



CDDH(2018)19

06/11/2018

STEERING COMMITTEE FOR HUMAN RIGHTS
(CDDH)

Draft Additional Protocol
concerning the protection of human rights and dignity of persons
with mental disorder with regard to involuntary placement and involuntary treatment

Frequently asked questions

1) Why is there a need for an Additional Protocol?

Involuntary measures exist in law and practice in member States of the Council of Europe. All Council of Europe members States having explicitly referred to this issue in their report on the implementation of the UN Convention on the Rights of Persons with Disabilities (CRPD) in recent years¹ have indicated that they provide some form² of involuntary placement and/or involuntary treatment.

There is an increasing number of judgments of the European Court of Human Rights (“the Court”) finding violations of the European Convention on Human Rights (ECHR) because of the lack of effective procedural safeguards for persons subject to involuntary placement and/or involuntary treatment.

To date, the Court has found violations of the relevant Article 5 (1) e ECHR (unlawful detention) in an overall number of 65 cases³ against 20 Member States⁴; 41 of these judgments have been given during the last 5 years (i. e. since 2013).

An examination of the implementation of Rec(2004)10 concerning the protection of human rights and dignity of persons with mental disorder identified legal gaps in certain Member States concerning legal provisions governing measures for involuntary placement and treatment. In view of this observation and of the importance of the subject in relation to the protection of human rights, the decision was taken to elaborate a legally binding instrument giving higher legal rank to a number of fundamental principles and setting out indisputable individual rights, which would serve as a reference in particular for the elaboration or the revision of the national legislations concerned.

2) What is the purpose of the Additional Protocol?

The draft Protocol does not promote the use of involuntary measures. On the contrary, it aims at preventing abuses and at minimizing the use of such measures in a threefold way:

- (1) by promoting the use of alternatives to involuntary measures,
- (2) by providing safeguards to ensure that involuntary measures are only used as a last resort,
- (3) by ensuring that if such measures are used, then the person concerned receives appropriate support and procedural safeguards that enable them to effectively exercise their rights.

¹ Netherlands (2018), France (2016), Switzerland (2016), Estonia (2015), Norway (2015), Turkey (2015), Latvia (2014), Luxembourg (2014), Malta (2014), Montenegro (2014), Poland (2014), Russian Federation (2014), Italy (2013), Republic of Moldova (2013), Lithuania (2012), Serbia (2012), Slovakia (2012), Czech republic (2011), Denmark (2011), Germany (2011), Sweden (2011), Austria (2010), Hungary (2010) and Andorra (no date given). Bulgaria, “The former Yugoslav Republic of Macedonia” and Portugal recently declared orally in front of the UN Committee on the Rights of Persons with Disabilities their intention to abolish all involuntary measures within a short time-frame.

² With varying terminology and legal concepts.

³ See, recently, [D.R. v. Lithuania](#), 691/15, 26 June 2018; [Trutko v. Russia](#), no. 40979/04, 6 December 2016; [Červenka v. Czech Republic](#), no. 62507/12, 13 October 2016.

⁴ Belgium (15), Bulgaria (6), Croatia (1), Czech Republic (2), Finland (1), France (2), Germany (3), Greece (2), Hungary (2), Latvia (4), Lithuania (1), Republic of Moldova (1), Netherlands (1), Poland (4), Russian Federation (9), Sweden (1), “The former Yugoslav Republic of Macedonia” (1), Turkey (1), Ukraine (4).

3) Does the lack of legal safeguards cause significant abuse?

While many Member States already have adequate legal safeguards protecting persons subject to involuntary measures in place, other States are still lacking such safeguards. The Additional Protocol aims at filling legal gaps in those member States who do not yet have sufficient safeguards in place and in ensuring compliance with the standards set in the case-law of the ECtHR.

Practical problems in implementing the standards set by the Court's case-law can be demonstrated by the time some member States need to fulfil their obligations spelled out in the Court's judgments. Currently, there are 32 cases against 14 member States⁵ under supervision of the execution of judgments by the Committee of Ministers, all of which are either leading or repetitive cases (or both).⁶

4) Does the Draft Protocol discriminate against persons with mental disorder?

The existence of a mental disorder is not a criterion which would justify any involuntary measure. Under the draft text, involuntary measures may only be used if the person's mental health condition represents a significant risk of serious harm to his or her health or to others, if the measure has a therapeutic purpose and if any voluntary measure is insufficient to address the risk(s).

This is in line with the wording of the UN Human Rights Committee's General comment No. 35 on Article 9 of the International Covenant of Civil and Political Rights.⁷

⁵ Belgium (6), Bulgaria (2), Croatia (1), Czech Republic (1), Finland (1), Greece (2), Hungary (1), Latvia (1), Republic of Moldova (1), Poland (1), Romania (3), Russian Federation (8), Turkey (1), Ukraine (3).

⁶ For example, the Grand Chamber judgment of *Stanev v. Bulgaria* (no. 3760/06, 17 January 2012) in which the Court found that placements in social care homes, did not comply with the conditions set in the case law of the Court regarding detention of persons suffering from mental disorders, has become final in January 2012. More than 6 years on, the execution of the judgment in respect of measures aimed at preventing violations of Article 5 because of deficiencies in legal safeguards is still not finalised.

⁷ CCPR/C/GC/35, para. 19 : "The existence of a disability shall not in itself justify a deprivation of liberty but rather any deprivation of liberty must be necessary and proportionate, for the purpose of protecting the individual concerned from serious harm or preventing injuries to others".