was refused on the ground of potential fundamental rights violations.

Additionally, the court (as competent authority in the execution state) may refuse to execute if the judgment contains a prison sentence or measure involving deprivation of liberty that is incompatible with Austrian law by its nature and cannot be adapted.

Although psychiatric or medical treatment is not specifically mentioned here, it is included. Generally, the court should first try to adapt the sentence or preventive measure involving deprivation of liberty contained in the judgment to comparable national measures [72]. This "adapted" measure should correspond with the original measure and must not be more severe than the latter. If the sentence is higher than the maximum sentence under Austrian law for a corresponding offence, the Court has to reduce the sentence to the maximum sentence.[73] If the measures cannot be adapted, the court may refuse to execute.[74] Austrian law only refers to prison sentences, which in a strict interpretation, would mean that it is only applicable to cases of "ordinary" criminal proceedings.[75] To be in line with the Framework Decision however, a broad interpretation of this is required, including proceedings concerning persons with intellectual and/or psychosocial disabilities, who – because of their disability – are subjected to other proceedings.[75] Some challenges arose in **practice due to the specific rules applicable** for persons with intellectual and/or psychosocial disabilities who are declared criminally responsible (to have had criminal legal capacity when committing the criminal offence) but still subjected to detention with forensic psychiatric treatment for an indefinite period of time.[77] As this specific form of proceeding and deprivation of liberty is not provided for in many other Member States, transfers cannot take place in most cases.[78]

Regional courts as competent executing authorities are **decentralised and do not have a specialization for some judges and smaller courts**.[79] The interviews and consultations conducted revealed that one of the reasons for the refusal of enforcement is that the issuing authority does not respond in a timely manner. Many actors have pointed out that cross border proceedings are rather lengthy and bureaucratic. While language in general is not considered to be a barrier, as translations are possible and accessible, it does however slow proceedings down. However, even beyond these issues, it was pointed out that even with Germany – where no translations are necessary – proceedings usually take at least two years.[80] The authorities tend to prefer to have the execution of a custodial measure in Austria, avoiding lengthy and bureaucratic proceedings, or to await conditional releases.

2.4. FD 2009/829/JHA – EUROPEAN SUPERVISION ORDER

2.4.1. STATISTICS AND LEGAL FRAMEWORK

FD 2009/829/JHA (FD 829/ESO) regulates the recognition of decisions on supervision measures as alternatives to pre-trial detention. The reason for the adoption of this instrument was that foreigners were often more likely to be placed in pre-trial detention compared to nationals, who – under the same circumstances – would be subjected to alternative measures.[81] The FD 829/ESO is implemented in Art 100 - 121 EU-JZG.82 Art 100-114 EU-JZG regulate the supervision of decisions of other Member States in Austria and Art 115-121 EU-JZG regulate the supervision of Austrian decisions in other Member States. Regional courts are competent issuing and executing authority.[83]

The interviews with experts and the research results show that there is only very limited application of these provisions.[84] According to information from the Ministry of Justice, no disaggregated data is collected concerning persons with intellectual and/or psychosocial disabilities, as there are no unified processes of the courts on the application of these measures.[85]

2.4.2. IMPLEMENTATION AND ASSESSMENT IN PRACTICE

The provisions do not specifically refer to persons with intellectual and/or psychosocial disabilities or other persons in a situation of vulnerability.

Concerning Austria as the executing authority, Art 101(1)(9) EU-JZG foresees **ground for refusal** relating to a violation of the

principles laid down in Art 6 TEU, or if there are objective indicators that the European Supervision Order (ESO) was issued for the purpose of persecuting or punishing this person based on discriminatory grounds.86 While grounds for refusal are optional under FD 829/ESO, they are binding under national law. If the requirements are met, the court must act accordingly. The specific requirements of the ground for refusal follow the same proceeding as Art 19(4) EU-JZG (concerning FD 584/EAW).[87]

Art 101(1)(9) EU-JZG goes beyond Art 15 FD/ESO and follows the letter of Recital 16 of FD/ESO. However, even without finding a basis in Art 15, it is still covered by Art 5 FD/ESO[88], which states that the FD ***"[…] shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union. […]"***[89]

The Austrian law also transposed into domestic law the following optional **supervision measures**,[90] which are particularly relevant for persons with intellectual and/or psychosocial disabilities:

- Obligation to undergo withdrawal treatment or other medical treatment, **provided that the person concerned consents to this measure;**[91] and

- Preliminary probation, **provided that the person concerned consents to this measure.**[92]

If the alternative measures to preventive detention ordered by the issuing state are not available in Austria, the competent authority should seek to find a corresponding or comparable measure in the context of the ESO. This corresponding measure must not be more restrictive for the person concerned than the original measure.[93] However, so far, no case on the application of this supervision measure has been identified.

The consultations have not revealed any **cases concerning persons with intellectual and/or psychosocial disabilities**. Thus, very little experience of practitioners can be found.[94] It was pointed out by various experts that there was not enough awareness of the FD 829/ESO and the possibility to have an alternative to pre-trial detention supervised in another Member State. Additionally, the FD 829/ESO was considered to be more complicated in its application and overly bureaucratic.[95]

2.5. FD 2008/947/JHA - PROBATION AND ALTERNATIVE SANCTIONS

2.5.1. STATISTICS AND LEGAL FRAMEWORK

FD 2008/947/JHA (FD 947/PAS) regulates the recognition of decisions on supervision of alternative sanctions and probation measures. The rationale behind it is – as with the other Framework Decisions – to facilitate social rehabilitation. FD 947/PAS is implemented in **Art 81 - 99 EU-JZG**.[96] Sections 81-94 EU-JZG contain the provisions for monitoring decisions of other Member States in Austria and Sections 95-99 EU-JZG contain the provisions for monitoring Austrian decisions in other Member States. **Regional courts are competent issuing and executing authority**.[97] Due to the absence of a centralized authority, statistics are difficult to find, and no disaggregated data is collected on cases concerning persons with intellectual and/or psychosocial disabilities, as there are also no unified processes of the courts on the application of these measures.[98] The consultations have shown that FD 947/PAS is very rarely applied, thus leading to a lack of experience of practitioners.[99] Reasons for the rare use of these provisions can be found in the differences in probation measures, alternative sanctions and lack of knowledge.

2.5.2. IMPLEMENTATION AND APPLICATION IN PRACTICE

Art 82(1)(12) EU-JZG foresees **ground for refusal** relating to the respect of fundamental rights and fundamental principles laid down in Art 6 TEU, or if there are objective

indicators that the decision was taken for the purpose of persecuting or punishing this person based on discriminatory grounds.[100] As regards the specific requirements, the same rules as laid down in Art 19(4) EU-JZG (concerning FD 584/EAW) apply.[101] Throughout the research within the context of the project, no case was identified where a decision related to an alternative sanction or probation measure concerning a person with intellectual and/or psychosocial disabilities was refused on fundamental rights grounds.

Furthermore, the court may refuse the execution **if the probation measure orders a medical or therapeutic treatment that cannot be supervised in Austria**.[102] Austrian law does not transpose Recital 16 of the FD 947/PAS, referring to the "person who has not been found guilty, such as in the case of a mentally ill person", but rather includes the wording of Art 11(1)(i) FD 947/PAS. Before being allowed to refuse the execution based on this ground, the court must consider whether there is the possibility to adapt the measure to a national probation measure.[103]

Austrian law implemented all probation measures and alternative sanctions laid down in the Framework Decision.[104] Austria did not add any additional sanctions. The measure **"obligation to undergo therapeutic treatment or treatment for addiction"**[105] was transposed in Art 81(2)(11) EU-JZG.[106]

It was pointed out by various experts that there was not enough awareness of the FD 947/PAS and the possibility to have one's probation measure supervised in another Member State.[107]

> **"We are not used to it and that is why it is not happening."[108]**

In cases where monitoring is possible in another country, pragmatic solutions are primarily used outside the regulations of the Framework Decisions. One judge reported that in some cases, for example, lawyers provided confirmation of treatment or support options and the person concerned was then conditionally released; the instructions were not monitored.

> **[...] there were always lawyers in the background who, so to speak, helped to push this along, who then provided the necessary proof of treatment so that you didn't have to worry about it at all. [...][109]**

Additionally, **highly bureaucratic systems** with no possibility of communication between actors involved (other than competent authorities) pose an additional burden on the sometimes very active organisations. From the probation agency it was explained that in one case, the person concerned, while being in detention, wished to go back to his home country (Germany). The Austrian probation agency then contacted the German probation agency. However, in order to have the probation transferred and the relevant measures supervised in Germany, decisions have to be taken by the competent national authorities. This takes a lot of time and resources. This case did not, however, concern a person with intellectual and/or psychosocial disabilities.

2.6. OVERALL CHALLENGES

LACK OF KNOWLEDGE OF OTHER (CRIMINAL) JUSTICE SYSTEMS

Many actors involved have raised concerns about the **different (criminal) justice systems** available concerning persons with intellectual and/or psychosocial disabilities. These differences pose an obstacle in cross border cooperation as some measures/options are not available, in which case the cross border instruments are not applied. It was pointed out that for these reasons, there are almost no cases of the transfer of persons who are detained based on Art 21(2) ACC, as there are almost no comparable systems in other Member States.

On the other hand, there is also a **lack of knowledge of the other systems**, which not only hinders the cooperation but also leads to an erosion of mutual trust between the relevant actors in the Member States and thus a certain reluctance to apply the cross border provisions. Even where there is knowledge of the corresponding system in the other Member States, there are genuine concerns and uncertainty about the relevant provisions, a lack of knowledge of the existing frameworks and sometimes a lack of confidence and trust in the other national proceedings. Interviewees have pointed out that they are not aware of these cross border instruments and thus, do not apply them in practice.

NO INSTITUTIONALIZED MEANS OF COMMUNICATION

While there is some communication between competent authorities (although successful communication also varies between Member States), communication between other actors or institutions involved (e.g., prison staff, probation officers or lawyers) is very difficult and sometimes impossible. Courts are also unable to contact prisons or other authorities in other Member States directly (or only at great expense). Lawyers have critically pointed out that there is no institutionalized cross border criminal defence system for the persons concerned.

It is very time-consuming and costly for attorneys and legal representatives of persons concerned to support their clients on a cross border case due to existing language barriers.[110]

LACK OF PRACTICE IS LEADING TO NO PRACTICE

There are hardly any cases of application, particularly with regard to the Framework Decisions or relevant provisions concerning the supervision. Consultations have shown that one of the reasons for this is that "people are not used to it" and therefore it is not applied. [111] It follows that courts, for example, find solutions in other (more practical) ways, unrelated to the provisions of the Framework Decisions.

NO OVERARCHING STANDARDS: TREATMENT AND TRANSFER

The lack of overarching standards for treatment in different Member States represents a strong obstacle in cross border cases. This concerns different aspects and stages of the proceedings. First, there should be standards on the transfer/support of the person concerned during transfer. Second, standards on the treatment after the transfer are also necessary. This is the case both for proceedings involving a transfer of persons as well as probation measures. Once the person is transferred, it is difficult to make sure they receive the same treatment (particularly psychological and educational/occupational therapy) due to the differences in systems.[112]

HIGH OPINION OF OWN SYSTEM

One prosecutor also pointed out that there is a tendency of finding one's own national system superior to other national systems. This perception also sometimes prevents the authorities from cooperating in cross border proceedings or using the existing framework.

03. NATIONAL LEGAL AND POLICIES FRAMEWORK CONCERNING DEFENDANTS AND DETAINEES WITH PSYCHOSOCIAL AND/ OR INTELLECTUAL DISABILITIES

3.1. DEFINITIONS AND STATISTICS

3.1.1. GENERAL DEFINITIONS

According to Art 1(2) CRPD, "Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others." The CRPD Committee113 understands a disability as an interaction between an individual's personal condition and the social and material environmental factors, such as negative attitudes or inaccessible information. Personal conditions may be "[a] physical, psychosocial, intellectual or sensory personal condition that may or may not come with functional limitations of the body, mind or senses. [...]".[114]

Austrian laws do not provide a consistent legal definition for the term **"intellectual and/ or psychosocial disabilities"**. The Law on (the protection of) Disabled Persons ("Behindertengesetz") defines the term **"disability"** as a "physical, mental, cognitive, or developmental condition which is not temporary and that impairs, interferes with, or limits a person's ability to engage in certain tasks or actions or participate in typical daily activities and interactions in society."[115]

In the criminal justice context, references are made to persons with intellectual and/ or psychosocial disabilities in different laws. First, the ACCP refers to **"vulnerable defendants"** in the context of mandatory representation in criminal proceedings. A person suffering from a "mental illness or who suffers from a comparable impairment of one's capacity".[116]

Additionally, the Austrian Criminal Code (ACC), mentions **"serious/severe and persistent mental disorder"** ("schwerwiegende und nachhaltige psychische Störung").[117] This includes persons with intellectual, mental, psychosocial or emotional disabilities as well as persons affected by dementia or learning difficulties regardless of age. Various experts have criticized this broad understanding, especially the inclusion of persons with dementia or learning difficulties for preventive measures, as the necessary improvement for release can be very hard (or even impossible) to achieve.[118] The identification of such a "disorder" can have an impact on the criminal proceedings as well as on the deprivation of liberty. The terminology used in the criminal context focuses strongly on a medical understanding of disability,[119] and does not comply with the terminology and social model or the human rights based model supported by the CRPD.[120] This model postulates that a disability is based on an inadequate social environment. A legal and social framework is needed to remove these social barriers and allow the persons concerned to access their fundamental and human rights.

The deprivation of liberty of persons with intellectual and/or psychosocial disabilities in the criminal justice sphere is primarily focused on the "preventive measure" ("Maßnahmenvollzug"), incorporated into the ACC in 1975. For a long time, there have been very few substantial

changes. In 2014, following an incident that was brought to the media's attention, a multidisciplinary expert group wrote a report containing 92 recommendations on reforming the system (touching upon all relevant points, including, for example, procedural safeguards, the legal basis, detention conditions, treatment, alternatives, etc.).[121] After almost seven years of repeated calls for reform from various actors in the criminal justice system and beyond, the Austrian parliament adopted a reform law on the legal system of preventive measures, which entered into force on 1 March 2023.[122] This reform is (supposed to be) the first step of a two-step legal reform. The first part focuses on changing terminology, foresees changes in the legal basis for the application of preventive measures (and its continuance) and procedural accommodations during the criminal proceedings.[123] It further aims to increase the application of probation measures and alternative sanctions. The second part of the reform will introduce a separate "preventive measure act" ("Maßnahmenvollzugsgesetz") that is intended to make further changes to the deprivation of liberty itself, including the execution of measures (therapy and treatment options), as well as release and aftercare options. A date for the draft law has not yet been announced. The reform law was received partly positively and partly negatively. However, it appears to address only some of the points of criticism and leaves key questions unanswered. In addition, some amendments were criticized particularly due to the lack of transitional provisions.

In September 2023, the law was amended in respect of the legal basis for the placement of juveniles. Prior to the amendment, a maximum limit of 15 years would have been set for juveniles. Persons who were placed under criminal law for a juvenile offense would have had to be released unconditionally after a period of 15 years. Instead of this maximum limit, case conferences are now to take place after 10 years in order to prepare inmates for conditional release. This adjustment, or "tightening up," has been criticized. Many of the young people concerned had already been informed of their imminent release. The change therefore led to frustration and disappointment.Persons with such an intellectual and/or psychosocial disability who have first committed a criminal offence as a consequence of their disability and who, second, due to their disability, are presumed to commit other offences in the future, may be subjected to **"preventive measures."** The preventive measure aims to (i) prevent them from committing further punishable acts and (ii) improve their condition in so far as it is not expected that they commit further punishable acts and lead an upright life that is compatible with societal life. Within the preventive measure system, Austrian laws envisage two categories: persons with an intellectual and/or psychosocial disability who are found ***not criminally responsible*** (i.e. to have had criminal legal capacity at the time of the criminal act) for the offence and those who are ***criminally responsible*** for the punishable offence.[124] The Austrian legal system does not foresee the concept of partial criminal responsibility. Persons who are subjected to preventive measures are no longer called "accused" but instead **"affected persons."**[125]

Persons with intellectual and/or psychosocial disabilities who are found to lack criminal responsibility by the court and thus deprived of their liberty under the scope of Art 21(1) ACC, are subjected to **preventive custodial measures** (and not detention as they do not receive a sentence).[126]

Persons with intellectual and/or psychosocial disabilities who found to be criminally responsible by the court and are thus deprived of their liberty under the scope of Art 21(2) ACC, are subjected to **preventive detention** and may receive a prison sentence in addition to their detention.[127]

The National Action Plan (NAP) on Disabilities 2022-2030 contains certain regulations concerning the deprivation of liberty of persons with intellectual and/or psychosocial disabilities. It includes a call for the reform of the current legal system in compliance with international human rights standards. Additionally, it includes plans for sensibility training and training especially of staff in

confinement institutions where persons with intellectual and/or psychosocial disabilities are being detained, as well as trainings for judges on the intensity of measures regarding the deprivation of liberty.[128] The NAP on Disabilities 2022-2030, however, falls short of expectations as it only briefly mentions the problems related to the complex system of preventive measures in Austria.

3.1.2. STATISTICS

The following table[129] shows the increase of absolute numbers of persons with intellectual and/or psychosocial disabilities who are subjected to preventive measures.

Year[130]	Preventive custodial measures 21(1) ACC	Preliminary (pre-trial) preventive custodial measures 429 ACCP	Preventive detention 21(2) ACC	Preliminary (pre-trial) preventive detention 438 ACCP	Regular detention (criminal justice)	Pre-trial detention	Total[131]
2021	**706**	99	505	0	5227	1565	8488
2020	**611**	87	452	4	6028	1801	9072
2019	**545**	75	418	2	6158	1866	9163
2018	**497**	75	382	3	5883	1933	8852
2017	**419**	74	383	2	5895	1757	8619
2016	**397**	56	380	2	6041	1721	8665

This table shows that over the past six years, the number of persons who are subjected to preventive measures (including pre-trial preventive measures) has increased from 9.65% of the total number of detainees in 2016 to 15.44% in 2021. This represents an increase of more than 150% of the total number of detainees over the course of five years. In 2022, the numbers have once again risen to a total of more than 1400 persons who are subjected to preventive measures.

One reason for this steady increase is the fact that there are more admissions to preventive measures each year than releases, which is inextricably linked to the lack of appropriately specialized aftercare facilities. A closer look also shows that in recent years there has been an increase in admissions to detention in cases of less serious crimes.[132] Another reason is the lack of preventive mechanisms to avoid the prospect of persons with intellectual and/or psychosocial disabilities ending up in the criminal justice system. *"There is actually evidence that* ***persons who are considered difficult and disruptive in psychiatric clinics and communal psychiatric frames of reference systems are increasingly left uncared for over longer periods of time.*** *Triggered by a predicate offence, they* ***ultimately have to be taken care of in detention centres for mentally ill offenders,*** *which is why the numbers of cases there are rising continuously."*[133]

This is also emblematic for one of the biggest challenges regarding persons with intellectual and/or psychosocial disabilities in Austria: the lack of sufficient care in the general healthcare system to support them and respond to their needs, which can equally function as a preventative mechanism.[134]

3.1.3. RECOGNITION, IDENTIFICATION AND ASSESSMENT OF INTELLECTUAL AND/OR PSYCHOSOCIAL DISABILITY

For persons with intellectual and/or psychosocial disability whose disability is identified, certain additional procedural safeguards are provided. It follows logically that the **moment when the disability is identified is crucial** for the rest of the proceedings.

On the one hand, the ACCP provides for certain procedural provisions that are applied in the various phases of criminal proceedings (see Chapters 3.2.1 and 3.2.2). Second, based on this identification, persons concerned may be subjected to different forms and places of deprivation of liberty.[135] Third, it may influence the availability and/ or application of alternative measures and probation services (see chapters 3.22). Whether or not a disability is recognized and subsequently determined may depend on the expertise of law enforcement officers, experts or other persons and actors involved (e.g., judges, lawyers, legal representatives of the person concerned, social workers, etc.). Additionally, interdisciplinary exchange can also help to recognize and respond to disability in a timely manner.

EXECUTIVE AUTHORITIES, PRISON STAFF AND MEDICAL DOCTORS

As the head of the investigation, prosecutors must rely on the information provided to them by the police as they very often are not in contact with the accused directly (unless they are subjected to pre-trial custodial measures). While a prosecutor can interview the accused him/herself, this rarely happens, except in the context of severe cases (e.g., murder charges) or if the prosecutor has doubts about the information due to a lack of available resources.[136] If there is no information in the case file about the mental health of the person and they have no reason to suspect anything, they continue with the ordinary proceedings without applying any additional safeguards.[137]

> **"In the case of intellectual disabilities, we usually learn very little about them. And then you are often surprised in the main hearing, when the people sit in front of you for the first time, what kind of condition the person concerned or the defendant is actually in." [138]**

If persons with intellectual and/or psychosocial disabilities are subjected to pre-trial detention, they are examined by a medical doctor upon admission to the pre-trial detention facility. However, intellectual disabilities frequently remain undetected, especially if they do not appear relevant for the criminal proceedings (i.e., if they are not severe enough to lead to preventive measures).[139]

IDENTIFICATION AND ASSESSMENT BY EXPERT WITNESSES

For expert opinions on determinations relevant for the criminal proceedings in the context of Art 21 ACC, only experts from the field of psychiatry are relevant.[140] Medical expert opinions (of the field of psychiatry) are an important element for various determinations concerning the criminal proceedings.[141] This opinion can lead to the foundation of the assessment of a disability (if it has not been identified before), the question of criminal responsibility, the perceived dangerousness of the person and the necessity of custodial measures and the possibility of alternatives. However, in recent years, medical experts and their work have been criticised considerably.[142]

As expressed many time, it is precisely because of the great importance of expert opinions that the current shortage of experts represents one of the greatest challenges, as they are unable to cope with the ever-increasing workload given the rising number of admissions. This acute shortage is accompanied by the **lack of quality standards for expert opinions**, which has been mentioned by numerous experts[143] (and has also been addressed in numerous sources in recent years).[144] In expert interviews, it was pointed out that the quality of the expert opinions vary.[145]

Past studies have shown that some expert opinions tend to be quite vague, do not explain clearly the behaviour of the person and are subjective.[146] Experts have pointed out that some expert opinions are products of "copy-paste," including inadequate and discriminatory language and sometimes containing paragraphs that do not even apply to the individual concerned. They also mentioned that some experts write their opinions simply on the basis of the case file without having talked to the person. This can pose a major problem, especially in the annual proceedings to review the need for continued placement (review proceedings).[147] Where examinations

do take place, the duration varies greatly and in some cases may only last a few minutes or take place in locations unsuitable for such an assessment, such as a public café.[148]

> **“Well, there are experts – when you read their name, you already know that it’s going to be “negative”. […] There are experts who are in favour of preventive measures in the vast majority of cases. There's a lot of copy-paste in the expert opinions. Unfortunately, it's often the case that they don't talk to the people concerned, and then they often prepare their opinions based on case files that are years old.”[149]**

> **“The preliminary reports are copied one-to-one, the statements of the prisons, if there are any, are copied one-to-one. But one does not deal with relatives, for example. One does not deal with a medical history before the crime.”**

In fact, it has been pointed out by experts that there are a lot of people who are **wrongfully subjected to preventive measures**.[150] One prosecutor explained that it sometimes happens that the questioning of the expert during the hearing reveals that the requirements which have been confirmed by the expert are actually not met.[151]

While the consideration of the expert opinion is at the discretion of the judge,[152] both prosecutors and judges have pointed out that due to the lack of their medical expertise, they (have to) rely fully on the expert opinion.[153] They can only determine the conclusiveness of the opinion.[154] Additionally, there is a shortage of experts, which presents a challenge for both prosecutors and judges.[155] This is due, in part, to low remuneration for expert opinions[156] as well the reluctance of some medical experts to provide opinions in light of possible public denunciation if there are negative consequences stemming from a release based on their opinion.[157] Accordingly, the experts whose opinions are considered of high quality and high accuracy are overwhelmed. One prosecutor shared that prosecutors sometimes “save” the good experts for the “important” trials (e.g., murder charges) because if they request them for every case, they might not be available for the bigger cases.[158]

Furthermore, it has been pointed out that the **lack of a specialization in forensic psychiatry** increases the differences in experts’ opinions and their approaches.[159] Experts should have specific knowledge of the field in order to make this kind of assessment, including the danger prognosis. With the new reform law, the expert should preferably be from the field of psychiatric criminal prognostics, and the expert opinion has to contain information about extra-mural treatment options that may lead to postponing the execution of the preventive measure.[160] This last point seems particularly relevant as the assessment currently relies primarily on medical factors, not taking into account other important elements gathered from the social net of the person concerned, social workers, NGOs working with persons with intellectual and/or psychosocial disabilities or others who have been supporting the person. It remains to be seen whether this will bring change in practice. One probation officer shared that where there are indicators of the need for examination by a psychologist or psychiatrist, the first step would be to discuss this with the person concerned.[161]

3.2. NATIONAL FRAMEWORK CONCERNING DEPRIVATION OF LIBERTY

3.2.1. CRIMINAL PROCEEDINGS, LEX GENERALIS

Persons with intellectual and/or psychosocial disabilities whose disabilities do not reach the threshold of "severity and persistence,"[162] as well as persons whose disabilities are not identified, are subjected to the procedural guarantees of "ordinary" criminal proceedings under national law, including the right to an effective defence, the right to a fair hearing and the right to information.[163]

A disability may be considered in the proceedings as a mitigating factor in sentencing.[164] If the person does not reach the threshold but is nevertheless found to lack criminal legal capacity, the proceedings are discontinued.[165] Additionally, a person whose disability is not (yet) recognized, is treated under the ordinary criminal procedural rules. **Besides the mandatory representation for pre-trial detention, the law further dictates mandatory representation in other cases, including, for instance, crimes that are sanctioned with more than three years of imprisonment.**[166]

The ACCP accounts for different forms of representation and defence in criminal proceedings. In some cases, the law provides for mandatory representation ("notwendige Verteidigung"), where the defendant must be represented by a lawyer. Cases of mandatory representation include defendants who are subjected to pre-trial detention. Additionally, mandatory representation is often linked to the severity of the crime. If a person does not provide the necessary financial resources to hire a defence lawyer, they may request legal aid. In cases of mandatory representation, if the person does not possess financial means, the court shall order a court-appointed defence lawyer. Additionally, persons who are in situations of vulnerability (including persons with intellectual and/or psychosocial disabilities) may request a legal aid defence lawyer.[167] The court is also required to assess whether the defendant may be in a situation of vulnerability, and if so, assign them a defence lawyer.

Persons whose disability does not reach the threshold (of severity and persistency) laid down in Art 21 (for the application of preventive measure proceedings) and persons whose disability has not been identified may be subjected to pre-trial detention.168 The requirements are laid down in Art 173 ACCP.

Pre-trial detention can be imposed at the request of the public prosecutor's office and by court order. It is permissible if the accused person is urgently suspected of a specific criminal offense and at least one of the grounds for detention applies: risk of absconding, risk of concealment or risk of reoffending when the offence carries a minimum prison sentence of more than six months.

The following procedural safeguards are in place for pre-trial detention proceedings:

- Every defendant/detainee **must be represented** by a defence attorney.[169]
- Pre-trial detention must be **ordered by a court and reviewed regularly** by the court. If the hearings are not held within the legally provided deadlines and/or the court does not make its decision in time, the detainee must be released.
- Before the renewal of the detention order or if the detainee requests one, **detention hearings** must be held, where the detainee has the **possibility to be heard**.[170]

While the **duration of pre-trial detention** relies on the severity of the (allegedly) committed offence, the law provides for an absolute maximum of pre-trial detention of two years.[171] During the main hearing, pre-trial detention is limited by the principle of proportionality. An extension beyond six months is only allowed if it is unavoidable due to special difficulties or the special scope of the investigation with regard to the weight of the reason for detention.[172]

If a conviction is handed down and a prison sentence of more than 18 months is imposed, the Ministry of Justice has to decide within the first six weeks of admission in which detention facility a person will serve the sentence ("Klassifizierung").[173] This decision is based on the nature of the person, their history, their personal relations and the nature of the offence. If a **more in-depth analysis of the personality** of the person is necessary, they must be subjected to psychiatric, psychotherapeutic or psychological surveillance. Once the person is placed in the detention facility, the head of the facility must determine the specific detention plan ("Vollzugsplan"), including work possibilities, education and medical treatment, contact with the outside world and surveillance.[174]

The duration of the sentence is set in the judgment. If a person was already subjected to pre-trial detention, this time will be counted towards the prison sentence.[175] Persons whose disability does not reach the threshold of preventive measures under Art 21 ACC and persons whose disability has not been identified also serve their sentences in (ordinary) **prisons**.

(Medical) treatment: The law contains various provisions regarding the medical care of prisoners, including the right to receive necessary medical or other care.[176] In every prison or detention centre. there is a general practitioner with a wide range of responsibilities. They decide on the physical and mental condition of the person being detained, their prison plan and the need for security measures to protect a person from harming themselves or others.

Prisons generally (unless they are special prisons) do not provide sufficient psychiatric services, psychotherapeutic services, occupational therapy or other forms of support that may be needed by detainees with intellectual and/or psychosocial disabilities.[177] It is not only the lack of specialists that is noticeable, but also a lack of general practitioners. This was also critically observed by the Austrian Ombudsman Board.

> **"[...] if it is not relevant to the offense, then there is usually no therapy. [...] If it is criminally relevant or necessary for prevention, then the person gets therapy. [...]"**

If a person cannot be properly treated in a prison, they may exceptionally be transferred to a forensic therapy centre.[178] If treatment there is not possible either, a transfer to a public psychiatric hospital or a psychiatric ward of a public hospital is possible.[179]

RELAXATIONS/PRIVILEGES

Depending on the individual circumstances (e.g., good behaviour or availability of resources), a detained person can apply for a relaxation of the sentence. This generally serves to check the stability of the person's development under certain "relaxed conditions" and are ultimately intended to prepare for (conditional) release. Important insights for the detention plan can be gained from the process of relaxed sentences.

3.2.2. PREVENTIVE MEASURE PROCEEDINGS

LEGAL BASIS

(1) Any person who has committed an act under subsection (3) under the decisive influence of a serious and persistent mental disorder and who cannot be punished solely because he was not criminally responsible (section 11) at the time of the act on account of such disorder shall be placed in a forensic therapeutic centre if, on the basis of his person, his condition and the nature of the act, there is a high probability that he will otherwise commit an act punishable by a penalty with serious consequences in the foreseeable future under the decisive influence of his mental disorder.

(2) If there is such a fear, a person who has committed an act pursuant to subsection (3) under the decisive influence of a serious and lasting mental disorder without being criminally irresponsible shall also be placed in a forensic therapeutic centre. In this case, the placement shall be ordered at the same time as the imposition of the sentence.

(3) Preventive measures may be occasioned only by acts punishable by more than one year's imprisonment. If the threatened term of imprisonment for this act does not exceed three years, the apprehension under subsection (1) must relate to an act directed against life and limb punishable by more than two years' imprisonment or to an act directed against sexual integrity and self-determination punishable by more than one year's imprisonment. Acts against the property of others, which are punishable by law, shall not be considered to be the predicate offense, unless they were committed with the use of force against a person or with the threat of imminent danger to life or limb (Section 89).

Within the preventive measure ("Maßnahmenvollzug") system, Austrian law envisages two categories: persons with an intellectual and/or psychosocial disability who are found **not criminally responsible** for the punishable act (Art 21(1) ACC) and persons who are **criminally responsible** for the punishable act (Art 21(2) ACC). The lack of criminal responsibility must be a consequence of the disability.[180]

Whether or not a person is criminally responsible depends on the condition of the person in the moment of the committal of the offense.[181] The ACC defines defendants/ detainees that are **without criminal legal capacity** in Art 11, which describes them as persons who are *"incapable of recognising the wrongfulness of his or her act or of acting on the basis of such recognition because of a mental illness, a mental disability, a profound disturbance of consciousness or another serious mental disorder equivalent to one of these conditions."*[182] The Austrian legal system does not recognise the concept of partial criminal responsibility. The question of criminal responsibility is a legal question and must be determined by the competent court.[183] However, in practice, this decision is (very often) primarily based on an expert opinion.[184]

The law lays out specific requirements for the application of preventive measures (including both preventive custodial measures and preventive detention). With the recent reform, some of the requirements have been changed. In all cases of persons subjected to preventive measure, where, based on the recent reform, the requirements are no longer fulfilled, persons must be released at the next judicial review.[185] The requirements are the following:

First, a **triggering offence**.[186] Any act punishable by more than one year's imprisonment qualifies as a triggering offence with the exception of acts against the property.[187] However, if the threatened term of imprisonment does not exceed three years, preventive measures may only be ordered if the prognostic act[188] is directed against physical integrity punishable by more than two years' imprisonment or against sexual integrity and self-determination punishable by more than one year's imprisonment. Purely property offenses are not suitable crimes. For juveniles, only offences that are punishable by a life sentence or a prison sentence of at least ten years can now be considered triggering offences.

It remains to be seen what impact this "increase" will have in practice. In other words, it is unclear whether in the future, fewer people who have committed a "comparatively low-threshold offense" will continue to be held for an indefinite period of time (in some cases far beyond the threatened sentence).

Second, the offender must have an **"impairment"**[189] and there must be a **link** between the offender's disability and the triggering offence.[190] The triggering offence must have happened under the significant influence ("maßgeblicher Einfluss") of the "impairment".[191] This seems to be in clear contrast to the CRPD, as the deprivation of liberty is based (in essence) on the disability of a person.[192] If the disability of the person does not reach the threshold of "severity and persistency" as described by the law, and the person is still declared not criminally responsible, the proceedings must be discontinued.[193] Art 5 ECHR (right to liberty and security) and ECtHR caselaw do not fundamentally exclude the deprivation of liberty due to disability but standardize the existence of sufficient procedural safeguards. In contrast, this appears to be in clear contradiction to the CRPD, which considers any type of deprivation of liberty based on the disability of a person concerned to be unlawful even if additional factors are also used to justify it.

Third, there must be a **prognostic act** ("Prognosetat"). The law provides that there must be a high probability ("hohe Wahrscheinlichkeit") that the person will commit another punishable act with serious consequences under the significant influence of the mental disability in the foreseeable future ("absehbare Zukunft").[194] This criterion is assessed through a "dangerousness prognosis" ("Gefährlichkeitsprognose"). The reform law introduced the term "foreseeable future," which has not been clarified by jurisprudence. It remains to be seen what this will mean in practice. The dangerousness prognosis is determined based on the condition of the offender at the time of the decision[195] and takes into account personal characteristics, their condition and the nature of the triggering offence.[196] The judge must decide on the dangerousness prognosis. However, in practice, this is often assessed based on the expert opinion.[197] The prognostic act is not defined with a minimum term of punishment. However, in order to meet the threshold of severe consequences, it must have especially bad implications, such as the death of a person or severe injury.[198] Financial crimes can never be prognostic acts.[199] It is not necessary to establish a danger in regard to society as a whole. Rather, it suffices if the dangerousness is only directed against a specific person.[200]

Whenever the requirements of Art 21 ACC are fulfilled, preventive measures must be ordered. The provision in itself does not entail any sort of proportionality test, nor must the measure be of last resort (ultima ratio). Preventive measures are the only consequence to the fulfilment of the requirements.[201] However, the court must consider whether the execution of the preventive measure may be temporarily refrained from upon ordering alternative measures and probation services.[202] The proportionality test should be part of the dangerousness prognosis; no separate assessment of proportionality is necessary.[203] Additionally, without the necessary improvement of available resources for outpatient treatment, the ultima ratio is effectively hindered despite the legal provision. This is not only contrary to national constitutional law[204] but also to international standards laid down, for example, in Art 5 ECHR and by the jurisprudence of the ECtHR.[205] Concerns have been raised regarding the threshold for confirming the requirements for preventive measure. Some judicial decisions lack proper justification and simply confirm the requirements, without providing further information on the argumentation.[206] This practice also appears questionable with regard to the conditions for the lawful deprivation of liberty set out by the ECtHR in accordance with Art 5 para 1 ECHR, according to which the individual case and interest in individualization must always be taken into account, particularly with regard to less restrictive measures.

If, at the end of the preliminary proceedings, the public prosecutor's office has reason to believe that the requirements of Art 21 (1) ACC have been met, it must submit an application to the competent court (instead of the indictment) for the person concerned to be placed in preventive measures. The person concerned has the opportunity to object to the application.

Persons with intellectual and/or psychosocial disabilities within proceedings based on Art 21 ACC (not criminally responsibility) may be subjected to pre-trial preventive measures ("vorläufige Unterbringung").[207] For this, all prerequisites of Art 21 ACC[208] must be presumed fulfilled. Whether or not these requirements are actually met will only be decided at the moment of the final on the imposition of the preventive measure itself.[209] Additionally, there must be one of the grounds for detention.[210] Based on the legal framework, it follows logically that whenever an application based on Art 21(1) ACC is presumed fulfilled (especially the prognostic act Art 173(2)(3) ACCP) that at least the "risk of commission of punishable acts" is fulfilled as well. Thus, an application for a proceeding according to Art 21(1) ACC is not possible without a simultaneous application for pre-trial preventive measures.[211] The provisions regarding the **maximum duration** of pre-trial detention (and detention during trial) apply equally for persons subjected to pre-trial preventive measures.[212]

At the same time, the law dictates a **subsidiarity of deprivation of liberty vis-à-vis non-custodial measures**/extra-mural care and treatment at the pre-trial stage. Pre-trial preventive measures must not be ordered (or continue), if the aims can also be achieved by having the affected person treated and cared for without being subjected to a preventive custodial measure.[213] In this case, the court has the ability to refrain from the pre-trial preventive measure. Before doing so, the court may involve the head of the probation services and request him to organize a social net conference.[214]

Based on specific facts, if the court assumes that the requirements for preventive measures are fulfilled but that it may refrain from the execution of measures ("vorläufiges Absehen"), the court should order pre-trial probation measures.[215] In this case the plan for the application of alternative measures must be provided in the main hearing.[216]

PROCEDURAL ASPECTS & SAFEGUARDS

For persons who are subjected to preventive measure proceedings (Art 21 ACC), the procedural rules of ordinary criminal proceedings apply.[217] Additionally, the following specific rules/safeguards apply:[218]

- **Mandatory representation** by a defence attorney:[219] The defence attorney must be present at all times of the proceedings. Under certain circumstances, the defence may already be required from the beginning of the preliminary proceedings (if it is clear from certain facts that proceedings for preventive detention are to be conducted).The absence of the defence attorney leads to a nullity of the proceedings.
- The **defence attorney has the power to make decisions and statements in favour** of the affected person against their will if this is beneficial to the affected person (applicable only for proceedings according to Art 21/1 ACC).[220]
- The **affected person must be examined by at least one expert from the field of psychiatry.**[221] This expert should preferably be from the field of psychiatric criminal prognosis. The affected person does not have a say in the choice of expert.
- For each interrogation of the affected person, one or more expert witnesses may be consulted.[222]
- In proceedings according to Art 21 ACC, the regional court decides as a court of lay assessors with two judges and two lay assessors.[223]
- Holding of a public oral main hearing.[224]

Reform: The reform law eliminated the possibility of having an in absentia trial. The main trial must be held in presence of the affected person.[225] Additionally, the court can no longer refrain from hearing or questioning the affected person.[226] If at any point the court comes to the conclusion that the person may be lacking criminal legal capacity and thus, that the proceedings should be altered, it must hear the affected person.[227]

While mandatory representation is provided throughout the proceedings until the end of the trial,[228] **no such mandatory representation is required during the execution stage** (i.e., during the time of the deprivation of liberty). This also has repercussions on the right to free legal aid. A person may request legal aid when they find themselves in a vulnerable situation,[229] but it is mandatory for proceedings in which representation is obligatory.

PLACES OF DEPRIVATION OF LIBERTY

All persons subjected to preventive measures should be detained in **"forensic therapeutic centres"**, including specialized detention facilities for persons who are considered not criminally responsible and specialized detention facilities for persons who are considered criminally responsible.[230] The provisions related to the **allocation to a specific facility**[231] apply equally for persons who are subjected to **preventive measures.**[232] In 2016, the Ministry of Justice additionally created specialized offices within the Ministry for preventive measures[233] and one specifically for preventive detention, "Clearingstelle".[234] This is the initial office to examine the person and consequently coordinate the treatment of persons and develop individual non-binding treatment and support plans. The establishment of the Clearingstelle was reviewed positively and the examinations are now done more speedily.[235]

Persons with intellectual and/or psychosocial disabilities who are considered **not criminally responsible** should be confined in **specialized forensic therapeutic centres** that offer the necessary requirements to respond to the (medical) needs related of the person concerned.[236] This also corresponds to caselaw of the ECtHR on Art (1) (e) ECHR. At this point, particular reference should be made to caselaw of the German Federal Constitutional Court in the "distance requirement" contained therein. This states, among other things, that persons with intellectual and/or psychosocial disabilities must be physically separated from prisoners in normal prisons and must receive individualized therapy options there.[237] It should also be noted at this point that, in contrast, the CRPD Committee generally takes the view that while persons with disabilities should not be separated from other detainees, conditions should be created within the general prison system to meet the needs of each person.

Currently there are three specialized forensic therapeutic centres for males: Asten, Göllersdorf and Wien Favoriten.[238] Additionally, the detention facility Wien Josefstadt, is a "branch facility" of Wien Göllersdorf.[239] Women who are subjected to preventive custodial measures are placed in Asten.[240] In these specialized detention facilities, persons are usually accommodated in residential units ("Wohngruppen") of different sizes (double or triple-occupancy) where they should receive broad therapeutic care and support, aiming to achieve mental stability, understanding of the disease and cooperation in treatment.[241] In 2010, a forensic psychiatry centre was opened on the premises of the detention facility Linz and the forensic centre Asten, focusing on the long-term rehabilitation of persons subjected to preventive custodial measures with primarily trained social workers and almost no prison staff. In 2019, the centre was reformed into an independent detention facility. Until a few years ago, the treatment in preventive custodial measures, especially in the forensic centre Asten, was received as somewhat successful with an overarching system and multi-disciplinary staff.[242] Due to the constant increase of persons being committed to the system and the lack of according increases in resources, these facilities have not been able to keep up this work.[243]

> **"The way it was set up, [it] was a model institute in my opinion and you could have kept it that way, you could really rely on it 100%, everyone involved who worked there did it to the best of their knowledge and belief. You could also trust that."[244]**

Reform: The reform law foresees the extension of forensic-therapeutic institutions instead of depriving persons in special departments of "ordinary" detention facilities. To some, this is a positive development as a response to the lived practice in Austria, which often showed a lack of treatment and therapy offerings. Recently, detention facilities have opened "special departments" for preventive measures due to the steadily increasing number of affected persons.[245] However, the creation of large institutions (of up to 400 detainees) does not seem to comply with the requirements of the CRPD of having smaller facilities that are close to the community and equipped with the necessary treatment and therapy services.

Alternatively, persons who are found **not criminally responsible** by the court, may be subjected to preventive custodial measures in a **public psychiatric hospitals or psychiatric departments of public hospitals.**[246] In 2019, 270 persons were subjected to preventive custodial measures in a public hospital while 302 were detained in detention facilities.[247] This is only possible if the hospital is adequately equipped to treat and care for the person upon consent of the person concerned and their legal representative and upon consultation with the head of the hospital.[248] In practice, the consent of the person concerned is usually not retrieved.[249] The preventive measure in a public hospital underlies some of the provisions applicable to the deprivation of liberty under criminal law, and in part, the provisions applicable to involuntary placement under civil law.[250] In practice, the treatment and the applicable systems can be unforeseeable and confusing, particularly for persons with intellectual and/or psychosocial disabilities.

Persons with intellectual and/or psychosocial disabilities who are found **criminally responsible** by the court are detained in **specialized forensic therapeutic centres**, or in separate departments of regular prisons.[251] Currently, there is only one forensic therapeutic centre, Wien Mittersteig, and a few departments in Garsten, Graz-Karlau and Stein. Additionally, women who are subjected to preventive detention are detained in Asten prison.[252]

Following the recent reform, the procedural rules have been aligned predominantly. What remains, however, is the difference in accommodation in forensic therapeutic centres for persons who were considered criminally responsible and those considered not criminally responsible.[253] It was pointed out that it might be more helpful to base the committal to a specific institution on the specific situation and condition of each individual and not have specialized detention facilities for persons subjected to preventive custodial measures and those for persons subjected to preventive detention.[254]

Regarding **pre-trial preventive measures**, additional provisions must be considered for persons who are considered to be lacking criminal legal capacity and those who are considered to have criminal legal capacity.

Persons who are considered not **criminally responsible** and are subjected to **pre-trial preventive measures** should be in **forensic-therapeutic centres**.[255] Where appropriate – and provided that the person concerned receives appropriate treatment and care – they may be placed in a psychiatric public hospital or in the psychiatric department of a public hospital.[256] If the person is placed in a hospital, the costs will be covered by the Ministry of Justice.[257] The person should be placed as close as possible to the competent court in the criminal proceedings. The Minister of Justice may, on a case-by-case basis, determine a different forensic-therapeutic centre if this is in the interest of the affected person or if this seems necessary to achieve the overall goal of the preventive measure.[258] The transfer to another facility may also be done in order to avoid overcrowding. In this

case, the consent of the affected person is required. If the affected person requests a transfer to another facility, the Minister of Justice has to decide within a period of four weeks.[259] Prior to any transfers, the affected person, their legal representative, the prosecutor's office and the court must be heard.[260] If the person is already subjected to pre-trial detention, they must be transferred to a forensic-therapeutic facility as soon as the court decides to order pre-trial preventive measures.[261]

For the execution of the pre-trial preventive custodial measures, the **rules regarding the execution of preventive custodial measures** are applicable.[262] During the pre-trial preventive custodial measure, the affected person should receive the treatment and care with the aim of improving their condition to such an extent that the application of preventive measure is no longer necessary or that the execution can be temporarily suspended.[263] Upon the issuing of a motion for preventive custodial measures or a bill of indictment, the head of the forensic-therapeutic centre has to send the court the therapeutic plan as well as documentation of the implementation and a report on the preliminary treatment success.[264]

There are some regional differences. In some states (e.g., Upper Austria and Lower Austria), pre-trial preventive custodial measures are most often carried out in **public hospitals** where persons receive treatment primarily in the form of medication. Public hospitals are facing difficulties in receiving the necessary documentation/information for the treatment of persons due to insufficient communication with the courts. The Ministry of Justice has confirmed that there is no unified system for how public hospitals receive the relevant information (including the expert opinion).[265] This sometimes makes it difficult for doctors in psychiatric hospitals to provide the adequate treatment speedily.[266] Therefore, it sometimes took weeks and months until the persons receive the necessary treatment, which also negatively influences their chances of having positive development during pre-trial preventive custodial measures and decreases their chances of having their measures conditionally suspended.[267] In Vienna, on the other hand, pre-trial preventive custodial measures are primarily carried out in the hospital ward of the prison for pre-trial detainees.

For persons who are considered to possess **criminal legal capacity** and subjected to **pre-trial preventive measures**, it was critically pointed out that during this period, they usually do not receive the necessary treatment.[268] During the pre-trial preventive measures, the detainees are treated as pre-trial detainees.[269] The available figures show that these cases were (or are) very rare. In the past years, practice showed that that persons are usually detained in (ordinary) pre-trial detention facilities.[270] During pre-trial detention, the persons concerned are treated like other pre-trial detainees, with very limited (or no) access to treatment or therapy. This pre-trial detention can be upheld until the judgement of the court (on the merits). Even after the sentence is final, persons remain in pre-trial detention facilities due to a lack of places in other institutions prescribed for them where adequate therapeutic and other programmes are available.[271]

Reform: **Persons with an intellectual and/or psychosocial disability who are facing proceedings according to Art 21 ACC** should already spend their **pre-trial preventive measure** in forensic therapeutic centres, in public psychiatric hospitals or in psychiatric departments of public hospital if this seems appropriate and the necessary treatment and care for the person concerned is available.[272] Pre-trial preventive measures for persons who are found criminally responsible in pre-trial detention facilities will no longer be allowed. However, until the end of February 2027, the previous rules are still applicable.[273]

DURATION AND REVIEW PROCEEDINGS

Preventive measures are ordered by courts for an indefinite period.[274] In this context, particular reference should be made to the proportionality between the severity of the offense and the sentence. The ECtHR stated that disproportionality between the offense and the sentence, taking into account the circumstances of the individual case, could undermine

Art 3 ECHR (prohibition of torture).[275] This proportionality test also applies with regard to measures as this also has the character of a sanction.[276] Although the placement order itself does not result in a violation of Art 3 ECHR, this must nevertheless be taken into account in the annual review. Due to the severity of the psychological burden associated with indefinite deprivation of liberty, the possibility of indefinite detention was considered by the CRPD Committee to be a violation of Art 15 CRPD (prohibition of torture).[277]

The measures must be enforced for as long as their purpose requires.[278] The purpose is twofold: it should (i) prevent them from committing further punishable acts and (ii) improve their condition in so far as it is not expected that they commit further punishable acts and lead an upright life that is compatible with societal life.[279] A revocation of the preventive measure is only possible by court decision. **Persons who are declared criminally responsible** may receive a (regular) sentence in addition to their (unlimited) preventive detention. In this case, the preventive measures should be applied first, and the prison sentence should be applied after.[280] The time that persons spend in preventive detention counts against the sentence. If they are released from the preventive detention before the end of their sentence (if they have received one), they are transferred into the "ordinary" prison.[281] In practice however, preventive detention usually exceeds the prison sentence.[282]

The **competent court has to decide on the necessity of the continuance of the preventive measure on an annual basis.**[283] The time limit begins on the day of the previous decision.[284] As part of the review, the court must determine whether the preventive measure is still necessary and thus, whether the degree of dangerousness, which is a determinant for the decision on the deprivation of liberty, is still existing or if it was eliminated. To assess the legality in the review process, the court is not obliged to consult a medical expert annually.[285]

However, the court has to consult a medical expert once every two years as part of the hearing regarding the conditional release.[286] However, in some cases, review decisions are based on the expert opinion from the criminal proceedings, which dates years back.[287]

In the case of Lorenz v. Austria,[288] the ECtHR dealt with the case of a man, Lorenz, who was sentenced to imprisonment for three counts of murder and placed in a forensic psychiatric institution for persons with intellectual and/or psychosocial disabilities. The Court declared him criminally responsible, therefore sentencing him to a prison sentence and additionally ordering preventive measures. After serving his sentence, he asked to be released, but the Austrian courts refused because he needed therapy to prepare for his release, which was only offered in another institution. Despite repeated recommendations, Lorenz was not transferred to the appropriate facility. The ECtHR ruled that the continued deprivation of liberty violated the right to personal liberty as the authorities had failed to transfer Lorenz to the required facility and had not adequately reviewed the lawfulness of the placement. The ECtHR emphasized that the continuation of placement in an institution for offenders with mental disorders must be carefully reviewed and that the medical assessment must be up to date to adequately assess the mental health of the person concerned at the time of the discharge review. In addition, it was held that delay in a review is a violation of the right to a prompt judicial decision.

The ECtHR further dealt with the question of obtaining expert opinions at reasonable intervals. In this specific case, the execution court had based its decision on an expert opinion that was around three years old, as the person concerned had refused to be examined by a medical expert. The Court found that "special diligence is required from the authorities when deciding whether to continue the preventive detention of someone like the applicant, who has already spent such a substantial amount of time in an institution for mentally ill offenders".[289] It further found that if the person concerned refuses to be examined by a medical expert, the court must consult a new opinion based on the casefile, which should then be used by the court as a basis for the continuation of the deprivation of liberty.[290]

In cases of annual review proceedings regarding the continuation of preventive measures, it is frequently the case that only statements of internal experts (medical doctors at the hospital) are taken into account. The CPT in its recent report raised concerns about this practice because involving external experts independent from the institution where the person is deprived of their liberty offers an important safeguard, particularly for persons who have already been detained for a long time.[291]

In some cases, years go by without "new" expert opinions being requested and taken into account.[292] Lawyers in particular have expressed concerns that **annual review proceedings are dealt with rather hastily, without giving the detainee notice and sufficient time to prepare for the hearing.**[293]

> **"The hearings themselves are for the most part mass processing, where an appointment is always made with the corresponding prison and on that day everyone who has just completed the year and has the hearing [...]. Very few of them have the opportunity to really have their say. [...] I have also spoken with those affected, who often did not even know that this was actually already the big appointment. They all have a lot of hope in the appointment, so to speak. That is, obviously there is also little preparation. [...]"**[294]

Additionally, the person concerned may **request a conditional release throughout the year** if they consider that the necessity of the ongoing confinement no longer persists and that they should be conditionally released.[295] As persons who are subjected to preventive custodial measures or preventive detention do not have **obligatory representation in review proceedings**, they are very often not aware of the upcoming proceedings nor of their ability to request the review throughout the year. Their right to be assisted by a lawyer is frequently not exercised in practice, which lowers the chances of having the case properly reviewed and being (conditionally) released.[296]

PRIVILEGES/RELAXATIONS

Based on the individual circumstances (e.g., good behaviour and availability of resources), a person subjected to deprivation of liberty may request certain **privileges/ relaxations.**[297] Privileges may include detention without locking the common rooms or the gates during the day, leaving the institution for the purpose of education or for the purpose of receiving outpatient treatment measures, supervised exits or the

interruption of the preventive measure.[298] Privileges generally **help the review of the developmental stability** for the person under certain more "relaxed conditions."[299] Based on the process of privileges, important knowledge may be discovered for the execution plan.

The **interruption of the preventive measure** ("Unterbrechung der Unterbringung") is often used (by being placed in an extra-mural facility for a trial period) to assess the situation and condition of the persons.[300] The interruption of the preventive measures may **only be allowed if it is expected that the person will not commit further offences during the interruption.** For this, the behaviour before and during the deprivation of liberty is considered. Additionally, an interruption of up to one month may be considered if this is deemed necessary to prepare a person for the (conditional) release.[301] Interruptions of a duration of up to two weeks are decided by the head of the (special) detention facility. Beyond that, the decision lies with the execution court.[302] As a general requirement, an interruption is only possible if the person concerned has a place to stay.[303] The detention facility pays for the interruption (e.g., if the person is released into an extra-mural facility) and carries the responsibility. What experts have pointed out as interesting is that the interruption of the preventive measure is not connected to any judicial orders, whereas if persons are conditionally released, they usually receive a judicial order for many different alternative measures. However, based on an internal order, the detention facilities must prepare an outline of the aims and goals of the interruption and the extra-mural facility has to provide monthly updates on the progress. After 90 days, the extra-mural facility must determine, whether the interruption is successful, additional time is needed and conditional release is recommended. Research shows that this privilege has been used increasingly over the past years and has become an essential pre-requisite for conditional releases in many cases.[304] While this privilege was generally reviewed as a positive measure for persons in preventive measures, experts have mentioned some **concerns regarding its application.**[305] First, as the interruptions can be repeated one after the other, instead of being conditionally released, persons can have multiple interruptions consecutively applied. This is referred to as chain interruptions ("Ketten-UdU").[306] While this also leads to their enjoyment of this privilege and they are temporarily placed in an extra-mural residence facility, the interruption might be terminated at any time (without any wrongdoing from their side). They do not have a right to an interruption or a prolongation. Additionally, as long as they are not conditionally released, their probation period, leading in the end to the definite release, does not start.[307] This decreases the morale of the person deprived of liberty and leads to a loss of perspective.[308] Second, the enjoyment of this privilege very often relies on the availability of extra-mural facilities offering the necessary treatment of a person. In practice, however, the enjoyment of such privileges (as a sign of personal development) is an important factor on which the decision on conditional release depends. Consequently, persons may not be conditionally released for lack of available resources.[309]

CONDITIONS OF DETENTION

The **conditions of detention** may vary significantly depending on what type of deprivation a person is subjected to (i.e., ordinary prison sentence, preventive custodial measures or preventive detention). However, there are several common provisions and safeguards for all deprivations of liberty in the criminal context.[310] The standards and provisions regarding conditions in detention (including medical treatment, social care, contact to the outside world, disciplinary measures, purposeful activities, privileges, etc.) are regulated in the Austrian Correction Act (ACA). In case of deprivation of liberty in a public hospital, the provisions of the Involuntary Placement Act (IPA) are of particular importance.

Adequate treatment: Every prison or detention facility has a designated **medical doctor**, a general practitioner who has a wide range of responsibilities. They decide on the physical/ mental ability of a person to be detained, their execution plan "Vollzugsplan", as well as the

necessity of any sort of security measures to protect a person from harming himself or others.[311]

According to national law, persons subjected to **preventive custodial measures** should be treated based on the accepted principles and methods of psychiatry, psychology and education. Their rights and their dignity must not by violated.[312] Austrian laws state that during **preventive detention**, persons should be provided with the necessary treatment and the medical care, especially psychiatric, psychotherapeutic and psychological, that they need.[313] Additionally, quality standards regarding treatment and therapy during preventive detention have been developed, which are mandatory for all detention facilities.[314] Despite these standards, multiple experts from different fields (including representatives of NPMs, lawyers, medical doctors and probation officers)[315] have pointed out that persons who are subjected to preventive detention very often do not receive the necessary treatment and support they need. Very often, persons who are being subjected to preventive detention (and particularly during the pre-trial phase) are detained in ordinary prisons without adequate support and care/treatment.[316]

> **[...] he does not belong here [prison] ... he belongs in a hospital [...][317]**

There have been multiple accounts of persons **not receiving the treatment (particularly therapeutic treatment) that they need** for multiple months.[318] One expert even shared that he was asked to provide a statement for the first annual review proceedings on the development of the person concerned. However, at this point, that person's therapy had not even started yet.

> **[...] some who waited a year for a place in therapy. Then they just sat around in some prison. That is terrible. [...] The person was de facto in the penal system for a year, because there was nothing. And then the court asked me to make a statement about a conditional release or a release. So, with what? So, there is nothing to judge. [...][319]**

Sometimes the detention facilities in which persons are subjected to preventive detention simply do not offer the treatment/therapy that is necessary. In turn, this can lead to overly long stays in preventive detention due to lack of "improvement of the situation" and "reduction of danger." The ECtHR has ruled that the lawfulness of deprivation of liberty with regard to Art 5(1)(e) ECHR is dependent on a therapeutic purpose.[320] In the abovementioned case, Lorenz v. Austria, the applicant was subjected to preventive detention. He had requested a transfer to the specialized detention facility Wien Mittersteig as only there he could receive the therapy that was a precondition for his conditional release. The head of the detention facility rejected the request, which led to the applicant's refusal to undergo any further therapy. This refusal was interpreted by the detention facility as a refusal to cooperate, which served as a basis for the denied transfer. The applicant continued to be detained in the institution for four more years. The ECtHR found that in such a situation, as the authorities did not examine the applicant's transfer in the review proceedings, the continued detention did not meet the criteria of lawfulness under Art 5 ECHR (right to liberty and security).[321]

> *"64. The Court concludes from the above that the prison authorities ignored, over several years, the obvious need – which had clearly been stated in the domestic courts' decisions – that the applicant be transferred to the Vienna-Mittersteig Prison to receive the appropriate therapy and be prepared for an eventual release, even though at the latest from 2009 the authorities could and should have been alerted that this was the only institution where the applicant could receive such treatment. While the applicant refused to undergo any more therapy, he requested measures for his release.* ***It was thus for the authorities to find a way to overcome this obvious deadlock and examine the question of the transfer of the applicant to that prison.***

> 65. Thus, ***because the authorities failed to examine in the review proceedings the question of the applicant's transfer to the Vienna-Mittersteig Prison, the applicant's detention was not in line with the requirements of lawfulness of Article 5 § 1 (e) of the Convention.*** *For the same reasons as those set out above, the Court finds that the causal connection between the applicant's initial sentence and his continued detention was broken, which is why his detention following the review proceedings in question could not be justified under sub-paragraph (a) of Article 5 § 1 of the Convention either."*[322]

On the other hand, a transfer to another facility may require the transferred person to "prove themselves" again, repeat therapies (e.g., "anti-aggression-therapy") and the behaviour or steps taken in the previous facility are not taken into account. Any training or therapy that has already been completed may have to be repeated. This can again lead to a prolonged placement.

Lack of specialist care/adequate staff: There is general a lack of (resources for) psychologists as well as psychiatrists and physical therapists.[323] In the forensic-therapeutic centre Asten, the NPM recently reported that medical care was not available after 3.30 pm or on weekends.[324] In the most recent report, the CPT further reported that medical care as well as psychologists, nursing staff and special educators were insufficient in Göllersdorf. It raised particular concerns about the situation in the detention facility Stein, where three psychiatrists were available for a total of 22 hours per week for an estimate of around 800 detainees, more than 100 of which were in preventive detention.[325] In addition to a shortage of specialist doctors, there is a considerable shortage of other specialist staff in prisons. For example, there are not enough social education workers and nursing staff (especially in light of the increasing number of elderly inmates). Prison officers often do not have sufficient training in dealing with persons with intellectual and/or psychosocial disabilities, which exacerbates the situation. Furthermore, the CPT recommended that *"[a]t all forensic psychiatric facilities, including forensic prison establishments/units, the majority of staff working in direct contact with the patients should be health-care professionals."*[326] Language barriers can also impede the success of treatment or therapy or fundamentally mean that affected persons do not receive the support they need.

The National Action Plan on Disabilities 2022-2030 provides for sensitivity training and training courses, particularly for staff in prisons where people with intellectual and/ or psychosocial disabilities are housed, as well as training for judges.[327]

Lack of capacity in hospitals: Hospitals do not have the necessary capacity to treat people adequately, even in urgent/emergency cases.[328] This impression was also confirmed during the national roundtable.[329] A lack of resources in public hospitals led in one case, for example, to a prisoner being released from hospital after just two days following several suicide attempts even though it was established that the risk of suicide was chronic and still acute. The detainee was then held in solitary confinement in the prison for three weeks without the necessary and appropriately trained staff being available, which further increased their personal suffering.[330] These abuses do not comply with international protection provisions, particularly the provisions of the Convention against Torture.

Use of restraints/security measures: Persons who are deprived of their liberty may be subjected to **measures of restraint/ security measures**. These may include solitary confinement in a special security cell, search of belongings or the use of measures of (mechanical) restraint, such as cuffs or restraining jackets.[331] Placement in specially secured cells is only permitted if the person being held poses a danger to themselves or other persons, but also if there is a danger to property. The use of restraints is only allowed if the person threatened, tried or prepared suicide, demonstrated physical acts towards others, or attempted to leave, and only if other security measures are not

possible or sufficient.[332] While subjected to these measures, persons concerned are denied the right to receive visitors as well as telecommunications.[333] In public hospitals, these measures are ordered by a medical doctor.[334] In detention facilities, the measures are ordered by the executing prison officer, and must be authorized by the head of the facility.[335] These measures must be approved by the executing court if they exceed a week (for security cells) or 48 hours (for restraints). The court must also determine a maximum duration of the measures.[336] Special security measures must be subject to a proportionality test.

The NPM reported that due to the lack of space, resources and single rooms in public hospitals, persons are being subjected to **personal restraints (in the presence of other patients).** The NPM shared its concern with regard to this behaviour and indicated a possible Art 3 ECHR (probation of torture) violation. In one of the recent reports, it stated that it is ***"not acceptable that external conditions determine whether a patient is mechanically restrained, forensic area is to be extended, the structures need to be enhanced."***[337] The NPM further witnessed that fixation straps were not removed after the restraint but instead remained to restrain the person even during sleep.[338]

Documentation of **restraint measures** (including the use of fixation straps and isolation) were not complete or only vaguely referring to the danger for the person or others. This makes it increasingly hard to reconstruct the events that took place and gain access to the necessary remedies against these measures.[339] The CPT recently recommended to keep a register of measures such as fixation or isolation.[340] Especially with regard to the prevention of inhuman treatment, meticulous documentation is of utmost importance.[341] There are no unified guidelines on the use of restraints available.[342] During seclusion, persons concerned are not always supervised and they lack meaningful contact with human beings (apart from daily medical visits or brief check-ins during meal times).[343] The use of chemical restraints in the form of rapid tranquilizers is another reason for concern. Furthermore, for persons in preventive detention, the use of solitary confinement for **excessively long periods** of time **without meaningful contact** to human beings is another reason for concern.[344]

Non-consensual treatment: If persons subjected to preventive measures refuse to participate in a medical examination/ treatment which is absolutely necessary under the circumstances, they may be subjected to these measures by force, provided this does not involve a risk to life and is otherwise reasonable.[345] A measure is considered "absolutely necessary" if it is necessary to avert danger to life and not merely a minor bodily injury.[346] There is no uniform answer as to which treatments are considered "reasonable" within the meaning of the law.[347] If one follows the view of the CRPD, any form of compulsory treatment must be rejected. In any case, Art 69 ACA does not provide a legal basis for long-term psychopharmacological therapy but is aimed at acute measures.[348]

Unless there is imminent danger, the approval of the Ministry of Justice must be obtained before any compulsory examination or treatment is ordered.[349] In practice, **consent is not always obtained, and persons concerned are not properly informed of their medication.**[350] Approvals from the Ministry are sometimes simply obtained by phone without further documentation.[351] Experts have also raised concern regarding the consequences of refusing to take medication. When this happens, persons concerned are perceived as non-cooperative, which may negatively influence their annual review and the chances of receiving privileges. This was also confirmed in the most recent CPT report.[352]

Overuse of pharmaceutical treatment: Experts have further noticed **an increase in medication/pharmaceutical treatment,** particularly psychopharmacological treatment, which is given priority over other forms of treatment and care.[353] Those affected suffer from the consequences of prescribed medication even beyond the duration of their placement.

“Recently during a house visit at my former place of work and I saw there a client again, whom I have cared for seven years ago. Seven years ago, the young man was quite marked by his drug career, but very fit, very active, well able to treat himself, has written rap lyrics in “self-therapy”, so to speak. I have not seen him for many years in between, now recently again and he has about 40 kg more, has aged massively, and can hardly formulate a coherent text, so really not. The short term memory has suffered massively, so he has degraded so drastically in so few years. He has already had a very high medication at that time and has said 'hey, I think that makes me stupid!' and he was really right.”[354]

Meaningful contact/ contact to outside/ loneliness/ stigma: While the law states that persons must be treated with respect and dignity,[355] practice does not correspond with these legal requirements. Experts have pointed out that persons who are subjected to preventive measures suffer more severely than ordinary prisoners from degrading treatment by authorities.[356] They are victims of insults and there are multiple accounts of persons experiencing loneliness and desperation. One probation officer mentioned that ***“[m]any people in the measure are really lonely, no closeness at all or very little.”***[357] This was increased during the COVID-19 pandemic and the measures imposed to avoid the spreading of the virus.[358] Private telephone calls are often not possible, due to their location in hallways.[359]

Lawyers have mentioned that cooperation with (specialized) detention facilities are often difficult and that they are facing difficulties in accessing documents (e.g., therapy plans).[360] Due to the COVID-19 pandemic, many detention facilities/forensic centres introduced the possibility of persons who were deprived of liberty to video-telephone with their families and friends. This possibility, while not replacing the personal visits but rather serving as an option for “regular” telecommunication, was appreciated both by the persons concerned as well as their relatives and friends. Many custodial facilities continue to offer this service.[361] The forensic therapeutic centre, Asten, introduced an online registration platform for visitors/attorneys.[362] With this platform, it is even possible to apply for a zoom-video meeting with a person inside an institution. This platform made organization much easier and was also welcomed by the persons concerned and their relatives/friends.[363]

Living conditions/privacy: In past years, many **psychiatric hospitals** or forensic departments of public hospitals have been **overcrowded, some even** by up to 100%.[364] The Austrian NPM mentioned the negative influence of overcrowding on living conditions in forensic departments of public hospitals.[365] Due to this overcrowding, patients share their rooms with up to six others.[366] This lack of privacy in the rooms, combined with an improper use of social rooms (e.g., for therapy or restraints), decreases the ability of patients to withdraw and be alone.[367] The Austrian NPM also mentioned that this lack of space leads to increased potential for aggressive behaviour which consequently leads to a rise in medication.[368] Additionally, it was pointed out that the (newly re-designed) detention facility, Wien Favoriten,[369] is not equipped for the needs of persons with intellectual and/or psychosocial disabilities.[370]

Safeguards/complaints and (legal) support: For involuntary treatment under civil law,[371] **patient attorneys** (“Patient:innenanwaltschaft”) are available; each patient is provided with a patient attorney if they are subjected to civil involuntary treatment.[372] This system provides each patient with information, support and (legal) advice on his or her situation and the relevant legal provisions. These patient attorneys also represent the patients in their legal proceedings concerning the civil involuntary treatment and provide information to legal representatives and relatives.[373] Experts have been voicing for a long time to adopt an equal system for persons within the preventive measure system in order to protect and guarantee their rights whilst being deprived of liberty.[374] Additionally, persons subjected to preventive measures are not always aware of complaint routes (e.g., to the Ombudsman Board) nor do they have access to complaint boxes[375] in a confidential way (i.e., not outside the view of a surveillance camera).[376]

3.3. NATIONAL FRAMEWORK CONCERNING ALTERNATIVES AND PROBATION

3.3.1. GENERAL

The Austrian criminal justice system accounts for non-custodial measures that are self-standing sanctions:[377] diversion,[378] monetary penalties and the electronic monitoring anklet. None of these non-custodial measures are applicable to the preventive measures system.[379]

In addition to these alternatives, the Austrian criminal justice system provides for a variety of alternative measures that may be imposed by the court either in case of the conditional suspension of a prison sentence, preliminary refraining from a preventive measure or in case of a conditional release from a prison sentence/preventive measure. The former is available for pre-trial and post-trial detention/preventive measures; the latter only applies to post-trial detention/preventive measures.

If a person is subjected to conditional suspension or conditional release of his/her **prison sentence**, the court may issue a judicial order ("Weisung") for non-custodial measures, as well as probation services.[380] Generally, the court may issue any order that seems appropriate to prevent the person from committing further punishable offences. Alternative measures that cause an unreasonable interference with the personal rights or the lifestyle of the person concerned are not permissible.[381] Art 51(2) ACC contains a list of possible alternative measures that may be ordered, including:

- Order to live at a certain residence, with a specific family or in a specific home/facility;
- Order to avoid a specific location or persons;
- Order to communicate any change of address; and
- Order to contact an authority regularly

Additionally, the following non-custodial measures may be ordered only if the person gives his/her consent:

- Psychotherapeutic treatment;
- Medical treatment; and
- Withdrawal treatment

For persons who are subjected to preventive measures where the execution of the preventive measure is refrained, or who are conditionally released, the order to receive extra-mural treatment is mandatory. Usually, this order comes with other alternative measures, including psychiatric supervision, remaining at a place of residence and medication.[382] Usually, the person must receive probation services and additionally receive an order to live in a residence ("betreutes Wohnen"), which, depending on individual needs, may be full-time or part-time and sometimes in the form of "mobile" treatment.[383] Additionally, persons also receive an order to receive pharmaceutical and psychotherapeutic treatment.

In Austria, the non-governmental association **"NEUSTART"** provides probation services.[384] In addition to the offers of probation service, NEUSTART offers follow-up care of those released from prison, which constitutes an important pillar of rehabilitation assistance. Furthermore, NEUSTART offers probation service on a voluntary basis, in case there is no judicial order. The probation agency NEUSTART provides a thorough training of probation officers, including facilitating interaction with persons with intellectual and/or psychosocial disabilities and those who are subjected to (or used to be subjected to) preventive measures.[385]

If the orders for alternative measures are not complied with, or the person refuses to cooperate with the probation service, the execution court may revoke the conditional suspension if the court deems it necessary to prevent the commission of further offences.[386] Based on the experience of a probation officer, the court usually contacts the probation officer (if one is appointed) to find out what happened and whether there is a reason for the behaviour of the person. If

necessary, there may be a meeting with the competent judge where a formal warning is pronounced by the court.[387]

3.3.2. CRIMINAL PROCEEDINGS; LEX GENERALIS

CONDITIONAL SUSPENSION

For persons with intellectual and/or psychosocial disabilities who are subjected to **ordinary prison** (or monetary) sentences, the rules of conditional suspension ("bedingte Nachsicht") based on Art 43 ACC apply. Following this provision, a person who was sentenced to a prison sentence of no more than two years should have their sentence conditionally sentenced by the court for a probation period if the mere threat of the execution of the sentence, or in combination with further measures, will prevent them from committing further offences.388 Special consideration should be given to the possible progress achieved during pre-trial detention.389 This means that the person still receives a prison sentence, but this sentence is not executed. If a judge decides to conditionally suspend the sentence in combination with conditions, they must lay down the specific conditions. If the conditional suspension is not revoked throughout the probation period, the sentence will be definitely suspended.[390]

Persons whose disability does not reach the threshold of Art 21 ACC (preventive measures) and persons whose disability has not been identified may, as an alternative to the prison sentence, receive a monetary penalty or an electronic monitoring anklet.

CONDITIONAL RELEASE

Persons with intellectual and/or psychosocial disabilities whose disabilities do not reach the threshold of Art 21 ACC or whose disability has not been identified are – if they receive a sentence of imprisonment – detained in "ordinary" prisons. From there, they may be conditionally released. Detainees may apply for conditional release after having served half of their sentence, after at least three months, if the court considers that by issuing orders for alternative measures, the detainee will be prevented from committing further offences. The court may order a probation period and further measures.[391]

Regardless of the rules of the conditional release, after the end of their sentence, detainees are released without any further conditions and without a probation period.[392]

PROBATION SERVICES

If probation services are ordered by the court, a probation officer is appointed to support the person. He/she has to provide updates to the court on the development and situation of the person.[393] If a preliminary probation order is made during the pre-trial and trial stage, the preliminary probation officer prepares a report to be submitted at the hearing.[394]

For detainees in "ordinary" detention, as a preparatory measure before release, the head of the detention facility may initiate a **"social net conference"** ("Sozialnetzkonferenz")[395] to determine the requirements for a conditional release and determine the necessary measures to prevent the commission of further offences.[396]

3.3.3. PREVENTIVE MEASURE PROCEEDINGS

REFRAINING FROM EXECUTION OF PREVENTIVE MEASURES

The court shall **refrain from executing a preventive measure**[397] if the affected person can receive treatment and care outside of a forensic therapeutic centre and if this treatment in addition to other measures can counter the risk of committing further crimes.[398] The court has to take into account the personality of the person, their previous life, the character and severity of the triggering offence, the state of the person's health, the derived dangerousness, the previously achieved treatment success, the prospect and necessities of a suitable support and the prospects of an upright behaviour.[399]

The reform law no longer targets whether the mere threat of deprivation of liberty in

combination with extra-mural treatment and possible other measures (e.g., an order to live at a certain residence or to avoid certain locations) will prevent the person from committing further offences. Instead, it states that **if the dangerousness may be reduced in another way than by depriving the person of their liberty, this should be given priority.**[400] If these requirements are met, the preventive measure is not to be implemented and the competent court has to decide to refrain from the execution of the preventive measure, determine and order alternative measures and set a probation time between one and five years.[401] The execution of preventive detention (Art 21(2) ACC) may only be refrained from if the sentence is also conditionally suspended.[402] The court then has to determine and order non-custodial measures that are necessary and appropriate to the danger for which the criminal placement was ordered.[403] The law further clearly states that alternative measures must not infringe on the personal rights and lifestyle of the affected person.[404]

The following non-custodial measures may be ordered by the court:[405]

- To live in a specific location, with a specific family, in a specific home, or in a social-therapeutic residential facility;
- To undergo another form of outpatient care or to receive care in a daily structure;
- To avoid specific apartments, places, associations, or contact with persons;
- To refrain from consuming alcoholic beverages or other intoxicating substances;
- To learn or pursue a suitable profession that corresponds as closely as possible to one's knowledge, skills and inclinations;
- To report any change of one's place of residence or workplace; and
- To report to court or another institution at specific intervals.

Additionally, the court may order withdrawal treatment or psychological or psychotherapeutic treatment with the consent of the affected person. If the person does not have legal capacity, the legal representative of the person must give their consent to the order.[406]

As a rule, probation services should be ordered unless they are exceptionally dispensable.[407] This may be the case in circumstances where, depending on the personality and condition of the person or their development, it is assumed that probation services are not necessary.[408] If the ordered alternative measures are not complied with, or if the person refuses to cooperate with the probation service, the execution court may revoke the temporary refraining if the court deems it necessary to prevent the commission of further offences.[409] For preventive measures, the conditional suspension may also be revoked if the alternative measures (even in combination with additional measures) no longer seem sufficient to prevent the affected person from committing further punishable acts, especially where the affected person's health is deteriorating.[410]

PRACTICE: Experts from different fields have pointed out that conditional suspension (now temporary refraining from execution) is mostly successful if there is already a "package" prepared for the court regarding specific treatment, extra-mural care and facilities where a person can live.[411] Without this "package," the person concerned does not have high chances of enjoying the alternative.[412] Whether or not a person has their sentence suspended may rely heavily on the availability of a social network and the cooperation between actors and financial resources, which critical for experts.[413] While the rules on conditional suspension have changed, concerns remain nonetheless.

SOCIAL NET CONFERENCES[414]

The social net conference is a specific program that brings together members of the social environment of a person (in the context of criminal proceedings). Its aim is to develop a binding future plan for the person concerned in order to avoid deprivation of liberty (by way of conditionally suspending the custodial measure or conditional release). In addition to the social network, professionals such as therapists, social workers, representatives of aftercare facilities and probation officers are involved in the planning.

This is intended to prevent future criminal acts without deprivation of liberty (in the context of refraining from provisional placement or provisional refraining from enforcement). It was introduced to reduce pre-trial detention of youth in 2012.[415] The implementation is guided and supervised by the probation agency/probation officer. The coordinators are specially trained for this area and are only responsible for preparing the conference, moderating it and drawing up the plan. The person concerned is present and participates throughout the conference and is thus given the possibility to guide the plan. Once the plan has been drawn up, it is submitted to the court. If the court approves the plan, a probation officer takes over the supervision and monitors compliance with the plan. Based on a successful pilot project for youth,[416] this system was implemented into national law and entered into force in 2016.[417]

In the period of 2015-2016, a pilot research project analysed how the system of social network conferences could also be applied to reduce deprivation of liberty of persons with intellectual and/or psychosocial disabilities who are subjected to preventive measures in Austria.[418] The project showed a high success rate, and the participants were very happy about this initiative.[419]

REFORM: The reform law now **introduces social net conferences into the legal system with regards to preventive measures**. Before deciding to temporarily refrain from execution of the preventive measure, the court may instruct the head of the probation services to conduct a social net conference[420] and to present a plan for the application of alternative measures.[421] While the adoption of this power will hopefully bring an increase in the adoption of non-custodial measures, it remains to be seen whether it will be applied in practice. So far, the reform allows this ability only for the temporary refraining from the execution of the preventive measures, and not for conditional release.

Prior to the adoption of this ability, actors involved generally shared that **strong cooperation** between the social network, medical experts, extra-mural or after-care facilities and probation agencies usually positively influence the chances of a person getting conditionally released or sentenced. However, these plans must be brought forward at the initiative of the person concerned and/or their network, and thus, persons without as strong a network are put at a disadvantage.[422] One lawyer mentioned that in some areas, there is a **strong exchange between after care facilities and the local police**. Due to this regular exchange, authorities are aware of the situation and react differently if they encounter persons concerned. It is also helpful that they have support contacts where need be, to take care of the persons or pick them up.[423]

CRISIS INTERVENTION

REFORM: If the court has temporarily refrained from the execution of the preventive measures, and the person concerned finds themselves in a crisis situation, the court now has the ability to order an interruption of the temporary refraining and order the execution of the preventive measure in a forensic-therapeutic centre.424 This is only if the court assumes that the treatment there will improve the condition of the affected person to such an extent that a resumption of the temporary refraining is possible again ("crisis intervention"). The crisis intervention can be ordered for a duration of up to three months and prolonged for up to six months.425 The execution of the preventive measure must be in the facility where the affected person was recently detained. If the affected person had not been detained before, the location should be determined based on the location of the competent court.426 In case the crisis intervention is not successful, the court may revoke the temporary refraining.[427]

This new possibility was generally welcomed by many experts and practitioners as it gives the affected person the opportunity to react to a crisis instead of revoking the alternative measure altogether and permanently. However, experts have voiced criticism regarding the determination of the location

of the crisis intervention. Other facilities, such as the ones that had been treating the affected person, may be better suited than forensic-therapeutic facilities, especially as it is important to have stable environments in these exceptional situations.[428]

CONDITIONAL RELEASE

For **persons who are subjected to preventive measures**, a conditional release may only be ordered if accompanied by a probation period of at least five years while an immediate definite release from a preventive measure is not possible.[429]

A person has the right to be conditionally released, if **"in view of the performance and development of the person detained in the institution, his personal characteristics, state of health, previous life and prospects for a bona fide future, it may be assumed that the dangerousness against which the preventive measure is directed no longer exists."**[430] In terms of threshold, it is sufficient to have a "simple" probability that the dangerousness no longer exists.[431] If the requirements are met, the person has the right to be conditionally released.[432] The court has to take into account several aspects and consider them as a whole, including the advancement/development of the person during the deprivation of liberty, the personality of the person, the state of the person's health, their life history and the prospects of honest and upright behaviour. Without explicitly prioritising these aspects in the law, the latter seems to be the most important aspect of all.[433] Without personal development during the deprivation, a person will most likely not be conditionally released.[434] Personal development may be indicated by the enjoyment of **privileges** during the deprivation.[435]

The execution court must decide in a panel of three judges.[436] At least once every two years, it must set a hearing, giving the person concerned the ability to be heard regarding their possible conditional release.[437] Based on the experience shared in the consultations, courts usually request an expert opinion before they conditionally release someone from a preventive custodial measure. Some states even request two expert opinions to be sure.[438]

One of the major challenges is an ongoing **reluctance to conditionally release** persons from preventive measures. One of the main reasons (named by many experts and indicated in the literature) is the (fear of) "public denunciation and critique" in cases of recidivism of persons with intellectual and/or psychosocial disabilities who are released.[439] This seems especially distressing, considering the relatively low number of reoffending persons who were conditionally released from preventive measures based on Art 21 ACC compared to reoffending persons who were previously detained in "ordinary" prisons.[440]

The Austrian NPM further noted that there was an inconsistent practice with regard to the application of privileges and generally called for the application of privileges as soon as possible in order to strengthen the return to society.[441] At the same time, there is a need to further support persons concerned prior to release and to ensure that they receive the necessary support and care needed (e.g., by way of holding a social net conference prior to release).

A medical expert raised concerns in an interview especially for two groups of patients, including patients with intellectual disabilities.[442]

Quote "Of course, they are not criminally responsible when they commit a crime, but they have no chance of recovery. You don't become more intelligent in the measure. So that's not something you can treat. That means that from the moment the bar closes, they are in there for life and you can't get them out. Because there are no facilities outside (i.e., any assisted living communities or anything else that could deal with such patients). That is just totally difficult, because they are also completely wrong in a prison. So, I think someone with a reduction in intelligence has nothing to do with a prison or any other institution."

The second group concerns the group of persons who suffer from borderline person-

ality disorder. They need a very tight support system, and their condition makes a prognosis very hard as they are very sensitive towards external situations. Due to a lack of appropriate alternatives, including the necessary treatment and support, these persons are often deprived of their liberty for a long time as the courts do not see the necessary diminishing of their dangerousness.[443]

EXTRA-MURAL AND AFTER CARE FACILITIES

For interruptions of preventive measures, or if a person is conditionally released or has their preventive measure conditionally suspended, they may be ordered to take residence in an extra-mural or after care facility.[444] There are several facilities available offering different kinds of support (i.e., less intensive and more intensive care). Experts have stated that there are not enough extra-mural facilities available that offer accommodations for a person subjected to an interruption/conditional release/conditional suspension, which usually has a framework contract with the government that sets out the terms of care and support. Sometimes, it is hard for smaller facilities to get these framework contracts; very often the courts are not aware of smaller facilities. Experts have raised concerns regarding the quality of after care facilities. As far as quality standards exist, they are not reviewed properly.[445] Those working in after care facilities also do not have the necessary education or training to care for persons with intellectual and/or psychosocial disabilities.[446]

If residing in an extra-mural facility is ordered as an alternative measure by the court, the government takes over the costs.[447] Some extra-mural facilities only offer accommodation for court-ordered residence, meaning that once the probation period is over and the court withdraws the order, the person needs to find other means of accommodation. This is sometimes very difficult as the individual may still need treatment/support. Some facilities do not offer in-house psychotherapeutic treatment.[448]

04. CONCLUSIONS AND RECOMMENDATIONS

4.1. RECOMMENDATIONS CONCERNING EU CROSS BORDER PROCEEDINGS

Enhance systematic collection of data: There is currently no uniform data available on the application and use of the Framework Decisions, which is partly due to the decentralization of authorities and the different registration practices of the competent judicial authorities. In the absence of such data, it is not possible to draw meaningful conclusions on the application of the framework decisions, identify challenges and explain approaches that may work well. In particular, data should be collected with regard to persons with intellectual and/or psychosocial disabilities to ensure that sufficient procedural provisions are made.

Clarification and consent: Consent can be of particular importance in cross border EU proceedings. For example, it can lead to the implementation of the simplified procedure within the scope of the European Arrest Warrant system and thus shorten the period of detention pending surrender. In other cases, application is only possible if the person concerned consents to the supervision of probation services. This consent should be free of coercion and persons concerned should be informed and aware of the possible consequences. It is therefore essential to provide information about the consequences of consenting to a transfer or to the execution of a European Arrest Warrant in another EU Member State. With regard to persons with intellectual and/or psychosocial disabilities, special precautions must be taken here, for example in the form of involving a trusted person or by providing information from specially trained persons. Currently, there are no clear guidelines on the person's consent; instead, it appears that persons subject to a European Arrest Warrant usually consent in order to shorten their time in custody while not being fully aware of the consequences of the transfer or the available remedies.

National Central Authority: Except for the Ministry of Justice as the competent central issuing authority in cases of FD 909/TOP, the regional courts and the public prosecutor's offices are the competent issuing and enforcement authorities for the various Framework Decisions. There is widespread inexperience and fragmented specialist knowledge about the Framework Decisions discussed and EU cross border cooperation in criminal matters. A national body with experts in this field could serve as a platform for exchange and as a contact point for courts for all questions relating to cross border cases.

Training and further education opportunities: Knowledge of the Framework Decisions, their implementation and the various options is also limited among the competent judges. It would be necessary to offer regular training on the Framework Decisions and their application for enforcement and issuing authorities to ensure that they, as well as the most recent relevant decisions (in particular those of the CJEU and other relevant courts), are known. In principle, awareness of the various Framework Decisions (except FD 582/EHB) is currently quite low, even among other stakeholders. In order to increase the frequency of the application of all Framework Decisions, it is important to educate the actors involved about the available options. At the same time, it must be ensured that those affected are also aware of the options, especially since the Framework Decisions are aimed at increased resocialization.

Provision of information sheets on Framework Decisions: Persons affected should have easy access to information in understandable language on the Framework Decisions, the various transfer procedures and their consequences. In particular, information should also be provided on those instruments that standardize the use of alternatives/probationary measures. The information should also include information about the procedures in the executing Member State. Care should be taken to ensure that the information is provided in a comprehensible form and language.

Access to EU legal texts: A lack of knowledge about the various national criminal laws and legal systems can stand in the way of more successful cooperation in cross border criminal proceedings. Easier access to the national criminal law systems of other EU Member States – for example, on an EU-wide internet platform – would improve cooperation and facilitate exchange between the actors. This should also include the publication of relevant legal texts in the languages of the EU Member States. In particular, the provisions that apply to persons with intellectual and/or psychosocial disabilities in the context of criminal law, especially the specific procedural options and the deprivation of liberty/treatment of the persons concerned, should be explained in detail.

Strengthen cross border exchange between all relevant actors involved: Communication and exchange currently take place exclusively (if at all) between the competent authorities and also varies between Member States. There is no further possibility of communication between other actors involved (e.g., judicial officers, probation officers or lawyers). The institutionalization of a network between all actors could help ensure that the rights of persons with intellectual and/or psychosocial disabilities are protected and that the continuity of their care is guaranteed even in the event of a transfer. For example, an institutionalized network of cross border defence lawyers within the EU could strengthen the procedural rights of all defendants by ensuring legal support throughout the proceedings and especially in the event of transfers. This would be particularly beneficial for people with intellectual and/ or psychosocial disabilities, as the procedural rules are often complicated and cross border representation/defence is difficult both in terms of language barriers and knowledge of national criminal justice systems. In addition, a defence lawyer outside one's own country can be lengthy and expensive. By institutionalizing the EU cross border defence network, Member States could ensure that procedural rights are respected throughout the proceedings.[449]

4.2. RECOMMENDATIONS ON THE NATIONAL SYSTEM

4.2.1.GENERAL RECOMMENDATIONS

Prevention: Many experts interviewed and consulted in the framework of the project mentioned that there was an increased need to strengthen any mechanisms and available resources to prevent persons from ending up in the preventive measures system. Criminal offences could be prevented if persons with intellectual and/or psychosocial disabilities would already receive adapted treatment where needed. Strengthening support in the community and general healthcare, providing broad therapeutic (including occupational therapy, psychotherapy and education) and psychosocial care and support should be a priority. Strongly related is the problem that resources in the general healthcare system are often not sufficiently available, leading to persons with psychosocial disabilities in need of care and treatment being temporarily committed to psychiatric institutions and then released soon after.

Resources: To ensure that the rights of defendants and detainees with intellectual and/or psychosocial disabilities are protected, various resources are necessary. Adequately educated and trained staff in all places of deprivation of liberty, including psychiatrists, psychologists and occupational therapists, are particularly necessary. Additionally, equal resources are needed for extra-mural facilities in order to ensure the shortest possible duration of deprivation of liberty and access to non-custodial measures.

Unlimited detention based on disability: The system of preventive measures allows for unlimited deprivation of liberty of persons with intellectual and/or psychosocial disabilities, linked to the dangerousness of the person. This very often puts those affected in a situation of constant uncertainty, which leads to a lack of prospects and causes severe emotional stress. According to the CRPD, it is recommended that indefinite detention of a person due to their disability should be abolished in criminal law. If a time limit is provided for within the framework of a maximum duration, it must be

considered that this maximum duration has a protective character and does not have the function of being exhausted in every case. Rather, the conditions should be reviewed annually as part of the review procedure. During the measure, work should be done towards release (by providing the necessary therapy and support measures, as well as the use of relaxation periods) in order to prepare for release in the best possible way.

4.2.2. IDENTIFICATION

Quality standards for experts: As revealed in the research, expert opinions are crucial in criminal justice proceedings concerning persons with intellectual and/or psychosocial disabilities. Currently, there are no quality standards for experts, which makes it very hard for prosecutors, judges, persons concerned, defence attorneys and relatives to determine the accuracy, reliability and comparability of the expert's opinions. By providing clear and comprehensive standards for the examination of the person concerned, accuracy of expert opinions could be improved. This would improve identification of intellectual and/or psychosocial disabilities and make sure that persons concerned receive the appropriate care and treatment. Additionally, it could increase trust in the system, as many currently do not trust the opinions on which these criminal proceedings are based. There is a clear need for further and more specialized education for medical expert witnesses in the field of forensic psychiatry. Expert witnesses have a paramount role, especially in the proceedings concerning preventive measures. Consequently, their (specialized) education would improve the quality and accuracy of medical examinations, as well as generally raise the currently low standards of expert opinions. Some universities already offer inter-disciplinary courses,[450] which should be encouraged.

Multidisciplinary assessments: In addition to the need for specialized medical experts, it is equally important to also include experts from other fields in the assessment of persons with intellectual and/or psychosocial disabilities, thus being able to assess the individual need for support more precisely. The assessment of medical experts is limited to the medical sphere and often does not take into account additional important factors regarding, for example, the environment of the person or their social network. Therefore, it is recommended to apply a multidisciplinary approach toward the assessment of intellectual and/or psychosocial disabilities on a case-by-case, including, for example, with psychologists, physical therapists, social workers and NGOs supporting persons with disabilities.

It is also important to **increase awareness** among all stakeholders involved, including prosecutors, judges and lawyers, on how to recognize intellectual and/or psychosocial disabilities throughout proceedings in order to ensure equal access to justice.

4.2.3. PROCEDURAL SAFEGUARDS AND REVIEW PROCEEDINGS

Strengthen safeguards: Whenever the threshold of requirements laid down in Art 21 ACC is not reached, persons with intellectual and/or psychosocial disabilities are subjected to the "ordinary" criminal proceedings with little to no procedural safeguards. They may not comprehend the different procedural steps or their rights. Additionally, they may be subjected to pre-trial detention, which can be particularly harmful for them. It is thus recommended to include further procedural safeguards for persons with intellectual and/or psychosocial disabilities in order to ensure their effective participation.

Defence in preliminary proceedings: While there is a right to defence lawyers during the entire proceedings for preventive measures, and therefore they may already be present in the preliminary proceedings, the absence of the defence lawyers during an interrogation in the preliminary proceedings does not expressly result in nullity (in contrast to an absence in the main hearing). At the same time, in police interviews, statements that are crucial to the proceedings are often made without being aware of the consequences. It should therefore be ensured that persons with intellectual and/or psychosocial disabilities receive support and legal assistance from the beginning of the investigation proceedings. Indicators could be, for example,

the existence of adult representation or the existence of reasonable suspicion that a disability exists. If these circumstances subsequently become known, interrogations without the presence of the defence lawyers should not be conducted.

Adapted preparation time: Review proceedings are frequently rushed, not giving the person concerned sufficient time to adequately prepare for the hearing. In order to ensure effective participation in the proceedings, it is recommended that persons are informed sufficiently ahead of the date and time of the hearing. This information should also be provided in a comprehendible manner. Of equal importance is informing the person concerned of an upcoming assessment by an expert witness in order to ensure that the person can prepare for this assessment and contact a person of trust accompany them. It should also be ensured that both internal and external experts are involved in review procedures where necessary.

Involvement of the person concerned: It is important to give the person concerned the ability to be heard in the overall proceedings and ensure that they can effectively participate. It is also recommended to ensure participation of the person concerned in the review proceedings as much as possible.

Access to information: In order to ensure access to information, including information about general house rules, services provided by the detention facility, the therapy plan and complaint mechanisms, information must be available in a comprehendible manner. Additionally, staff should be available to support the persons concerned in their research. It is equally important that legal representatives (i.e., defence lawyers) have access to the necessary information in a transparent way. Where necessary information is not provided by the detention facility, there should be legal (disciplinary) remedies available to persons concerned against the authorities.

Legal representation: To protect the rights of persons deprived of their liberty in preventive measures, it is important to ensure that they have access to their rights. These range from possible complaints against any measures ordered by the head of the institute to being generally informed about their treatment. These also include having their ongoing deprivation of liberty reviewed (in line with domestic and international standards). One way of ensuring this (effective) access to their rights would be to provide them with access to a patient attorney ("Patientenanwaltschaft") comparable to the one for civil involuntary treatment. This patient attorney should be provided to all persons deprived of their liberty. Such attorneys would be involved in all proceedings regarding privileges/ relaxations and would also evaluate regularly the practice within preventive measures. This kind of support is a crucial element to ensuring equal access to justice and preventing overly prolonged stays in detention, which may ultimately amount to ill-treatment and a violation of the rights of persons concerned as laid down in Arts 3 ECHR and 15 CRPD.

4.2.4. TREATMENT AND CONDITIONS

Ensure early adequate and necessary treatment: In order to ensure the shortest possible time of deprivation of liberty, it is important to start adequate and necessary treatment as early as possible. Currently, persons who are subjected to pre-trial preventive measures (particularly those who are subjected to preventive detention) often do not receive this treatment, which prevents them from benefiting from non-custodial measures. It is important that this treatment is assessed on a case-by-case basis, including not only with pharmaceutical treatment but also psychotherapy or other forms of therapy (such as occupational therapy), where necessary. The person concerned should always be involved in this plan. Language barriers to the availability of support and treatment should be overcome and services sufficiently offered.

Support by specialist staff: In all facilities where persons with intellectual and/or psychosocial disabilities are accommodated under criminal law, it should be ensured that sufficient specialized and sensitized specialist staff, particularly from the health sector, are available. Particularly, elderly people need to be provided with adequate care and support.

Release preparation: The use of privileges and relaxations of the preventive measures provide good opportunities to prepare detainees with intellectual and/or psychosocial disabilities for release. They can be a useful tool to strengthen rehabilitation. However, it is important to not misuse this system by applying (only) privileges for long periods of time without actually releasing the person concerned. In case of transfers, prior therapies should be considered. It is recommended to provide for the possibility of a social net conference prior to release in order to ensure that persons are properly prepared and receive the support they need upon release.

Use of restraints: Isolation should only ever be used as a last resort, as it can be particularly harmful for persons with intellectual and/or psychosocial disabilities. It is recommended to ensure that isolation is not used as a punishment and that its duration is strictly limited to the shortest possible period. Furthermore, all instances of the use of security measures and coercion should be carefully reviewed and only documented in detail as a last resort to allow for retrospective review. The documentation should also include debriefings involving the person concerned and, if necessary, therapists. In addition, the person concerned should be informed about this documentation and informed about routes for complaints.

Free and informed consent: Persons with intellectual and/or psychosocial disabilities frequently do not fully understand the treatment plan and the medication prescribed. Any refusal to accept treatment may be misinterpreted as non-compliance, which may hinder their conditional release. It is important to support persons with intellectual and/or psychosocial disabilities in understanding all necessary information to provide informed and free consent. This should be provided in all places of deprivation of liberty in the criminal justice context, including prisons, forensic centres and public hospitals. Easily read information leaflets, as well as a patient attorneys or another person of trust who provides support, may be an option to ensure access to information in order to obtain free and informed consent.

4.2.5. NON-CUSTODIAL MEASURES AND EXTRA-MURAL (AFTER) CARE

Increased application of non-custodial measures and outpatient treatment: As pointed out by several stakeholders in the framework of the project and the consultations, there is a strong tendency to apply custodial measures and not enough consideration is given to non-custodial measures. The reasons are manifold, including lack of resources, insufficient awareness of services available and the fear of "public denunciation." However, keeping in mind the internationally accepted standard of using deprivation of liberty as a measure of last resort, it is strongly recommended to increase the application of non-custodial measures, particularly as prison environments can be emotionally and mentally stressful for persons with intellectual and/or psychosocial disabilities. At the same time, increasing the use of outpatient treatment or ambulant treatment options will reduce overcrowding in prisons and detention facilities. With the reform law, the priority of treatment/care outside of a forensic therapeutic centre was codified. This is certainly a step in the right direction, but now it needs to be applied accordingly in practice. At the same time, it must be ensured that sufficient resources and capacities are available in after care facilities. In this context, it should also be noted that both the Nursing and Residential Homes Residence Act and the Accommodation Act apply deprivation of liberty as a last resort. It is incomprehensible why this is not provided for with regard to the execution of measures.

Database on available facilities and services: Judges and prosecutors are often not aware of the different non-custodial services available. This makes the application of these measures very difficult. It is important for courts to have easy access to the available institutions, actors and services. This could be done by developing a database at the national level. The establishment of a central information system containing all available care facilities, therapeutic services, lists of psychologists, psychiatrists and probation services, etc. would be of great assistance

and would also be relevant with regard to cross border proceedings. This would give all actors involved in supporting the person concerned the opportunity to create an individual package tailored to the individual case. This would help the courts when ordering alternative measures, as they would have a better overview of the available resources. In addition, it is important to create a transparent and comprehensible system with regard to benefits (during deprivation of liberty), preparation for release and aftercare options. With regard to the development of such a system, data protection regulations must be strictly observed and the person concerned must be protected.

Guidelines and quality control in after care facilities: To make the care in after care facilities effective and tailored, it is important to provide clear guidelines on what is expected and ensure quality control regarding overall conditions and the services offered. Currently, it is only up to the National Preventive Mechanism to provide any form of quality control, but additional quality control by the Ministry of Justice could be useful.

4.2.6. INTERDISCIPLINARY EXCHANGE AND COOPERATION

International and/or national networking events: Many experts have voiced that the success depends in many cases on the individual motivation and dedication between the different actors.451 This inter-disciplinary communication and exchange should be strengthened. This could be achieved by institutionalising structures of communication between all actors, including the judiciary, attorneys, forensic-psychiatrists, extra-mural facilities, after care facilities and probation agencies. Those networking events that have taken place have been welcomed by actors involved and some have mentioned that their exchanges have increased over the past years. This should be strengthened further. Cooperation and communication should especially be strengthened between detention facilities and defence attorneys/legal representatives and relatives. Additionally, regional networking events would ensure that actors from different provinces are able to share their experiences and learn from one another. By creating a big network, individual case-oriented system cooperation should be enabled in order to assess the situation on a case-by-case basis.

Create a system of case management: Proceedings concerning persons with intellectual and/or psychosocial disabilities are often more complex and they involve various actors. To contain all the necessary information and be able to apply an individual case-oriented system of cooperation, it would be helpful to implement a system of case management. A case manager would be the coordinator of the various actors. Ideally, this is already implemented at an early stage, which may increase the chances of an early/earlier conditional release, thereby providing continuous support and care. If the case manager – as is done in relation to persons who have committed crimes related to substance abuse/addiction – were to be the probation officer, this would be beneficial on all parts as the probation officer does not have a financial gain in providing support and would in fact have a duty to report to the court. It was recommended to have a case manager who coordinates between the different actors and who is able to support the individual in the different areas (conditional release, probation, residence and treatment/therapy, etc.).

4.2.7. TRAINING

International and regional human rights standards: Currently, there is a lack of knowledge on the applicable human rights standards to defendants and detainees with intellectual and/or psychosocial disabilities. Particularly, the CRPD and the principles laid down in therein are not well known. Since the ratification of the CRPD, very little change was observed in places of deprivation of liberty. It is important to ensure that all actors involved understand the standards and the framework they must build on in order to ensure that the rights of the persons concerned are upheld.

Interaction with persons with disabilities: To ensure the best possible care and treatment of persons with intellectual and/or psychosocial disabilities, it is important to properly

educate and train all actors involved in the proceedings (including judges, prosecutors, prison staff and staff in extra mural facilities) on interacting with persons with intellectual and/or psychosocial disabilities. Many experts have pointed out that they are overwhelmed in addressing persons concerned and would welcome the opportunity to receive tailored training.

Guidelines on preventive measures system: It would be helpful to have clear guidelines for criminal proceedings – especially during the pre-trial stage – for the actors involved, in particular regarding pre-trial preventive custodial measures for persons who are found not criminally responsible.452 This could make proceedings more comprehensive and transparent for all actors involved.

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24 Expert interview, 26.07.2022.

25 National roundtable, 06.07.2022; expert interview, 26.07.2022.

26 Commission Recommendation, of 27 November 2013 on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings, available at https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2013:378:0008:0010:EN:PDF#:~:text=The%20aim%20of%20this%20Recommendation,('vulnerable%20persons').

27 Art 16a (1)(1) – (5) EU-JZG in conjunction with relevant provisions in the ACCP and the ARHG.

28 ErläutRV EU-JZG-ÄndG 2013, 8.

29 Herrnfeld in Göth-Flemmich/Herrnfeld/Kmetic/Martetschläger, Internationales Strafrecht § 16a EU-JZG, para. 2.

30 Schallmoser in WK2 EU-JZG § 16a, para. 16 and ErläutRV EU-JZG-ÄndG 2013, 6.

31 Art 30a (1) EU-JZG.

32 Art 30a (2) EU-JZG. See Art 59 (5) (2) ACCP.

33 GZ 2020-0.308.727.

34 See Art 61 (2) (2) ACCP. This stems from the implementation of Directive (EU) 2016/1919 of the European Parliament and of the Council of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings. See also BMJ, Erlass vom 18. Mai 2020 über den rechtsanwaltlichen Bereitschaftsdienst - Erweiterung des rechtsanwaltlichen Bereitschaftsdiensts durch das Strafrechtliche EU-Anpassungsgesetz 2020 – Gesamtdarstellung, GZ 2020-0.308.727, at 3, available at https://www.ris.bka.gv.at/Dokumente/Erlaesse/ERL_BMJ_20200518_2020_0_308_727/ERL_BMJ_20200518_2020_0_308_727.pdf (last access 06.04.2023).

35 National roundtable, 06.07.2022. Expert interview, 26.07.2022.

36 Art 20 EU-JZG. The speciality rule prevents the person concerned from being prosecuted, sentenced of otherwise deprived of liberty for an offence committed prior to their surrender other than that for which they were surrendered. See Art 27(2) FD 584/EAW.

37 Herrnfeld in Göth-Flemmich/Herrnfeld/Kmetic/Martetschläger, Internationales Strafrecht § 20 EU-JZG, para. 5. For more information see further below.

38 Art 20(3) EU-JZG.

39 Art 18 EU-JZG in conjunction with Art 29 ARHG;

40 Expert interview, 08.08.2022; in accordance with Art 71 ACA.

41 Art 19(4) EU-JZG.

42 This interpretation is based on Recital 12 and Art 1(3) of FD EAW.

43 Art 19(4) EU-JZG.

44 Herrnfeld in Göth-Flemmich/Herrnfeld/Kmetic/Martetschläger, Internationales Strafrecht § 19 EU-JZG, para. 9. This provision translates Art 23(3) FD EAW into practice.

45 Martetschläger in Göth-Flemmich/Herrnfeld/Kmetic/Martetschläger (2020), Internationales Strafrecht Kurzkommentar, § 40 EU-JZG, para. 20.

46 Herrnfeld in Göth-Flemmich/Herrnfeld/Kmetic/Martetschläger, Internationales Strafrecht § 19 EU-JZG, para. 9 f.

47 As the ECtHR may only be addressed after exhaustion of domestic remedies, this exception cannot be used regarding an EAW for prosecuting a person.

48 Erl. 2021-0.576.942, 24. August 2021, available at https://www.ris.bka.gv.at/Dokumente/Erlaesse/ERL_BMJ_20210824_2021_0_576_942/ERL_BMJ_20210824_2021_0_576_942.pdf

49 Art 5 EU-JZG.

50 Transposing Art 23 (4) FD EAW.

51 Art 25 EU-JZG.

52 Herrnfeld in Göth-Flemmich/Herrnfeld/Kmetic/Martetschläger, Internationales Strafrecht § 25 EU-JZG, para. 2-4.

53 C-699/21, 18.4.2023.

54 Art 42b EU-JZG.

55 Art 40a EU-JZG.

56 9th Round of Mutual Evaluations on mutual recognition legal instruments in the field of deprivation or restriction of liberty – Report on Austria (117005/EU XXVII.GP), henceforth referred to as “Evaluation Report Austria”, at 57, available at GUTACHTEN IM RAHMEN DER NEUNTEN RUNDE DER GEGENSEITIGEN BEGUTACHTUNGEN Neunte Runde der gegenseitigen Begutachtungen: Rechtsinstrumente der gegenseitigen Anerkennung im Bereich freiheitsentziehende oder freiheitsbeschränkende Maßnahmen BERICHT ÜBER ÖSTERREICH (117005/EU XXVII.GP) | Parlament Österreich.

57 Art 39 EU-JZG.

58 Art 41a (8) EU-JZG.

59 The Directorate for the penitentiary system is currently working on a new document aimed at simplifying the information given to prisoners.

60 Art 42a EU-JZG.

61 Evaluation Report Austria, at 57.

62 Evaluation Report Austria, at 44; see also Art 42b(10) EU-JZG.

63 Ibid, at 51.

64 Expert interview, 14.02.2023.

65 Expert interview, 14.02.2023.

66 Ibid.

67 Expert interview, 14.02.2023.

68 Expert interview, 14.02.2023.

69 Art 40(12) EU-JZG.

70 Art 3(4) FD TOP.

71 See Chapter 2.2.1.

72 Article 41b(4) EU-JZG.

73 Art 41b(3) EU-JZG.

74 Art 40(10) EU-JZG.

75 For more detailed information on the proceedings based on Art 21(2) ACC see below Chpater 3.2.2.

76 Martetschläger in Göth-Flemmich/Herrnfeld/Kmetic/Martetschläger (2020), Internationales Strafrecht Kurzkommentar, § 40 EU-JZG, para. 18.

77 In accordance with Art 21(2) ACC. For more information see Chapter 3.2.

78 Evaluation Report Austria, at 49.

79 Evaluation Report Austria, at 58.

80 Expert interview, 14.02.2023.

81 Recital 5 FD ESO.

82 ErläutRV EU-JZG-ÄndG 2013, 1.

83 Art 102 EU-JZG (competent executing authority); Art 115 EU-JZG (competent issuing authority).

84 National roundtable, 06.07.2022; expert interview, 26.07.2022; expert interview 14.02.2023; regional consultation workshop.

85 Communication from Ministry of Justice.

86 Art 101(1)(9) EU-JZG.

87 See Chapter 2.2.1. and 2.3.1.

88 Herrnfeld in Göth-Flemmich/Herrnfeld/Kmetic/Martetschläger, Internationales Strafrecht § 101 EU-JZG, at para. 1.

89 Art 5 FD ESO.

90 As provided for in Art 8(2) FD 829/ESO.

91 Art 100(1)(8) EU-JZG.

92 Art 100(1)(10) EU-JZG. For more information see also: Council Framework Decision 2009/829/JHA on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention - Implementation by Austria; Austria's competent authorities and declarations, 13/11/2013, available at https://www.ejn-crimjust.europa.eu/ejn/libdocumentproperties/EN/1176 (last access 04.04.2023).

93 Art 106(2) EU-JZG.

94 Expert interviews; National roundtable, 06.07.2022.

95 National roundtable, 06.07.2022.

96 ErläutRV EU-JZG-ÄndG 2013, 1.

97 Art 83 EU-JZG (competent executing authority), Art 95 EU-JZG (competent issuing authority).

98 Communication from Ministry of Justice in the framework of the project; see also Evaluation Report Austria, at 12.

99 Expert interviews; National roundtable, 06.07.2022.

100 Art 40(12) EU-JZG.

101 See Chapter 2.2.1.

102 Art 82(1)(10) EU-JZG.

103 Art 82(1(10) in conjunction with Art 87 EU-JZG; transposition of Art 11(1)(i) FD PAS.

104 Art 81 EU-JZG.

104 Art 4(1)(k) FD 947/PAS.

106 The German term to transpose “therapeutic treatment” is very broad (“Heilbehandlung”) and may even include surgery which cannot be ordered by the court. Such a measure would have to be adapted. For more information see Herrnfeld in Göth-Flemmich/Herrnfeld/Kmetic/Martetschläger, Internationales Strafrecht § 82 EU-JZG, at para. 10.

107 National roundtable, 06.07.2022; expert interview, 26.07.2022, expert interview 22.09.2022.

108 Expert interview, 17.08.2023.

109 Expert interview, 17.08.2023.

110 National roundtable, 06.07.2022; expert interview, 02.08.2022.

111 Expert interview, 17.08.2023.

112 National roundtable, 06.07.2022.

113 United Nations General Assembly Official Records Seventy-second session Supplement No. 55 (A/72/55), Annex “Guidelines on the right to liberty and security of persons with disabilities”, pp. 16-17.

114 Ibid.

115 Art 1(2) Behindertengesetz. [Translation] provided by, Linder/Katona/Schleicher, “Enhancing Procedural Rights of Persons with Intellectual and/or Psychosocial Disabilities in Criminal Proceedings: Exploring the Need for Actions; Key Findings of the Austrian National Report” (2016), available at https://bim.lbg.ac.at/sites/files/bim/attachments/austria_key_findings_of_the_national_reports.pdf (last accessed 14.09.2022).

116 Art 61(2)(2) ACCP.

117 Art 21 ACC; Following a most recent reform, the previous very stigmatising and discriminatory language, referring to “serious/severe mental or emotional disorder” (“geistige oder seelische Abartigkeit höheren Grades”) was changed.

118 VertretungsNetz, Stellungnahme des Vereins VertretungsNetz – Erwachsenenvertretung, Patientenanwaltschaft und Bewohnervertretung zum Entwurf eines Bundesgesetzes, mit dem das Strafgesetzbuch, die Strafprozeßordnung 1975, das Strafvollzugsgesetz, das Jugendgerichtsgesetz 1988 und das Strafregistergesetz 1968 geändert werden (Maßnahmenvollzugsanpassungsgesetz 2021), GZ: 2021-0.371.078, available at https://vertretungsnetz.at/fileadmin/user_upload/3_SERVICE_Stellungnahmen/2021_Stellungnahme_Massnahmenvollzugsanpassungsgesetz.pdf (last access 05.04.2023).

119 See also Erläuterungen, Maßnahmenvollzugsanpassungsgesetz 2022, at 15.

120 As explained above. For more information on the "social model," see Guidelines of the CRPD Committee on Art 14.

121 Arbeitsgruppe Maßnahmenvollzug, Bericht an den Bundesminister für Justiz über die erzielten Ergebnisse, Jänner 2015, BMJ-V70301/0061-III 1/

122 Parlamentskorrepsondenz, Nr. 1493, available at 21.12.2022, https://www.parlament.gv.at/aktuelles/pk/jahr_2022/pk1493#XXVII_I_01789

123 Ibid.

124 Art 21 ACC; for more information, see below Chapter 3.2.

125 For a discussion on the terminology, refer to Nimmervoll in Nimmervoll (ed), Haftrecht3 (2018) Kapitel 5: Vorläufige Anhaltung, p. 347.

126 Due to their lack of responsibility, they are not "detained."

127 When in doubt, the person shall be treated as "not criminally responsible" based on the principle of in dubio pro reo. See Nimmervoll, SbgK, Art. 21, at para. 3; Ratz, WK-StGB 2, Art. 21, para 1.

128 Nationaler Aktionsplan Behinderung 2022–2030, at 50-51.

129 The data used for this table was provided to the LBI-GMR by the Ministry of Justice.

130 Per 1 January of the year.

131 This number also includes detainees subjected to administrative detention and other forms of detention; however, those only represent less than 1% of the total number of detainees.

132 For further details, see Tschacherl, Der österreichische Maßnahmenvollzug im Lichte der EMRK (2020), p 30; also Arbeitsgruppe Maßnahmenvollzug, Bericht (2015), p 36.

133 Annual Report 2018 on the Activities of the Austrian National Preventive Mechanism (NPM), at 47, available at aob-annual-report-2018_gesamt.pdf (volksanwaltschaft.gv.at).

134 National roundtable, 06.07.2022.

135 Ibid.

136 Expert interview, 26.07.2022.

137 Expert interview, 26.07.2022.

138 Expert interview, 26.07.2022.

139 Expert interview, 29.06.2023.

140 Art 429 ACCP; see also Murschetz in Fuchs/Ratz, WK StPO § 429, at para. 10.

141 Aichinger, "Die Macht der Sachverständigen", Die Presse, 21.03.2014, available at https://www.diepresse.com/1577792/die-macht-der-sachverstaendigen (last accessed 21.09.2022).

142 See e.g. Stempkowski, Avoiding Recidivism of Mentallly Ill Perpetrators, University of Vienna Law Review, Vol. 3 (2019), pp. 42-72, at 53.

143 National roundtable, 06.07.2022.

144 Arbeitsgruppe Maßnahmenvollzug, Bericht an den Bundesminister für Justiz über die erzielten Ergebnisse, Jänner 2015, BMJ-V70301/0061-III 1/, available at https://vertretungsnetz.at/fileadmin/user_upload/5_Patientenanwalt/2015_bericht_ag_massnahmenvollzug.pdf (last accessed 22.08.2022); Novak/Krisper, Der österreichische Maßnahmenvollzug und das Recht auf persönliche Freiheit, EuGRZ (2013); Annual Report 2018 on the Activities of the Austrian National Preventive Mechanism (NPM), aob-annual-report-2018_gesamt.pdf (volksanwaltschaft.gv.at), at 114.

145 Expert interview, 26.07.2022; Expert interview, 02.08.2022; Expert interview, 22.09.2022; National roundtable, 06.07.2022.

146 An evaluation requested by the Austrian MInistry of Justice: Kunzl, Qualitätsanalyse österreichischer Gutachten zur Zurechnungsfähigkeit und Gefährlichkeitsprognose von Sexualstraftätern, Dissertation zur Erlangung des Doktorgrades der Humanbiologie der Medizinischen Fakultät der Universität Ulm, 2011; see also for further references Stempkowski, Avoiding Recidivism of Mentallly Ill Perpetrators, University of Vienna Law Review, Vol. 3 (2019), pp. 42-72, at 54.

147 Expert interview, 22.09.2022; this may of course in some cases be due to the refusal of the person to be examined.

148 Monitoringausschuss, „Maßnahmenvollzug Stellungnahme zur Ist-Situation und Prävention", 19 January 2015, available at https://www.monitoringausschuss.at/download/stellungnahmen/massnahmenvollzug/MA_SN_MassnVollz_2015_01_19.pdf (last accessed 22.09.2022); same perceptions were shared at the National roundtable, 06.07.2022; see also Linder/Katona/Kolda/Geller/Metz/Schleicher, „Enhancing Procedural Rights of Persons with Intellectual and/or Psychosocial Disabilities: Dignity at Trial", at 47.

149 Expert interview, 22.09.2022.

150 Arbeitsgruppe Maßnahmenvollzug, at 42; contrary to this, the psychiatrist pointed out that the expert opinions he has seen were mostly accurate.

151 Expert interview, 26.07.2022.

152 OGH 30.05.2012, 7Ob85/12v.

153 National roundtable, 06.07.2022; Expert interview, 26.07.2022.

154 National roundtable, 06.07.2022.

155 Expert interview, 26.07.2022; National roundtable, 06.07.2022.

156 Salary for experts varies from province to province.

157 Stempkowski, Legalbewährung psychisch kranker Rechtsbrecher (2020), at 255; expert interview, 26.07.2022.

158 Expert interview, 26.07.2022.

159 National roundtable, 06.07.2022; Grafl, Gratz, Höpfel, Hovorka, Pilgram, Schroll und Soyer, „Kriminalpolitische Initiative", at 154.

160 Art 430 (1) (2) ACCP.

161 Expert interview, 22.09.2022.

162 Art 21 ACC.

163 For a detailed analysis of the procedural rights during the ordinary proceedings please see Art 49ff ACCP; Art 21 ACC.

164 Ebner in Höpfel/Ratz, WK2 StGB § 34, at para. 3.

165 Expert interview, 26.07.2022.

166 § 61 para. 1 Z.2 and 5 StPO; including also other exceptions.

167 See Art 61 (2) (2) ACCP. This stems from the implementation of Directive (EU) 2016/1919 of the European Parliament and of the Council of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings. See also BMJ, Erlass vom 18. Mai 2020 über den rechtsanwaltlichen Bereitschaftsdienst - Erweiterung des rechtsanwaltlichen Bereitschaftsdiensts durch das Strafrechtliche EU-Anpassungsgesetz 2020 – Gesamtdarstellung, GZ 2020-0.308.727, at 3, available at https://www.ris.bka.gv.at/Dokumente/Erlaesse/ERL_BMJ_20200518_2020_0_308_727/ERL_BMJ_20200518_2020_0_308_727.pdf (last access 06.04.2023).

168 For an overview of the prisons in Austria see BMJ, Strafvollzug in Österreich (2020), available at file:///C:/Users/fidlerb1/Downloads/strafvollzugsbroschuere_2020_download%20(7).pdf (last accessed 27.09.2022).

169 Art 61(1)(1) ACCP.

170 Art 176 ACCP. For the deadlines see Art. 175 ACCP and below.

171 Art 178(1)(2) ACCP; for more detailed information on specific duration rules and pre-trial detention, see Art 178 ACCP.

172 Art 178(2) ACCP.

173 Art 134 ACA.

174 See Art 167(1) in conjunction with Art. 135(1) ACA.

175 Art 38 ACC.

176 Art 68(2) ACA.

177 Expert interview, 29.06.2022.

178 Art 158(2) ACA.

179 Art 71 ACA.

180 Art 21(1) ACC.

181 As opposed to the moment of the arrest/trial, etc. which is relevant for the question of fitness to stand trial.

182 [Translation] ECtHR 21.6.2022, Application no. 10425/19 P.W. v Austria, para 26. Orignal text: "Wer zur Zeit der Tat wegen einer Geisteskrankheit, wegen einer geistigen Behinderung, wegen einer tiefgreifenden Bewußtseinsstörung oder wegen einer anderen schweren, einem dieser Zustände gleichwertigen seelischen Störung unfähig ist, das Unrecht seiner Tat einzusehen oder nach dieser Einsicht zu handeln, handelt nicht schuldhaft."

183 Rieder, ÖJZ 1981, 63ff; the basis for this assessment and determination is usually the expert opinion. See below on identification of intellectual and/or psychosocial disabilities.

184 National roundtable, 06.07.2022.

185 For more information on the judicial review, see further below. While positively perceived by many, it was also been critically pointed out that as the law did not provide for provisions for the transition of persons into release. It may be that they were without any kind of support, which could lead to a deterioration of their situation. For persons who are already conditionally released, this rule does not apply, which is seen very critically.

186 Art 21(3) ACC.

187 Unless they were committed with the use of force against a person or with the threat of imminent danger to life or limb. See Art 21(3) last sentence.

188 See below.

189 "Severe and persistent mental disorder."

190 See both Art 21(1) ACC and Art 21(2) ACC; see further Nimmervoll in Triffterer/Rosbaud/Hinterhofer (eds), Salzburger Kommentar zum Strafgesetzbuch (25. Lfg 2011), § 21 StGB, para 49.

191 Art 21 ACC.

192 See Monitoringausschuss, „Maßnahmenvollzug Stellungnahme zur Ist-Situation und Prävention", 19 January 2015, at 4, available at https://www.monitoringausschuss.at/download/stellungnahmen/massnahmenvollzug/MA_SN_MassnVollz_2015_01_19.pdf (last accessed 22.09.2022).

193 Expert interview, 26.07.2022.

194 Art 21 (1) ACC.

195 Nimmervoll in Triffterer/Rosbaud/Hinterhofer (eds), Salzburger Kommentar zum Strafgesetzbuch (25. Lfg 2011), § 21 StGB, para 67.

196 Nimmervoll in Triffterer/Rosbaud/Hinterhofer (eds), Salzburger Kommentar zum Strafgesetzbuch (25. Lfg 2011), § 21 StGB, para 89; Seiler in Birklbauer/Hilf/Konopatsch/Messner/Schwaighofer/Seiler/Tipold (eds), StGB - Strafgesetzbuch: Praxiskommentar (1. Lfg 2017), § 21 StGB, para 11

197 Nimmervoll in Triffterer/Rosbaud/Hinterhofer (eds), Salzburger Kommentar zum Strafgesetzbuch (25. Lfg 2011), § 21 StGB, para 70.

198 Nimmervoll in Triffterer/Rosbaud/Hinterhofer (eds), Salzburger Kommentar zum Strafgesetzbuch (25. Lfg 2011), § 21 StGB, para 74; e.g. for more examples cp. ibid para 77–88; Seiler in Birklbauer/Hilf/Konopatsch/Messner/Schwaighofer/Seiler/Tipold (eds), StGB - Strafgesetzbuch: Praxiskommentar, § 21 StGB, para 13.

199 Ibid.

200 Nimmervoll in Triffterer/Rosbaud/Hinterhofer (eds), Salzburger Kommentar zum Strafgesetzbuch (25. Lfg 2011), § 21 StGB, para 71.

201 Nimmervoll in Triffterer/Rosbaud/Hinterhofer, SbgK StGB, Vorbem §§ 21 - 25 Rz 21; OGH 18. 3. 2003, 11 Os 11/03.

202 Art 434g (1) ACCP; on temporary refraining see further below.

203 Nimmervoll in Triffterer/Rosbaud/Hinterhofer (Hrsg), Salzburger Kommentar zum Strafgesetzbuch (25. Lfg 2011) Vorbem §§ 21-25 StGB, at para. 18.

204 Art 1 (3) PersFrSchG; Art 5 ECHR. The longer the deprivation of liberty, the stricter the application of the ultima ratio principle.

205 The "distance requirement", which was initially set out by the German Constitutional Court, but confirmed by the ECtHR, entails the "ultima ratio", which seems equally applicable in this case.

206 Expert interview, 20.10.2022.

207 "vorläufige Unterbringung". Art 429(4) ACPC.

208 For more information, see above.

209 Nimmervoll in Nimmervoll (ed), Haftrecht3 (2018) Kapitel 5: Vorläufige Anhaltung, at para. 1564.

210 specified in Art 173(2) and (6) ACCP.

211 Nimmervoll in Nimmervoll (ed), Haftrecht3 (2018) Kapitel 5: Vorläufige Anhaltung, at para. 1572.

212 see Art 429(5) ACCP.

213 Art 431 (2) ACCP.

214 For more information on social net conferences, see further below on alternatives and probation. Chapter 3.3.

215 Art 433 (4) ACCP.

216 Arts 157a – 157f ACA.

217 Art 429 ACCP.

218 Art 430 ACCP.

219 Art 61(1)(2) ACCP.

220 Art 430(1)(1) ACCP.

221 Art 429(2)(2) ACCP; see also Austrian OGH 17.11.2016, 12 Os 127/16t.

222 Art 430 (1)(3) ACCP.

223 Art 434(2) ACCP.

224 Art 434a ACCP.

225 Former Art 430(5) ACCP.

226 Former Art 439(2)(5) ACCP.

227 Art 434b (1) ACCP. If this conclusion would lead to an alteration of the competency (panel of judges instead of a single judge), the judge must excuse themselves. See Art 434b (2) ACCP.

228 Art 61(2) ACCP.

229 Art 61(2) ACCP. This can, in practice, be difficult and costly.

230 Art 158 ACA; the latter may also be detained in special departments of regular prisons.

231 “Klassifizierung”, see Chapter 3.2.1.

232 See Art 167(1) in conjunction with Art. 134(1) ACA.

233 “Kompetenzstelle Maßnahmenvollzug”

234 “Clearingstelle für Maßnahmenvollzug nach § 21 Abs 2 StGB”. See also Rechnungshof, Bericht Maßnahmenvollzug (2020) 78.

235 Stempkowski, Legalbewährung psychisch kranker Rechtsbrecher (2020), at 241.

236 Art 158(3) ACA.

237 For a detailed discussion and comparison with the German legal situation, see Tschacherl, Der österreichische Maßnahmenvollzug im Lichte der EMRK (2020), p. 108 ff; this also corresponds to the CPT's demand that facilities for persons with intellectual and/or psychosocial impairments should be clearly separated from normal prisons. See CPT Spain, 2020.

238 Ordinance of the minister of justice, Verordnung der Bundesministerin für Justiz über die Zuständigkeit der Anstalten zum Vollzug von Freiheitsstrafen und der mit Freiheitsentziehung verbundenen vorbeugenden Maßnahmen an Erwachsenen und an Jugendlichen (Sprengelverordnung für den Strafvollzug), Art 6(1).

239 Art 3, Verordnung des Bundesministers für Verfassung, Reformen, Deregulierung und Justiz über die Einrichtung von Außenstellen in Justizanstalten, StF: BGBl. II Nr. 404/2019, available at https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=20010861

240 Ibid.

241 BMJ, Strafvollzugsbroschüre 2020, at 46; available at https://www.justiz.gv.at/file/2c92fd157e7d3f68017f2ab489c16e63.de.0/strafvollzugsbroschuere_2020_download.pdf?forcedownload=true (last accessed 10.08.2022).

242 Especially the forensic centre Asten was an example of good practice; Expert interview, 08.08.2022.

243 Expert interview, 08.08.2022.

244 Expert interview, 17.08.2023.

245 Vereinigung der Österreichischen Richterinnen und Richter, Stellungnahme Maßnahmenvollzugsanpassungsgesetz 2021, 06.07.2021, at 2.

246 Art 158(4) ACA.

247 Rechnungshof, Bericht Maßnahmenvollzug (2020) 76.

248 Art 158(4) ACA.

249 Expert interview, 14.02.2023.

250 Art 167a(2) in conjunction with Arts 33-38 IPA.

251 BMJ, Strafvollzugsbroschüre 2020, at 31; available at https://www.justiz.gv.at/file/2c92fd157e7d3f68017f2ab489c16e63.de.0/strafvollzugsbroschuere_2020_download.pdf?forcedownload=true (last accessed 10.08.2022).

252 Ibid at 17; see also Ordinance of the minister of justice, Verordnung der Bundesministerin für Justiz über die Zuständigkeit der Anstalten zum Vollzug von Freiheitsstrafen und der mit Freiheitsentziehung verbundenen vorbeugenden Maßnahmen an Erwachsenen und an Jugendlichen (Sprengelverordnung für den Strafvollzug), Art 6(2).

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254 Stempkowski, Legalbewährung psychisch kranker Rechtsbrecher (2020), at 255; Expert interview, 10.08.2022.

255 With the recent change in legislation, the law now strictly refers to forensic-therapeutic centres. Currently, these are still the above described prisons for persons who are found not criminally responsible.

256 Art 432 (1) ACCP.

257 This fact is linked to one major challenge in Austria: due to the separation of costs between the state and the federal states, the state pays for expenses linked to the Ministry of Justice, while the federal states cover the costs of the health system. The state is covering costs that should be covered by the health sector.

258 Art 134 ACA.

259 Art 432 (2) ACCP.

260 Art 432 (4) ACCP.

261 Art 432 (3) ACCP.

262 —

263 Art 433 (3) ACCP.

264 Ibid.

265 Annual Report 2020 on the Activities of the Austrian National Preventive Mechanism (NPM) Protection & Promotion of Human Rights PB (Band II) 2020 - EN.pdf (volksanwaltschaft.gv.at), at 131.

266 Annual Report 2020 on the Activities of the Austrian National Preventive Mechanism (NPM) Protection & Promotion of Human Rights PB (Band II) 2020 - EN.pdf (volksanwaltschaft.gv.at), at 129.

267 Ibid.

268 —

269 ErläutRV 934 BlgNR 13. GP; at 36f.

270 The data used for this table was provided to the LBI-GMR by the Ministry of Justice; while the recent reform changed the requirements, requiring all persons subjected to proceedings according to Art 21 ACC to be placed in forensic therapeutic centres, this is not yet done in practice;

271 Annual Report on the Activities of the Austrian National Preventive Mechanism (NPM) 2022 Protection & Promotion of Human Rights, at 115, available at https://volksanwaltschaft.gv.at/downloads/6srhv/pb-2022-vol-2-en_bf-1.pdf

272 Art 432 ACCP.

273 Erlass vom 28. Februar 2023, Maßnahmenvollzugsanpassungsgesetz 2022, at 17.

274 Art 25 ACC.

275 ECtHR 27.7.2010, 28221/08 Gatt v Malta, § 29; see also Chamber decision ECtHR 17.1.2012, 66069/09 and others Vinter and others v U.K. §§ 88 f. For a more detailed description see: Tschacherl, Der österreichische Maßnahmenvollzug im Lichte der EMRK (2020), p 38 et seq.

276 See for example Grabenwarter/Pabel, EMRK 6 (2016) § 20 Rz 41 mwNw.

277 See UNCRPD Committee, Noble v. Australia, September 2, 2016, CRPD/C/16/D/7/2012, § 8.9; see also CRPD Committee, Arturo Medina Vela v. Mexico, September 6, 2019, CRPD/C/22/D/32/2015.

278 Art 25 ACC.

279 Art 164 ACA.

280 Art 24 ACC.

281 Art 24 ACC.

282 See Stempkowski, Legalbewährung psychisch kranker Rechtsbrecher (2020), at 277; see also: Annual Report 2019 on the Activities of the Austrian National Preventive Mechanism (NPM), npm-report-2019_en_web.pdf (volksanwaltschaft.gv.at), at 146; see also Arbeitsgruppe Maßnahmenvollzug, at 47.

283 Art 25(3) ACC in conjunction with Art 162 Austrian Criminal Execution Act. Decisions regarding the continuation of the preventive custodial measures/preventive detention must be made by a panel of law judges. Until the recent reform, the law provided that the court had to “examine” this on an annual basis, which meant that the simple initiation of the review proceedings was sufficient. There was no deadline for the final decision upon the necessity of ongoing confinement and the one year limit may be exceeded by the execution court. In this context, in Kuttner v Austria (2015), the ECtHR found a violation of the applicant’s right enshrined in Art 5(4) ECHR to have the lawfulness of his detention examined. The ECtHR found that it is not sufficient for the national court

to only initiate the review proceedings, but that the court would have had to decide this speedily. In the specific circumstances of the case, by taking 16 months to decide on the continuation, the court did not fulfil the requirement of "speediness" in accordance with Art 5(4) ECHR. For more information see Kuttner v Austria, Application no. 7997/08, 16 July 2015, available at https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22abnormality%22],%22respondent%22:[%22AUT%22],%22article%22:[%225-4%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-156068%22]} (last accessed 09.08.2022)

284 Art 25(4) ACC.

285 Nimmervoll in Triffterer/Rosbaud/Hinterhofer (Hrsg), Salzburger Kommentar zum Strafgesetzbuch (25. Lfg 2011) zu § 25 StGB, at para. 9.

286 See Art 167(1) ACA read in conjunction with Art 127(1) and Art 127(3) ACCP as referred to by the ECtHR in Lorenz v Austria, Application no. 11537/11, 20 July 2017, at para. 39.

287 Expert interview, 20.10.2022.

288 Lorenz v Austria, Application no. 11537/11, ECtHR, 20 July 2017.

289 Lorenz v Austria, Application no. 11537/11, ECtHR, 20 July 2017, at para. 70.

290 Lorenz v Austria, at para. 71.

291 Report to the Austrian Government on the periodic visit to Austria carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 23 November to 3 December 2021, CPT/Inf (2023) 03, at 71, available at https://rm.coe.int/1680abc16d

292 Expert interview, 20.10.2022.

293 National roundtable, 06.07.2022.

294 Expert interview, 02.08.2022.

295 Nimmervoll in Triffterer/Rosbaud/Hinterhofer (Hrsg), Salzburger Kommentar zum Strafgesetzbuch (25. Lfg 2011) zu § 25 StGB. For more informatin, see below on conditional relesase.

296 Regarding legal representation during deprivation of liberty see above (procedural rights).

297 Art 99ff ACA.

298 "Unterbrechung der Unterbringung" according to Art 166(2) ACA; Art 165(2) in conjunction with Art 166 ACA; Art 127 ACA.

299 Arbeitsgruppe Maßnahmenvollzug, at 53.

300 Stempkowski, Legalbewährung psychisch kranker Rechtsbrecher (2020), at 249.

301 Art 166(2)(b) ACA.

302 Art 166(2)(b) ACA.

303 Art 99

304 Stempkowski, Legalbewährung psychisch kranker Rechtsbrecher (2020), at 249; this was mentioned both from the perspective of judges as well as medical experts.

305 National roundtable, 06.07.2022; Expert interview, 22.09.2022.

306 Expert interview 5; expert interview 9.

307 National roundtable, 06.07.2022; see also Graupner, "Maßnahmenvollzug in Österreich: Weggesperrt und rechtlos", Der Standard, 01.06.2021, available at https://www.derstandard.at/story/2000127041316/massnahmenvollzug-in-oesterreich-weggesperrt-und-rechtlos (last accessed 21.09.2022).

308 National roundtable, 06.07.2022.

309 National roundtable, 06.07.2022; see also Graupner, "Maßnahmenvollzug in Österreich: Weggesperrt und rechtlos", Der Standard, 01.06.2021, available at https://www.derstandard.at/story/2000127041316/massnahmenvollzug-in-oesterreich-weggesperrt-und-rechtlos (last accessed 21.09.2022).

310 This concerns primarily the deprivation of liberty in prisons, special department of prisons or (special) detention facilities. The provisions on the accommodation and the specific rules applicable during the deprivation of liberty are generally contained in the Austrian Execution of Sentences Act (ACA).

311 Drexler/Weger, StVG4 § 132 Rz 3; Drexler/Weger, StVG4 § 135 Rz 5.

312 Art 165(1)(1) ACA.

313 Art 166(1) ACA.

314 Rechnungshof, Bericht Maßnahmenvollzug (2020), at 79.

315 National roundtable, 06.07.2022; Expert interview, 02.08.2022, Expert interview, 08.08.2022, Expert interview, 22.09.2022, Expert interview, 20.10.2022, Expert interview 29.06.2023.

316 National roundtable, 06.07.2022; see also AG Maßnahmenvollzug, Abschlussbericht (2015); CPT 2023 report.

317 Expert interview 9.

318 Expert interview, 08.08.2022; Annual Report on the Activities of the Austrian National Preventive Mechanism (NPM) 2022 Protection & Promotion of Human Rights, at 116, available at https://volksanwaltschaft.gv.at/downloads/6srhv/pb-2022-vol-2-en_bf-1.pdf

319 Expert interview, 08.08.2022.

320 For a detailed analysis, see Tschacherl, Die österreichische Maßnahmenvollzug im Lichte der EMRK (2020), 139 et seq.

321 Lorenz v Austria, at para. 63-5.

322 Ibid.

323 National roundtable, 06.07.2022;

324 Annual Report on the Activities of the Austrian National Preventive Mechanism 2022 Protection & Promotion of Human Rights, at 116, available at https://volksanwaltschaft.gv.at/downloads/6srhv/pb-2022-vol-2-en_bf-1.pdf

325 Report to the Austrian Government on the periodic visit to Austria carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 23 November to 3 December 2021, CPT/Inf (2023) 03, at p. 57 f, available at https://rm.coe.int/1680abc16d.

326 Ibid, at 59.

327 Nationaler Aktionsplan Behinderung 2022-2030, p 50 f.

328 Austrian Ombudsman Board, Report to the National Council and the Federal Council, Preventive Human Rights Monitoring 2021 (2021), p 136, available at https://volksanwaltschaft.gv.at/downloads/32cb0/pb-45-praeventiv_2021_bf-1.pdf (last accessed 11.04.2023).

329 National roundtable, 06.07.2022.

330 Austrian Ombudsman Board, Report to the National Council and the Federal Council, Preventive Human Rights Monitoring 2021 (2021), p 137, available at https://volksanwaltschaft.gv.at/downloads/32cb0/pb-45-praeventiv_2021_bf-1.pdf (last accessed 11.04.2023).

331 Art 103(2) ACA.

332 Art 103(4) ACA.

333 Art 103(3) ACA.

334 Art 167a (2) ACA in conjuncation with Art 33 Involunatary placement Act ("Unterbringungsgesetz").

335 Art 103(6) ACA.

336 Art 16 ACA.

337 Annual Report 2020 on the Activities of the Austrian National Preventive Mechanism (NPM) Protection & Promotion of Human Rights PB (Band II) 2020 - EN.pdf (volksanwaltschaft.gv.at), at 127.

338 Ibid.

339 Annual Report 2020 on the Activities of the Austrian National Preventive Mechanism (NPM) Protection & Promotion of Human Rights PB (Band II) 2020 - EN.pdf (volksanwaltschaft.gv.at), at 129.

340 Report to the Austrian Government on the periodic visit to Austria carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 23 November to 3 December 2021, CPT/Inf (2023) 03, at 61 f, available at https://rm.coe.int/1680abc16d

341 Annual Report 2019 on the Activities of the Austrian National Preventive Mechanism (NPM), npm-report-2019_en_web.pdf (volksanwaltschaft.gv.at) at 147, 148.

342 Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 23 November to 3 December 2021, CPT/Inf (2023) 03, at 65, available at https://rm.coe.int/1680abc16d

343 Ibid, at 67.

344 Ibid, at 75 f.

345 Art 167 in conjunction with Art 69 ACA.

346 Wintersberger, „Die vorbeugende Maßnahme gem § 21 Abs 1 StGB“ (2018), S 142.

347 Ibid.

348 Murschetz, in Fuchs/Ratz, WK StPO § 429 Rz 43.

349 Ibid.

350 Ibit, at 72; expert interview, 17.05.2023.

351 Expert interview, 17.05.2023.

352 Monitoringausschuss, „Maßnahmenvollzug Stellungnahme zur Ist-Situation und Prävention“, 19 January 2015, at 9, available at https://www.monitoringausschuss.at/download/stellungnahmen/massnahmenvollzug/MA_SN_MassnVollz_2015_01_19.pdf (last accessed 22.09.2022).

353 National roundtable, 06.07.2022.

354 Expert interview, 22.09.2022.

355 Art 165 ACA.

356 Monitoringausschuss, „Maßnahmenvollzug Stellungnahme zur Ist-Situation und Prävention“, 19 January 2015, at 5, available at https://www.monitoringausschuss.at/download/stellungnahmen/massnahmenvollzug/MA_SN_MassnVollz_2015_01_19.pdf (last accessed 22.09.2022); see also

357 Expert interview, 22.09.2022.

358 This was even increased due to the COVID-19 pandemic and the measures imposed to avoid the spreading of the virus. See e.g., the acounts of a person concerned https://exchange.atlas-of-torture.org/t/blog-series-human-rights-during-the-covid-19-pandemic-voice-of-a-person-concerned/229 (last accessed 29.09.2022).

359 Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 23 November to 3 December 2021, CPT/Inf (2023) 03, at 75, available at https://rm.coe.int/1680abc16d

360 National roundtable, 06.07.2022; Stempkowski, Legalbewährung psychisch kranker Rechtsbrecher (2020), at 244.

361 Annual Report 2020 on the Activities of the Austrian National Preventive Mechanism (NPM) Protection & Promotion of Human Rights PB (Band II) 2020 - EN.pdf (volksanwaltschaft.gv.at), at 108.

362 National roundtable, 06.07.2022.

363 see the registration platform available at: https://www.justiz.gv.at/ja_asten/justizanstalt-asten/besucherinformationen.2c94848544ac82a60144d41b82200bbd.de.html (last accessed 16.09.2022).

364 Jabloner, Wahrnehmungsbericht des Bundesministers für Verfassung, Reformen, Dereg-

ulierung und Justiz Dr. Clemens Jabloner Maßnahmenvollzug (2019), at 48, available at https://www.justiz.gv.at/file/2c94848b6d50e800016e6a285abf00ed.de.0/wahrnehmungsbericht_hbm%20jabloner.pdf (last accessed 23.08.2022).

365 Annual Report 2020 on the Activities of the Austrian National Preventive Mechanism (NPM) Protection & Promotion of Human Rights PB (Band II) 2020 - EN.pdf (volksanwaltschaft.gv.at), at 127.

366 Annual Report 2018 on the Activities of the Austrian National Preventive Mechanism (NPM), aob-annual-report-2018_gesamt.pdf (volksanwaltschaft.gv.at). at 47; See also Annual Report 2021 on the Activities of the Austrian National Preventive Mechanism (NPM) Protection & Promotion of Human Rights, at 136, https://volksanwaltschaft.gv.at/downloads/3adb4/PB_2021_%28Band_II%29_-_NPM_Bericht_2021_-_FINAL.pdf (last accessed 27.09.2022).

367 Ibid.

368 Ibid.

369 Wien Favoriten was recently turned into a specialized facility for persons with intellectual and/or psychosocial disabilities who were found not criminally responsible and detained based on Art 21(1) ACC. Before, it was a specialized detention facility for persons with withdrawal treatment.

370 Expert interview 3, 08.08.2022.

371 Involunatry treatment act ("Unterbringungsgesetz").

372 https://www.justiz.gv.at/home/service/patientenanwaltschaft-bewohnervertretung-und-vereinsvertretung/patientenanwaltschaft.b4.de.html

373 The non-profit association "VertretungsNetz" as responsible for the "Patientenanwaltschaft"; see https://vertretungsnetz.at/patientenanwaltschaft/ueber-uns.

374 See e.g.

375 Report to the Austrian Government on the periodic visit to Austria carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 23 November to 3 December 2021, CPT/Inf (2023) 03, at 61 f, available at https://rm.coe.int/1680abc16d

376 Annual Report 2020 on the Activities of the Austrian National Preventive Mechanism (NPM) Protection & Promotion of Human Rights PB (Band II) 2020 - EN.pdf (volksanwaltschaft.gv.at), at 132.

377 ACCP.

378 Diversion is the possibility for the prosecutor or the court to refrain from conducting a formal criminal proceeding when the circumstances have been sufficiently clarified. In the case of diversion, the accused or defendant is offered the opportunity to undergo an alternative measure (e.g., community service). When a criminal proceeding is concluded through diversion, there is no conviction and no formal sentencing. There is also no entry in the criminal record; however, the diversion is internally recorded within the justice system for a period of ten years. See Art 198 ff ACCP.

379 If a preventive detention is combined with a prison sentence, then the prison sentence can be replaced by a monetary penalty. For more information see Flora in Höpfel/Ratz, WK2 StGB § 37, at para. 3.

380 Art 50 ACC.

381 Art 51(1) sentence 2 ACC.

382 Stempkowski, Criminal Behaviour and Mental HealthVolume 30, Issue 6 p. 312-320.

383 In each province, different institutions/facilities are available. They may differ from the services/support they offer. Some facilities are specialized on persons who are conditionally suspended/released from preventive custodial measures, while others are specialized on preventive detention or provide housing for both.

384 For more information see: https://www.neustart.at/was-wir-tun/bewaehrungshilfe/

385 Expert interview, 22.09.2022.

386 Art 53(2) ACC.

387 Expert interview, 22.09.2022.

388 Art 43(1) ACC.

389 Ibid.

390 Art 43(2) ACC.

391 Art 46 ACC.

392 Unless they receive a lifelong sentence.

393 Art 20 Probation Measures Act (“Bewährungshilfegesetz“).

394 Expert interview, 22.09.2022.

395 For more information see Chapter 3.3.3.

396 Art 144a ACA.

397 “Vorläufiges Absehen von der Unterbringung“; prior to the recent reform, the court would “conditionally suspend” the measure. This possibility is moved from the ACC to the ACA. Concerns were raised that this move may lead to even less awareness of judges. As shown in the case 12 Os 18/20v of the Austrian Supreme Court, judges were often not aware of the instrument of conditional suspension for preventive measures.

398 Art 157a ACA.

399 Ibid.

400 175a ACA.

401 The same criteria regarding the refraining of the execution are relevant for the determination of the duration of the probation time. See Art 157a (4) ACA.

402 Art 45 ACC.

403 Art 157b (1) ACA.

404 Art 157c (1) ACA.

405 Art 157c (2) ACA.

406 Art 157c (3) and Art 157c (4) ACA.

407 Art 157b (2) ACA. Art 157e ACA contains specific rules for the probation officer regarding reporting to the court.

408 Erläuterungen Maßnahmenvollzugsanpassungsgesetz 2023, at 24.

409 Art 157f ACA; for more information see above.

410 Art 157f ACA.

411 Expert interview, 08.08.2022; Expert interview, 22.09.2022.

412 Expert interview, 08.08.2022.

413 National roundtable, 06.07.2022.

414 The idea stems from the Family Group Conference which was introduced in New Zealand. The system was also translated into German Law, known as “Familienrat”.

415 NEUSTART, Informationen zur Sozialnetz-Konferenz bei Jugendlichen, Wien, 2014, https://www.ris.bka.gv.at/Dokumente/Erlaesse/ERL_07_000_20141003_BMJ_S618_019_0001_IV_2_2 014/Beilage_Information_zur_Sozialnetz-Konferenz_bei_Jugendlichen__Neustart_.pdf.

416 For more information see BMJ, Sicherheitsbericht 2018, at 104, available at https://www.parlament.gv.at/PAKT/VHG/XXVII/III/III_00080/imfname_775930.pdf (last accessed 28.09.2022).

417 JGG-ÄndG 2015, Art 35a JGG.

418 See IRKS, „Endbericht - Evaluationsstudie zum Pilotprojekt „SozialnetzKonferenz bei Maßnahmenuntergebrachten“, November 2016, available at https://www.irks.at/assets/irks/Publikationen/Forschungsbericht/Endbericht_SONEKO.pdf (last accessed 23.09.2022).

419 Ibid, at 6; Expert interview, 26.07.2022.

420 Art. 29e Probation Service Act (Bewährungshilfegesetz).

421 Art 431 (2) 2, 434 (1) 2 CCP.

422 National roundtable, 06.07.2022.

423 Expert interview, 02.08.2022.

424 Or a public psychiatric hospital or a psychiatric department in a public hospital.

425 Art 157g (1) ACA; the prolongation is only possible if this is recommended based on an expert opinion. For the first three months, however, no expert opinion is required.

426 Art 157g (2) ACA.

427 Art 157h (2) ACA.

428 Stellungnahme Plattform Maßnahmenvollzug,

429 Birklbauer in Triffterer/Rosbaud/Hinterhofer (Hrsg), Salzburger Kommentar zum Strafgesetzbuch (24. Lfg 2011) zu § 47 StGB, at para. 46.

430 cp. Art 47 (2) ACC (BGBl 1974/60); Seiler in Birklbauer/Hilf/Konopatsch/Messner/Schwaighofer/Seiler/Tipold (eds), StGB - Strafgesetzbuch: Praxiskommentar (1. Lfg 2017), § 47 StGB, para 3.

431 Birklbauer in Triffterer/Rosbaud/Hinterhofer (Hrsg), Salzburger Kommentar zum Strafgesetzbuch (24. Lfg 2011) zu § 47 StGB, at para. 56.

432 Ratz, WK-StGB2 § 47 Rz 12ff.

433 National roundtable, 06.07.2022.

434 This was explicitly stated in the notes of the draft law in 1971: for details see EBRV 1971, 151.

435 For more information on privileges, see above on deprivation of liberty.

436 Art 162 (3) ACA. Birklbauer in Triffterer/Rosbaud/Hinterhofer (Hrsg), Salzburger Kommentar zum Strafgesetzbuch (24. Lfg 2011) zu § 47 StGB, at para. 82.

437 Art 167(1) ACA.

438 Stempkowski, at 277.

439 National roundtable, 06.07.2022. See also Rechnungshof, Bericht des Rechnungshofes – Maßnahmenvollzug für geistig abnorme Rechtsbrecher, Wien 2010, at 79f.

440 See Stempkowski, Avoiding Recidivism of Mentallly Ill Perpetrators, University of Vienna Law Review, Vol. 3 (2019), pp. 42-72, at 53; Nowak/Krisper, EuGRZ 2013 (2013), at 658.

441 Report on Activities of the NPM (2021), at 150.

442 Expert interview, 08.08.2022; Expert interview, 22.09.2022.

443 Expert interview, 08.08.2022.

444 For more information on the requirements and the legal framework of the conditional suspension and the conditional release, see below.

445 National roundtable, 06.07.2022.

446 Expert interview, 22.09.2022; Austria NPM report 2022, at 122 ff.

447 Art 179a ACA.

448 Expert interview, 22.09.2022; National roundtable, 06.07.2022.

449 National roundtable, 06.07.2022.

450 Universität Linz, see https://studienhandbuch.jku.at/104877 (last accessed 26.09.2022).

451 National roundtable, 06.07.2022.

452 National roundtable, 06.07.2022.

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