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for European Law**

Adult Suspect Vulnerability in European Criminal Procedure: (At Least) 5 Reasons Why it is Time for the EU to Take the Stage

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Abstract

Vulnerability can be understood as the inability to exercise or understand procedural rights. While the EU has acknowledged the need to protect vulnerable suspects since the late 90s, to date there is no dedicated binding instrument. This leaves the Member States significant discretion when it comes to regulating who counts as 'vulnerable suspect' and who is entitled to receive support. This research examines whether, in light of the development of the Area of Freedom, Security, and Justice (AFSJ) and the increasing reliance on mutual recognition instruments, there would be added value in adopting a common, binding European definition of 'adult suspect vulnerability'. To do so, this research employs both doctrinal and normative legal research methods, with a view to analyse and evaluate the current legal framework in EU law. After establishing that there exists a legislative gap in the protection of vulnerable adult suspects in EU law, this research first proposes two solutions to fill such a gap, and subsequently puts forward five arguments as to why there would be an added value in harmonising the definition of 'vulnerable adult suspect'. Ultimately, the research argues that establishing a European conceptualization of vulnerability would enhance legal certainty, ensure consistent protection across Member States, and reinforce mutual recognition within the EU legal framework.

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¹ *Francesco Mauri v The Italian Community in Maastricht*, Case C-23/24, ECLI: EU:C:2024:117.

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List of Abbreviations

CJEU	Court of Justice of the European Union
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Right
EU	European Union
CFR	Charter of Fundamental Rights of the European Union
CRPD	Convention on the Rights of Persons with Disabilities
EAW	European Arrest Warrant
PACE	Police and Criminal Evidence Act 1984
AFSJ	Area of Freedom Security and Justice
FD	Framework Decision
IA	Impact Assessment

1. Introduction

1.1 Relevance and Research Question

While the involvement in a criminal trial constitutes for everyone a stressful and unpleasant experience, for some individuals it can be particularly traumatic. There can be a wide variety of causes for the particular vulnerability of suspects, which may include age or any other factor capable of impairing their ability to understand and exercise fair trial rights.² Procedural rights are a crucial shield that protects individuals, who, by definition, during the investigative phases of criminal procedure happen to be in a disadvantaged position *vis-a-vis* the State's coercive powers.³ Interrogations can be intense and overwhelming, whereby police officers may be more focused on securing a confession than ensuring that the suspect's rights are protected.⁴ Considering the proneness of individuals to confess that may result from their condition of vulnerability, together with police interrogation practices,⁵ it is unsurprising that suspect vulnerability poses major threats to the truth finding process. To further highlight the socio-legal relevance of suspect vulnerability, it is important to consider the magnitude of the issue. According to the Innocence Project, 29% of wrongful convictions overturned by DNA evidence in the United States involved false confessions, many of which were given by individuals with mental impairments (9%) or who were minors at the time of the interrogation (31%).⁶ High-profile cases like the Central Park Five, where five teenagers were wrongfully convicted of rape and assault largely based on coerced confessions,⁷ highlight the dangers of failing to protect vulnerable individuals in the criminal justice system.

² Paolo De Stefani, 'Conceptualizing "Vulnerability" in the European Legal Space: Mixed Migration Flows and Human Trafficking as a Test' (Frontiers in Human Dynamics 2022) 1.

³ Erik Luna, 'Transparent Policing' (Iowa Law Review vol. 85 2000) 1127.

⁴ Melanie Morgavero Clark, 'An Exploratory Examination of Intellectual Disability and Mental Illness Associated with Alleged False Confessions' (Behavioral Sciences & the Law 2020) 302.

⁵ *ibid*, 303.

⁶ Innocence Project, 'DNA Exonerations in the United States (1989-2020)' (2024) <<https://innocenceproject.org/dna-exonerations-in-the-united-states/>> accessed on 15 August 2024.

⁷ Saul M Kassir, 'False confessions and the jogger case' (New York Times 1 November 2002).

European criminal procedure is a field of law that is essentially developing along two branches, namely judicial cooperation and the protection of procedural safeguards.⁸ The first branch has so far led to increased prosecutorial powers thanks to the introduction of various legislative instruments. These instruments have fostered close cooperation between the Member States enabling, for example, smoother collection of evidence or faster enforcement of arrest warrants in cross border situations.⁹ In this context, the second branch of European criminal procedure must proceed at the same pace as the first. The rationale behind this statement is twofold. First, equal protection of due process rights in the various Member States is necessary to ensure the legitimacy of these procedures, as well as the consistent interpretation of the rights enshrined in the Charter of Fundamental rights of the European Union (hereafter: CFR, or the Charter).¹⁰ Second, the EU instruments to facilitate cross border proceedings (e.g. the European Investigation Order Directive¹¹) can only function efficiently in an environment of mutual trust, in which Member States trust each other's human rights' protection systems.¹² In order to achieve these objectives, the EU has so far set out minimum standards on safeguards for suspects and accused persons through the enactment of six directives¹³ (hereafter: the Directive

⁸ Araceli Turmo, 'Towards European Criminal Procedural Law - First Part' (European Papers Vol. 5 No 3 2020) 1247.

⁹ *ibid*, 1248.

¹⁰ *ibid*; See also Andre Klip, *European Criminal Law* (4th Edition Intersentia 2021).

¹¹ European Parliament and Council Directive 2014/41/EU regarding the European Investigation Order in criminal matters [2014] OJ L 130/1 (European Investigation Order Directive).

¹² Valsamis Mitsilegas, *EU Criminal Law* (Bloomsbury Publishing 2n Edition 2022) 234.

¹³ European Parliament and Council, Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings [2010] OJ L 280/1 (Directive on Interpretation and Translation); European Parliament and Council, Directive 2012/13/EU on the right to information in criminal proceedings [2012] OJ L 142/1 (Directive on the Right to Information); European Parliament and Council, Directive 2013/48/EU on the right of access to a lawyer in criminal proceedings and European arrest warrant proceedings and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty [2013] OJ L 294/1 (Directive on the Right to a Lawyer); European Parliament and Council, Directive 2016/343/EU on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings [2016] OJ L 65/1 (Directive on the Presumption of Innocence); European Parliament and Council, Directive 2016/800/EU on procedural safeguards for children, i.e., persons under the age of 18, who are suspects or accused persons in criminal proceedings [2016] OJ L 132/1 (Procedural Safeguard for Children Directive); European Parliament and Council, Directive 2016/1919/EU of the European Parliament and of the Council on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings [2016] OJ L 297/1 (Legal Aid Directive).

package) and three recommendations.¹⁴¹⁵ Furthermore, the constitutionalisation of the Charter can be seen as a statement of the importance ascribed by the EU to the protection of fundamental rights in its operation and functioning.¹⁶

When it comes to adult suspect vulnerability, at first glance, it would appear that there is a general acknowledgment by the Member States and EU institutions of the need to protect this category of suspects within the AFSJ.¹⁷ And yet, despite this awareness, it also appears that the only instrument dedicated to the protection of vulnerable adults is Recommendation of 27 November 2013 on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings (hereafter: the 2013 Recommendation)¹⁸. While directives impose on the Member States obligations to implement the safeguards in national law, recommendations lack this binding force.¹⁹ However, having highlighted the serious threats that a failure to identify vulnerable suspects can pose to the criminal justice systems, one may wonder whether a non-binding measure is enough to ensure that vulnerable adults are adequately protected across the EU. This, *prima facie*, does not seem to be the case. On the basis of these considerations, this research attempts at answering the research question as to **whether there is an added value in having an**

¹⁴ Commission, Recommendation of 27 November 2013 on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings [2013] OJ C 378/5 (Vulnerability Recommendation or the 2013 Recommendation); Commission, Recommendation of 27 November 2013 on the right to legal aid for suspects or accused persons in criminal proceedings [2013] OJ C 378/46; Commission, Recommendation of 8 December 2022 on procedural rights of suspects and accused persons subject to pre-trial detention and on material detention conditions [2023] OJ L 86/47.

¹⁵ Commission, 'Report to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Effective Legal Protection and Access to Justice: 2023 Annual Report on the Application of the EU Charter of Fundamental Rights' [2023] COM(2023) 786.

¹⁶ Mitsilegas (n 12).

¹⁷ Commission, 'Commission Staff Working Document, Impact Assessment Accompanying the Document Proposal for a Directive of the European Parliament and of the Council on Procedural Safeguards for Children Suspected or Accused in Criminal Proceedings' [2013] SWD/2013/0480 final.

¹⁸ Vulnerability Recommendation.

¹⁹ European Parliamentary Research Service, 'Initial Appraisal of Impact Assessment (SWD (2013) 480, SWD (2013) 481/final/2 (summary)) for a Commission Proposal for a Directive on Procedural Safeguards for Children Suspected or Accused in Criminal Proceedings (COM (2013) 822 final)' (2014).

European concept of adult suspect vulnerability in criminal procedural matters.

In order to address the research question it is first necessary to answer certain sub questions, including as to what is vulnerability and what is the importance of conceptualising vulnerability, whether there is a European concept of adult suspect vulnerability as of now and whether this conceptualisation is adequate. Starting from the hypothesis that the existing conceptualisation is flawed, a further subquestion is with regard to the possibilities that the EU has to address the legislative gap.

Before turning to the methodology and structure of this work, however, it is necessary to clarify some terms employed in the research question. To start with, the expression “adult suspect vulnerability” needs to be unpacked. Firstly, it refers to adults aged 18 or above involved in criminal proceedings from the moment they become suspects until the end of the final appeal. The reason for this is that children below 18 are entitled to the safeguards enshrined in Directive 2016/800.²⁰ Moreover, “Suspect” has an autonomous meaning in EU law and, although it is always mentioned together with “Accused” in the Directive package, it can be defined as a person who is notified by the competent authority that there is evidence of their participation in a criminal offence, until the later stage when the competent authority has formulated a specific charge accusing that person of being the perpetrator of a criminal offence.²¹ Finally, while the framework which is considered to constitute European criminal procedure is defined in Section 1.2, the concept of “vulnerability” will be extensively explored in Section 2.

1.2 Methodology and Structure

The methodology that is employed to answer the research question is a combination of doctrinal and normative evaluative legal research, with justification as the end goal. Doctrinal research can be described as the systematic examination of the principles, rules, and concepts that govern a

²⁰ Procedural Safeguard for Children Directive, art. 3(1).

²¹ Directive on the Right to Information, art. 2(1); Klip (n 10) 311; Case C-467/18 Criminal Proceedings against EP, Proceedings instituted at the request of: Rayonna prokuratura Lom, KM, HO, Opinion of AG Campos Sanchez-Bordona [2019] ECLI:EU:C:2019:590, paras 56–58.

specific legal field or institution.²² It analyses the relationships between these elements to address ambiguities and gaps in the existing law.²³ According to Smits, doctrinal analysis has three aims, namely description, prescription and justification. The first aim is necessary in every piece of legal research, in that it lays the foundations of the system which will be analysed.²⁴ In this research, the techniques which are employed are derivation²⁵ of legal concepts from case law and legal fragments, and systematisation²⁶, with a view to highlight a legislative gap and enhance the reader's understanding. With regard to the aim of prescription, understood as the identification of a solution to fix a flaw in legislation, it must be mentioned that this research simply aims at explaining why the flaw must be fixed,²⁷ rather than prescribing the exact solution to the problem. Ultimately, this research aims at providing a justification, in that it is argued that a common definition of adult suspect vulnerability would be coherent with the system²⁸ of European criminal procedure. In order to do so, the technique of interpretation²⁹ will be used, by arguing that a conceptualisation would be coherent with the system in light of a teleological reading of the principles, legal documents, and case law analysed.

The system considered is European criminal procedure, which, for the purpose of this thesis, includes the treaties, the Directive package, the Charter of Fundamental Rights of the European Union (hereafter: CFR), and case law of the Court of Justice of the European Union (hereafter: CJEU). Furthermore, because of the impact played by the European Convention on Human Rights (hereafter: ECHR) on the rights of the CFR, the ECHR together with the jurisprudence of the European Court of Human Rights (hereafter: ECtHR) will also be part of the legal framework considered. It is important to note that the scope of application of the CFR is limited to Member States when they are

²² Jan Smits, 'What Is Legal Doctrine?: On The Aims and Methods of Legal-Dogmatic Research' in R van Gestel, H-W Micklitz and E L Rubin (eds), *Rethinking Legal Scholarship: A Transatlantic Dialogue* (Cambridge University Press 2017) 207.

²³ *ibid.*

²⁴ *ibid.*, 209.

²⁵ Jason N E Varuhas, 'Mapping Doctrinal Methods' in P Daly and J Tomlinson (eds), *Researching Public Law in Common Law Systems* (Edward Elgar 2023).

²⁶ *ibid.*

²⁷ *ibid.*

²⁸ Smits (n 24) 214.

²⁹ Varuhas (n 27).

implementing Union law, while the defence rights Directives are applicable to every criminal proceeding in the European Union. It must be borne in mind that according to Article 52(3) CFR the rights in the Charter are to be considered as having the same meaning and scope as the rights enshrined in the ECHR, at most the rights of the Charter can provide for more extensive protection. The materials which are used in this dissertation include judgments of the courts (CJEU and ECtHR) and various binding and non-binding instruments, including the CFR and ECHR. Furthermore, in order to have a deeper understanding of the purpose of certain acts, Commission Proposals, Communications and other working documents are consulted, next to secondary sources including journal articles and other academic publications.

Section 2 is dedicated to answering the first two subquestions, namely what is vulnerability and what is the importance of conceptualising vulnerability within the policy area of freedom, security and justice (hereafter: AFSJ). This section is going to be purely descriptive and theoretical in character, as it aims at introducing the reader to the relevance of the topic on the basis of a literature review, and to contextualise vulnerability in light of mutual trust and mutual recognition, as the cornerstone principles of European criminal procedure.

In *Section 3.1* some of the relevant factors which influence the effectiveness of a definition are identified, with a view to build a framework for analysis which will be employed in the remainder of *Section 3*, whereby the existing fragments in EU law dealing with adult suspect vulnerability will be systematised and critically analysed. The idea is to highlight the existence of a legislative gap by answering the third and fourth subquestions, namely whether there is a European concept of vulnerability as of now and whether this conceptualisation is adequate to the full realisation of procedural rights. This Section is both doctrinal descriptive and normative evaluative in character, as it is first a description of the legislative and non-legislative fragments, aimed at connecting the dots and observing the chronological evolution of the concept of adult suspect vulnerability within the AFSJ; secondly, its normative character lies in the analysis of the legal sources on the basis of a normative framework for evaluation which results from a literature review of various empirical studies.

Finally, after having reached the unsurprising conclusion that the current framework is insufficient, *Section 4* is devoted to answering the fifth subquestion

and the research question, namely how the legislative gap could be addressed by the EU, and, assuming there would be one, what would be the added value of an action taken at EU level. What is argued in this final section, in a nutshell, is that a common European conceptualisation of adult vulnerability in criminal proceedings would be beneficial for at least 5 reasons, namely (i) identification accuracy, (ii) free movement, (iii) equality of arms, (iv) mutual recognition, and (v) as a symbolic statement.

After having highlighted what this research aims at achieving, it is also important to clarify where its ambitions end. This research's final goal is to make a compelling argument as to the reasons why the EU should take a stronger role, through a critical analysis and an explanation of the added value of having a European conceptualisation of adult suspect vulnerability. However, it is acknowledged that in the absence of additional data it is hard to reach a normative prescriptive conclusion as to how an action at the EU level could look like, both in terms of the instrument to be used or as to which definition would be the best solution. The attempt here is to lay the foundations for future research that will take a comparative perspective on as many Member States' frameworks as possible, with a view to identify some common denominators and consider different solutions. Only on such a basis would it be possible to carry out a proper evaluation of the pros and cons that different approaches to the definition of adult vulnerability have. Furthermore, to assess the perception of implementing authorities regarding their confidence in identification accuracy, empirical research should also be carried out. Some ideas for future research directions are highlighted in more detail in *Section 4*.

2. Vulnerability: Why Should EU Law Care About It?

This section is structured along 3 subsections. While the first Subsection (2.1) is devoted to the conceptualisation of vulnerability, Subsection 2.2 highlights what are the issues that vulnerability poses to the exercise of procedural rights. Thirdly, in Subsection 2.3 the protection of adult vulnerable persons suspected in criminal proceedings is contextualised within the bigger picture of the European criminal procedural panorama. What is argued here is, in essence, that the protection of procedural rights of adult vulnerable suspected persons is relevant to the creation of an environment of mutual trust.

2.1 Conceptualising Vulnerability

As a starting point it is recognised that vulnerability is a common experience, inherent to the human condition, which according to Fineman is “profoundly shaped by a constant state of disparity”³⁰. This depends on the fact that all citizens have different social backgrounds, education, means and cultural identities. This inherent state of disparity, however, is particularly enhanced by certain situations or factors, e.g. the involvement in criminal proceedings.³¹ While criminal justice has been traditionally developed on the basis of the liberal conception of the relationship between state and individual, recognising the disparity of all citizens leads to a substantial rethinking of the role of the state in criminal proceedings.³² In line with this reasoning, justice is more likely to be achieved if the state is built around the recognition of the vulnerable subject, rather than on the idea of equality of all citizens.³³ Applying the vulnerability theory developed by Fineman to the realm of criminal procedure, it results that the state is responsible for providing the tools to address “the common misfortune”³⁴ caused by the vulnerability of suspects.³⁵ In line with this, since all individuals involved in criminal proceedings find themselves in a particularly vulnerable position they are entitled to the various components of the right to

³⁰ Martha A Fineman, ‘The Vulnerable Subject: Anchoring Equality in the Human Condition’ (Yale Journal of Law and Feminism 2008) 14; Roxanna Dehaghani, ‘Interrogating Vulnerability: Reframing the Vulnerable Suspect in Police Custody’ (Social & Legal Studies Volume 30 Issue 2 2021) 260.

³¹ Fineman (n 30) 14.

³² *ibid*, 15.

³³ *ibid*, 16.

³⁴ *ibid*.

³⁵ *ibid*, 17.

a fair trial.³⁶ However, it is considered that some individuals may be unable to benefit from such rights due to, for example, lack of understanding. This latter category of “particularly vulnerable”³⁷ will be the main focus of this research. It is in such cases that the state has a special duty to intervene to ensure that the disparities between the advantaged and disadvantaged are narrowed, with everyone ultimately being able to fully enjoy their right to a fair trial.³⁸

In the context of police custody, vulnerability can be seen as the psychological traits or mental conditions that make a person more likely, in some circumstances, to give information that may be inaccurate, unreliable, or misleading.³⁹ It is clear that vulnerability is not black or white and can result from a wide array of factors, including dispositional and situational factors.⁴⁰ On the one hand, dispositional factors (also known as internal factors) refer to unique characteristics that influence behaviour and actions in an individual.⁴¹ Brown refers to these situations as situations of natural or innate vulnerability.⁴² Some examples may include personality traits, mental disorders, and various physical or verbal impairments.⁴³ Furthermore, Brown also includes in this category temporary biological states associated with elevated fragility, such as acute illness or pregnancy.⁴⁴ On the other hand, situational factors (also known as external factors) are environmental influences that may have an impact on the individual’s cognitive or physical abilities.⁴⁵ Brown describes this type of vulnerability as a situation in which people find themselves at elevated fragility or risk of harm to particular circumstances or transgressions, which are associated with the active input of a human third party or a structural force, but

³⁶ Dehaghani, ‘Interrogating Vulnerability: Reframing the Vulnerable Suspect in Police Custody’ (n 30) 261.

³⁷ *Salduz v Turkey*, App no. 244888/94 (ECtHR 27 November 2008).

³⁸ Dehaghani, ‘Interrogating Vulnerability: Reframing the Vulnerable Suspect in Police Custody’ (n 30) 261.

³⁹ *ibid*, 256.

⁴⁰ Lore Mergaerts, ‘Situations of heightened vulnerability in police interviews’ (The police, investigative interviewing and human rights conference Berlin 24 May 2024).

⁴¹ Kate Brown, ‘Vulnerability and young people: care and social control in policy and practice’ (Bristol: Policy Press 2015) 29.

⁴² *ibid*.

⁴³ Mergaerts, ‘Situations of heightened vulnerability in police interviews’ (n 40).

⁴⁴ Brown, ‘Vulnerability and young people: care and social control in policy and practice’ (n 41) 29.

⁴⁵ *ibid*.

could also contain elements of individual choice or agency.⁴⁶ Some examples are very bright lights or loud noise resulting in sleep deprivation, lack of adequate food or water, and no access to restrooms for long stretches of time.⁴⁷

Vulnerability is also dynamic and interactive in character, in that it is dependent on the specific moment and situation,⁴⁸ e.g. could be different prior to and during police questioning or manifest during other investigative acts (e.g. reconstruction, confrontation). Furthermore, the vulnerability of suspects and accused is dependent on the relationship between the actors involved, with a strong role being played by the attitude of the police and judicial authorities, as well as the conduct of the defence lawyer or other support person.⁴⁹ Finally, even when the vulnerability of a subject is established, its degree could change,⁵⁰ as an example, when a vulnerable individual is under the influence of an antipsychotic drug, resulting in the symptoms disappearing.

Although, having regard to all of the above, it becomes clear that defining vulnerability can be challenging, it is also evident that suspect vulnerability poses considerable challenges to the criminal justice system that cannot be underestimated. These are explored in the next subsection.

2.2 Issues Posed by Suspect Vulnerability

It is estimated that a significant number of persons standing trial can be considered “vulnerable”,⁵¹ yet only a few are granted the relevant procedural safeguards.⁵² This can be explained either (1) because police officers are unable to detect vulnerability and grant the relevant procedural safeguards,⁵³ or (2) because they are willing to do so, as they prioritise procedural efficiency over due process rights.⁵⁴

⁴⁶ *ibid*, 31.

⁴⁷ Fritz Heider, ‘The Psychology of Interpersonal Relations’ (New York: John Wiley & Sons 1958).

⁴⁸ Mergaerts, ‘Situations of heightened vulnerability in police interviews’ (n 40).

⁴⁹ Lore Mergaerts, ‘Defence lawyers’ views on and identification of suspect vulnerability in criminal proceedings’ (International Journal of the Legal Profession 29:3 2022) 291.

⁵⁰ Mergaerts, ‘Situations of heightened vulnerability in police interviews’ (n 40).

⁵¹ Morgavero Clark (n 4) 302.

⁵² Saul M Kassir, ‘False Confessions: Causes, Consequences, and Implications for Reform’ (Policy Insights from the Behavioral and Brain Sciences Vol. 1(1) 2014) 112-121.

⁵³ Roxanna Dehaghani, ‘He’s Just Not That Vulnerable: Exploring the Interpretation of the Appropriate Adult Safeguard in Police Custody’ (Howard Journal of Crime and Justice 55 2016) 9.

⁵⁴ *ibid*, 11.

With regard to the first explanation, police officers may be unable to detect vulnerable suspects due to the complex character of vulnerability, which makes it hard for implementing authorities to establish who is to be considered vulnerable in a specific situation. Various reasons seem to influence the inability to identify the vulnerable, in particular, empirical studies highlight the central role that appropriate guidelines can play in this respect.⁵⁵ In fact, the authorities, which are expected to detect vulnerability, often perceive themselves as lacking the relevant training to carry out such a task.⁵⁶

With regard to the second explanation, as highlighted by Dehaghani, even where implementing authorities are able to identify a suspect as vulnerable, they may be unwilling to act upon it as they perceive additional safeguards as a loss of time or over-simplistically think that “he is just not that vulnerable”⁵⁷. This occurs in particular when police officers are left with too much discretion that they end up prioritising procedural efficiency over due process right, eventually deciding not to award any special safeguard to vulnerable suspects.⁵⁸ It is against this background that the definition becomes fundamental in influencing the protection of vulnerable suspects, as it serves as the guideline on which implementing authorities rely when trying to identify the vulnerable, but also as a way to limit police officers’ discretion.⁵⁹

If vulnerable suspects end up being overlooked and not supported, significant impairments to their defence rights may arise as a result. Difficulties in understanding and exercising in particular the right against self-incrimination, the right to a lawyer, the right to effective participation, and the right to silence can undermine the legitimacy of the entire trial.

In particular, vulnerable suspects have been found to be associated with higher rates of false confessions, which in turn have an overshadowing effect over other evidence, possibly resulting in miscarriages of justice.⁶⁰ Recent advances in DNA testing revealed in recent years a worrying number of

⁵⁵ *ibid.*

⁵⁶ *ibid.*, 11.

⁵⁷ *ibid.*, 9.

⁵⁸ *ibid.*

⁵⁹ *ibid.*, 8.

⁶⁰ Saul M Kassin, Katherine Neumann, ‘On the power of confession evidence: An experimental test of the fundamental difference hypothesis’ (Law and Human Behavior 21 1997) 470.

miscarriages of justice, many of which involving vulnerable defendants.⁶¹ This phenomenon has sparked a significant body of literature in legal psychology since the 1990s.⁶² Vulnerable suspects appear to be prone to confess due to some risk factors as identified by Kassin, e.g. vulnerable persons may be suggestible, avoid confrontation, be prone to compliance, and be sensitive to the interrogation tactics employed by the police.⁶³

Furthermore, vulnerable suspects are also likely to provide inaccurate or incomplete evidence to the police.⁶⁴ Knowing about the vulnerability of the person giving evidence is essential for the police, not only in order to implement the relevant safeguards to the suspect, but also for truth finding purposes. First, the weight to be given to a certain piece of evidence may be influenced by the vulnerability of the suspect concerned, and may in turn have an impact on subsequent investigative choices. Second, evidence collected in the absence of the relevant safeguards risks being inadmissible at trial.⁶⁵ This latter point also implies that there are extra costs resulting from appeals and delays. However, it is not an easy task to develop an exhaustive definition of vulnerability.

2.3 Suspect Vulnerability and The Fairytale of Mutual Trust

After having delineated the concept of suspect vulnerability, and after having highlighted some of the major issues that it poses to criminal justice, the magnitude of the problem becomes evident. What this Subsection aims at briefly explaining is why the protection of vulnerability is relevant to the policy area of European criminal procedure, having regard to the principles of mutual recognition and mutual trust.

As mentioned in the Introduction, the development of the AFSJ followed two paths. The first one aimed at ensuring high levels of security through the enhancement of the Member States' prosecutorial powers in cross-border

⁶¹ Kassin, 'False Confessions: Causes, Consequences, and Implications for Reform' (n 52) 112.

⁶² Roxanna Dehaghani, Lore Mergaerts, 'Protecting vulnerable suspects in police investigations in Europe: lessons learned from England and Wales and Belgium' (New Journal of European Criminal Law 11 2020) 8.

⁶³ Kassin, 'False Confessions: Causes, Consequences, and Implications for Reform' (n 52) 114.

⁶⁴ Gisli H Gudjonsson, 'Confession Evidence, Psychological Vulnerability and Expert Testimony' (Journal of Community and Applied Social Psychology 3(3)1993) 3(3) 122.

⁶⁵ *ibid.*

situations.⁶⁶ This was done through the introduction of mutual recognition instruments, such as the EAW FD⁶⁷ and the EIO Directive⁶⁸. The second one consisted of the introduction of certain minimum standards with regards to the protection of human rights.⁶⁹ This was done with the enactment of the CFR and with the introduction of the Directive package⁷⁰. The idea was that if the Member States comply with the Charter, the ECHR, and correctly implement the Directives, Member States must consider each other's judicial decisions as their own, "implying not only trust in the adequacy of other Member States' rule, but also trust in the correct application of those rules"⁷¹. This latter concept is what is referred to as mutual trust, which is in essence an assumption that Member States will offer an equal level of protection.⁷² Mutual recognition can be understood as the consequence of mutual trust,⁷³ in that the latter forms the basis on which mutual recognition of judicial decisions works effectively and smoothly.

However, although in theory the functioning of this policy area sounds like a flawless fairy tale, it is also important to recognise that criminal procedure has been traditionally perceived by the Member States as falling within the core of their sovereign powers.⁷⁴ Therefore, despite the Member States accepted some degree of compromise incentivised by the benefits of closer judicial cooperation, there remain significant differences between their criminal justice systems. This means that the protection provided by the Member States may also differ quite significantly, especially where the EU has not yet imposed a minimum standard.

When it comes to suspect vulnerability, there appears to be a general understanding by the Member States and institutions of the importance of adjusting a criminal trial to the needs of the persons involved for the realisation

⁶⁶ Turmo, 'Towards European Criminal Procedural Law - First Part' (n 8) 1248.

⁶⁷ Council, Framework Decision 2002/584/JHA on the European arrest warrant and the surrender procedures between Member States (EAW FD) [2002] OJ L 190.

⁶⁸ European Investigation Order Directive.

⁶⁹ Turmo, 'Towards European Criminal Procedural Law - First Part' (n 8) 1248.

⁷⁰ Valsamis Mitsilegas, *EU Criminal Law after Lisbon Rights, Trust and Transformation of Justice in Europe* (Hart Publishing 2016) 103.

⁷¹ Directive on Interpretation and Translation, recital 4; Andre Klip (n 10) 111.

⁷² *ibid*, 110.

⁷³ *ibid*, 111.

⁷⁴ Turmo, 'Towards European Criminal Procedural Law - First Part' (n 8) 1248.

of the right to a fair trial.⁷⁵ This is highlighted in several working documents, stakeholder interviews, but, first and foremost, it can be deduced by the fact that the protection of vulnerability is one of the measures envisaged by the Council in 2009 for the achievement of a climate of mutual trust.⁷⁶ In fact, according to the Commission “only if all envisaged initiatives on procedural rights in criminal proceedings are implemented, an environment of enhanced mutual trust between judicial authorities will be in place”⁷⁷.

In order to illustrate *in concreto* the relevance of ensuring an adequate protection of human rights in light of mutual recognition instruments, it is interesting to consider the case of the European Arrest Warrant as an example. The EAW is a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order.⁷⁸ The idea behind this procedure is an automatic system of arrest and surrender in cross-border situations, “without many questions being asked”⁷⁹, and “with the requested authority having at its disposal extremely limited grounds for refusing the request for cooperation”.⁸⁰ These grounds, listed in Articles 3 and 4 EAW FD, do not include the possibility to refuse an arrest warrant in case of doubts that the requesting Member States offers lesser human rights protection than the requested Member State. However, the

⁷⁵ Commission, 'Commission Staff Working Document, Impact Assessment Accompanying the Document Proposal for a Directive of the European Parliament and of the Council on Procedural Safeguards for Children Suspected or Accused in Criminal Proceedings' [2013] SWD/2013/0480 final; Council, Conclusions on the Protection of Vulnerable Adults across the European Union [2021] OJ C 330I; European Economic and Social Committee, Opinion on 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions — Union of Equality: Strategy for the Rights of Persons with Disabilities 2021-2030' (COM(2021) 101 final) [2021] OJ C 374.

⁷⁶ Council, Resolution for a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings [2009] OJ C 295.

⁷⁷ Commission, 'Commission Staff Working Document, Impact Assessment Accompanying the Document Proposal for a Directive of the European Parliament and of the Council on Procedural Safeguards for Children Suspected or Accused in Criminal Proceedings' [2013] SWD/2013/0480 final 34; European Parliamentary Research Service, 'Initial Appraisal of Impact Assessment (SWD (2013) 480, SWD (2013) 481/final/2 (summary)) for a Commission Proposal for a Directive on Procedural Safeguards for Children Suspected or Accused in Criminal Proceedings (COM (2013) 822 final)' (2014).

⁷⁸ EAW FD, art 1(1).

⁷⁹ Valsamis Mitsilegas, 'Autonomous concepts, diversity management and mutual trust in Europe's area of criminal justice' (Common Market Law Review Issue 1 2020) 51.

⁸⁰ *ibid.*

scenario is different when the requesting Member States' human rights protection standards appear to be significantly below those set by the ECHR. In such instances, the Court acknowledged that if the requested person faces a serious risk, the request can be temporarily halted while the authorities of the Member States assess the likelihood of such violations in the specific case and determine whether the surrender can be authorised.⁸¹ While this line of case law started with a case dealing with potential violations of Article 3 ECHR (Article 4 Charter), the Court also extended this ground for refusal to fair trial rights in 2018⁸². Having highlighted in Section 2.2 the major issues the vulnerability poses to the right to a fair trial, it becomes clear how the protection of adult suspect vulnerability is relevant to the functioning of mutual recognition instruments.

What was answered in this section is, in essence, why the protection of suspect vulnerability is *relevant* in light of the objectives of European criminal procedure. Considering the clear relevance of the issue to the envisaged climate of mutual trust, it is unsurprising that something has already been done at the EU level. The existing EU law fragments dealing with suspect vulnerability will be explored in the next Section.

⁸¹ Joined Cases C-404/15 and C-659/15 PPU, *Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen* [2016] ECLI:EU:C:2016:198.

⁸² Case C-216/18 PPU, *Minister for Justice & Equality v LM* [2018] ECLI:EU:C:2018:586; Irene Wieczorek, 'EU Harmonisation of Norms Regulating Detention: Is EU Competence (Art. 82(2)b TFEU) Fit for Purpose?' (European Journal on Criminal Policy and Research 28 2022) 468.

3. Vulnerability in European Criminal Procedure: Reconstructing the Puzzle

The previous Section highlighted the importance of protecting suspect vulnerability. In this Section the main focus will be on the conceptualisation of vulnerability, which is argued to be crucial in the subsequent implementation of procedural safeguards. As it will be explored in this Section, there appears to exist some procedural safeguards for vulnerable suspects in EU law, as there are in most Member States' legal systems.⁸³ However, in order for safeguards to be applied, it is first necessary that the police is able to detect suspect vulnerability. As mentioned above, the definition, or conceptualisation, of suspect vulnerability in law has been recognised in the literature to play a central role in guiding the implementing authorities (police or lawyers) in the assessment as to who is to be considered vulnerable, especially for suspects whose vulnerability is less visible, i.e. adults.⁸⁴ For this reason, this Section has a twofold aim. First, to reconstruct the puzzle, by putting together the existing fragments of legislative and nonlegislative instruments that deal with, and shaped, the current European conceptualisation of adult vulnerability in criminal procedure. As the puzzle is expected to be flawed and incomplete, this Section also has the objective of highlighting the legislative gap. In order to evaluate the instruments under analysis, the lens which is employed consists of several factors identified in the literature which appear to impact identification accuracy by police officers or other implementing authorities. The structure of the following Section will be chronological, starting from a 1998 Commission Communication concerning the AFSJ⁸⁵, until the most recent judgement in Case C-15/24⁸⁶. This choice allows the reader to appreciate the complex and not always linear development of the existing European conceptualisation of suspect vulnerability.

⁸³ Commission, 'Commission Staff Working Document, Impact Assessment Accompanying the Document Proposal for a Directive of the European Parliament and of the Council on Procedural Safeguards for Children Suspected or Accused in Criminal Proceedings' [2013] SWD/2013/0480 final.

⁸⁴ Dehaghani, 'He's Just Not That Vulnerable: Exploring the Interpretation of the Appropriate Adult Safeguard in Police Custody' (n 53) 11.

⁸⁵ Commission, Towards an area of freedom, security and justice (Communication) [1998] COM(1998) 459 final.

⁸⁶ Case C-15/24 PPU, Criminal proceedings against CH (Stachev) [2024] ECLI:EU:C:2024:399.

3.1 Building a Framework for Evaluation

Despite the scarceness of sources regarding the conceptualisation of suspect vulnerability in the different Member States, it is possible to draw from literature some lessons that are also relevant in the discussion of the European legal framework.

There exists some empirical studies⁸⁷ that investigated the perception of implementing authorities (police officers or lawyers) of who is to be considered vulnerable on the basis of a certain statutory definition. There is a general understanding that identification accuracy is enhanced by a clear, detailed and exhaustive statutory definition. There is also general agreement in the literature that implementing authorities lack sufficient training and are not able to detect vulnerability when it is not visible.⁸⁸ Furthermore, even where the relevant training is provided (e.g. Belgium, SUPRALAT), it is not enough to compensate for legislative deficiencies.⁸⁹ As an example, it resulted from an empirical study conducted by Dehaghani in England and Wales that police officers who are asked to determine who is to be considered “mentally vulnerable” claim that “they are not mental health practitioners” and they “don’t feel knowledgeable enough in identifying mental health issues”.⁹⁰ In such a case, the absence of clearer guidelines poses a challenge, as police officers with inadequate training are expected to identify individuals with medical conditions that are not precisely defined.⁹¹

Another factor which plays a role is the nature of the legislation in question. According to what Dehaghani calls a legalistic argument, providing soft law guidelines which are meant to clarify the criminal procedural code gives the impression that adult vulnerability is of lesser importance compared with

⁸⁷ Dehaghani, ‘He’s Just Not That Vulnerable: Exploring the Interpretation of the Appropriate Adult Safeguard in Police Custody’ (n 53); See also Mergaerts, ‘Defence lawyers’ views on and identification of suspect vulnerability in criminal proceedings’ (n 49).

⁸⁸ Mergaerts, ‘Defence lawyers’ views on and identification of suspect vulnerability in criminal proceedings’ (n 49) 285.

⁸⁹ *ibid*, 301.

⁹⁰ Dehaghani, ‘He’s Just Not That Vulnerable: Exploring the Interpretation of the Appropriate Adult Safeguard in Police Custody’ (n 53) 9.

⁹¹ Gudjonsson (n 64) 121.

the vulnerability of minors.⁹² In line with this, an effective definition should be binding, either contained in legislation, or clarified via case law.

With regard to the precise content of a definition, it is important to mention that this thesis does not aim at finding the 'perfect' definition of suspect vulnerability. However, it is possible to point out some characteristics of a definition which make it more or less effective. First, a definition may include dispositional, and/or situational factors. Most definitions tend to include dispositional factors only,⁹³ to avoid opening the floodgates for every suspect being able to claim to be vulnerable. However, according to Dehaghani, bearing in mind the impossibility of determining with certainty who is really vulnerable and who is not, it is safer to be overinclusive.⁹⁴ Second, a definition can leave more or less discretion depending on whether it focuses on the effect of vulnerability, or whether it consists of a categorisation. In the latter case, the definition could be a list of groups which are considered vulnerable. The risks of this option are both that it is under and over inclusive.⁹⁵ In fact, the risks of labelling are that people that are vulnerable but do not fit in a category are excluded, but also that people falling within a certain group are entitled to safeguards they might not need,⁹⁶ considering the dynamic character of vulnerability. When a definition focuses instead on the effects of vulnerability, namely the inability to understand or exercise procedural rights, the risk is that very large discretion is left to the implementing authority. As previously mentioned, this can be problematic in light of the inability or unwillingness of the police (or lawyers) to identify the vulnerable.⁹⁷ However, it is also important to note that a broad definition, if combined with sufficient training to implement authorities, can also be beneficial as it allows for a case by case assessment. Presumptions of vulnerability could be a good way to restrict the discretion left to implementing authorities, by imposing on the latter the burden to prove that in certain situations of serious vulnerability the person does not need the

⁹² Dehaghani, *He's Just Not That Vulnerable: Exploring the Interpretation of the Appropriate Adult Safeguard in Police Custody* (n 53) 9.

⁹³ Mergaerts, *Situations of heightened vulnerability in police interviews* (n 40).

⁹⁴ Dehaghani, *'He's Just Not That Vulnerable: Exploring the Interpretation of the Appropriate Adult Safeguard in Police Custody'* (n 53) 9.

⁹⁵ *ibid*, 10.

⁹⁶ *ibid*, 11.

⁹⁷ *ibid*, 17.

safeguards in a specific case. A final possibility is to conceptualise vulnerability by focusing on the relevant set of cognitive abilities that are impaired, e.g. language skills, attention and concentration abilities, reasoning abilities, memory capacities, physical condition and substance use.⁹⁸

On the basis of the above it is now possible to systematise and analyse the conceptualisation of vulnerability which is contained in various fragments of EU law. To sum up, what is considered is (i) whether the definition includes internal and/or external factors; (ii) whether the definition focuses on the effect of vulnerability on the understanding/exercise of defence rights; (iii) whether the definition consists of a categorisation of persons at risk; (iv) whether the definition is contained in a binding or not binding instrument; (v) whether the definition focuses on the relevant set of skills impaired.

3.2 EU Law Instruments

3.2.1 Green Paper (2003)

Despite the importance of ensuring adequate safeguards to suspects within the AFSJ was recognised as early as 1998,⁹⁹ the first move specific to suspect vulnerability came in 2003 in the form of a Green Paper. In such occasion, the Commission pointed out that to enhance mutual trust in practice a degree of harmonisation is necessary, to ensure that rights are not only “theoretical or illusory” in the EU, but rather “practical and effective”¹⁰⁰. Although the Commission recognised that procedural rights are already binding on the Member States, being signatories to the ECHR, the Green Paper pointed out that “there remain significant differences in the way human rights are translated into practice in national procedural rules”¹⁰¹. This does not necessarily result in violations of the ECHR, but it still risks hindering mutual trust and confidence, which is the basis of mutual recognition.¹⁰² On these premises, the Commission considered it necessary to (at least attempt to) provide vulnerable groups with a proper degree of protection as far as procedural safeguards were concerned

⁹⁸ Mergaerts, ‘Situations of heightened vulnerability in police interviews’ (n 40).

⁹⁹ Commission, Towards an area of freedom, security and justice (Communication) COM(1998) 459 final.

¹⁰⁰ Commission, Green Paper on Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the European Union, COM(2003) 75 final.

¹⁰¹ *ibid.*

¹⁰² *ibid.*

to offset their disadvantages.¹⁰³ Although this suggestion was well received, the difficulty in defining vulnerable groups led to the choice of a non binding instruments, aimed at constituting “European best practice”, and rendering more efficient and visible the practical operation of these rights, rather than an “intrusive action obliging Member States substantially to amend their codes of criminal procedure”.¹⁰⁴

In the consultation document, the Commission opted for a non-exhaustive list of potentially vulnerable groups, which includes foreign nationals, children, those who are vulnerable as a result of their mental or emotional state, those who are vulnerable as a result of their physical state, those who are vulnerable by virtue of having children or dependants, those who cannot write or read, persons with refugee status under the 1951 Refugee Convention, and finally persons dependent on alcohol or drugs.¹⁰⁵ According to Van Der Aa, the idea behind the categorisation chosen by the Commission stems from a reasoning as to which skills are impaired in a specific situation.¹⁰⁶ In particular, she argues that the categories at risk could be divided in 3 groups, namely (1) conditions that may impact the cognitive ability to understand proceedings or give their version of events (e.g. due to low IQ, illiteracy, linguistic disadvantages); (2) conditions that may impact the emotional and volitional ability to make free and independent choices relating to their conduct over proceedings (e.g. parents of young children, refugees); and (3) conditions that may impact the physical ability to endure interrogation (e.g. pregnant women, addicts).¹⁰⁷

On top of this non-exhaustive list, the Commission acknowledges that the assessment of vulnerability can be difficult to make and that simply using a category-based method may not always be appropriate.¹⁰⁸ Having regard to the case law of the ECtHR¹⁰⁹, the Commission recognises that regard should be

¹⁰³ *ibid.*

¹⁰⁴ *ibid.*

¹⁰⁵ *ibid.*

¹⁰⁶ Suzan van der Aa, *Variable Vulnerabilities? Comparing the Rights of Adult Vulnerable Suspects and Vulnerable Victims under EU Law* (New Journal of European Criminal Law Volume 7 Issue 1 2016) 42.

¹⁰⁷ *ibid.*, 43.

¹⁰⁸ Commission, *Green Paper on Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the European Union*, COM(2003) 75 final.

¹⁰⁹ *Quaranta v Switzerland*, App no.12744/87, (ECtHR 24 May 1991).

given to the 'personal situation' of the individual concerned, which is not limited to checking whether it falls within one of the categories at risk.¹¹⁰ Although it is affirmed that law enforcement officers should consider the question of the suspect's potential vulnerability, it is also admitted that such an assessment is difficult to make.¹¹¹ For this reason, the Commission concludes that training in this field could be offered.¹¹²

The definition provided in the Green Paper provides for a mix of categorisation of situations at risk, combined with the acknowledgement that a case by case assessment may be justified. This solution is not however immune to the risks of being under and over inclusive. The inadequacy of this instrument to protect vulnerable adults lies both in this risky definition, and its non-binding character, which means its effectiveness depends on the Member States willingness to do something about it. Finally, although training was considered as a factor which could have helped the implementation, it is just a possibility that is envisaged, rather than an obligation.

3.2.2 Failed Attempt for a Council FD (2004)

Quickly after the Green Paper, in 2004 the Commission put forward a Proposal for a Council FD¹¹³. The act, according to the Commission, was aimed at addressing the specific challenges in the protection of procedural rights, which are classified into five major subdivisions, namely (1) the right to legal assistance and representation, (2) the right to interpretation and translation, (3) the protection of certain potentially vulnerable groups, (4) the possibility for detained persons to communicate their whereabouts to the outside world and for foreign defendants to receive consular assistance and (5) the right to written notification of rights to ensure that each suspect/defendant is aware of their rights.¹¹⁴ The overall objectives of EU policy in this area was identified in ensuring that throughout the EU all persons encounter equivalent fair trial standards in the course of criminal proceedings, regardless of the Member State

¹¹⁰ Commission, Green Paper on Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the European Union, COM(2003) 75 final.

¹¹¹ *ibid.*

¹¹² *ibid.*

¹¹³ Commission, Proposal for a Council Framework Decision on Certain Procedural Rights in Criminal Proceedings throughout the European Union, COM/2004/0328 final.

¹¹⁴ *ibid.*

in which those proceedings occur.¹¹⁵ In this context, the Commission recognised the duty of care towards suspected persons unable to understand or follow the proceedings as central to a fair administration of justice.¹¹⁶ The idea behind granting dedicated protection through a framework decision was perhaps grounded on the need to ensure equality of arms in proceedings involving vulnerable adults, who by definition find themselves in a particularly disadvantaged position when faced with criminal proceedings.¹¹⁷

In the proposal, the Commission acknowledges that the assessment of vulnerability can be difficult to make and that simply using a category-based method is not appropriate.¹¹⁸ For this reason, the proposed definition focuses this time on the ability to understand or follow proceedings. In particular, the proposal refers to persons who, owing to their age or their physical, medical or emotional condition, cannot understand or follow the proceedings.¹¹⁹ Furthermore, the assessment as to the “physical, medical or emotional condition” of the suspect must be made at all relevant stages of the proceedings from arrest onwards.¹²⁰ In the proposal, it is recognised that an enhanced duty of care towards vulnerable adults is necessary to promote fair trials and to avoid potential miscarriages of justice.¹²¹

The definition provided is indeed very broad, but according to the Commission, the idea is to impose a minimum expectation on law enforcement officers to at least assess whether the suspect is able to understand or follow the proceedings, having regard to their age or mental, physical or emotional condition.¹²² Although the terms employed are vague and they are not otherwise specified in the proposal, this broader definition would have been binding and included emotional factors. This could have been a symbolic statement of the importance of protecting vulnerable suspects, including vulnerable adults, and would have forced the Member States to adapt their legislation to this minimum definition. However, this attempt constituted what Van Der Aa refers to as “a

¹¹⁵ *ibid.*

¹¹⁶ *ibid.*

¹¹⁷ *ibid.*

¹¹⁸ *ibid.*

¹¹⁹ *ibid.*

¹²⁰ *ibid.*

¹²¹ *ibid.*

¹²² *ibid.*

bridge too far”.¹²³ After years of political debate concerning the proposal, it was eventually abandoned in 2007.¹²⁴

3.2.3 Resolution for a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings (2009)

The subsequent step took place in 2009, when the Council endorsed a Roadmap delineating a step by step approach aimed at encouraging the Commission to put forward measures with the purpose of delineating European Union standards for the protection of procedural rights of suspects and accused.¹²⁵ The reasoning behind this is once again revolving around the principle of mutual recognition, having regard to the progress already achieved in the area of judicial and police cooperation and the need to improve the balance between such measures and the protection of the procedural rights of the individual.¹²⁶ In particular, it is noted that these efforts are necessary in a European Union where citizens make increasingly more use of their free movement rights, in order to strengthen procedural guarantees and the respect of the rule of law in criminal proceedings, no matter where citizens decide to travel, study, work, or live in the European Union.¹²⁷ The six priorities areas identified in the Roadmap can be found in the annex, and include (A) Interpretation and Translation, (B) Information on Rights and Information about the Charges, (C) Legal Advice and Legal Aid, (D) Communication with Relatives, Employers and Consular Authorities, (E) Special Safeguards for Suspected or Accused Persons who are Vulnerable, and (F) Green Paper on Pre-Trial Detention.¹²⁸ In point E, it is pointed out that special attention must be given to suspected or accused persons who cannot understand or follow the content or the meaning of the proceedings, owing, for example, to their age, mental or physical condition.¹²⁹ This Roadmap is particularly relevant to the present discussion on the protection of adult vulnerability, as it highlights how

¹²³ van der Aa (n 106) 44.

¹²⁴ *ibid.*

¹²⁵ Council, Resolution for a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings [2009] OJ C 295.

¹²⁶ *ibid.*

¹²⁷ *ibid.*

¹²⁸ *ibid.*

¹²⁹ *ibid.*

the issue is in fact perceived by the Council as deserving dedicated attention in order to achieve the desired climate of mutual trust in the AFSJ.¹³⁰

3.2.4 Procedural Rights Directive Package (2010-2016)

On the basis of the Roadmap, starting from 2010, the EU began to harmonise certain procedural standards through a set of Directives.¹³¹ Although these instruments are not specific to vulnerability, they do impose a broad mandate to implement special accommodations for vulnerable individuals through some provisions scattered throughout Directives. In particular, Directive 2013/48 on the right to a lawyer and Directive 2016/1919 on legal aid impose an obligation on the Member States to ensure that the particular needs of vulnerable suspects and vulnerable accused persons are taken into account in the application of the instrument.¹³² Furthermore, Article 3(2) of Directive 2012/13 on the right to information imposes on the Member States the obligation to ensure that the information provided for under paragraph 1 of the same provision is given taking into account any particular needs of vulnerable suspects or vulnerable accused persons. Moreover, all the Directives refer in the recitals to the Roadmap and the measures thereby envisaged, focusing in particular on the purpose of such initiative, which “is designed to operate as a whole”, and “only when all its components are implemented will its benefits be felt in full”. Further references to vulnerable suspects and accused appear in the Recitals of the various Directives. For example, in Recital 51 of Directive 2013/48 and Recital 27 of Directive 2010/64 it is emphasised that the “duty of care towards suspects or accused persons who are in a potentially weak position underpins a fair administration of justice” and “the prosecution, law enforcement and judicial authorities should facilitate the effective exercise by such persons of the rights provided for in this Directive”. To this end, they are encouraged to take into account “any potential vulnerability that affects their ability to exercise their rights by taking appropriate steps to ensure those rights are guaranteed”. Finally, also Recital 42 of Directive 2016/343 on the presumption of innocence encourages Member States to take into account the needs of vulnerable persons

¹³⁰ *ibid.*

¹³¹ Directive on Interpretation and Translation; Directive on the Right to Information; Directive on the Right to a Lawyer; Directive on the Presumption of Innocence; Procedural Safeguard for Children Directive; Legal Aid Directive.

¹³² Directive on the Right to a Lawyer, art. 13; Legal Aid Directive, art. 9.

in the implementation of the Directive. In such a context, the definition provided in Recital 1 of Recommendation of 27 November 2013 is also mentioned, according to which vulnerable suspected or accused in criminal proceedings are those “who are not able to understand or effectively participate in criminal proceedings due to their age, their mental or physical condition or any disabilities they may have”.¹³³

On the basis of the above it can be observed that none of the Directives does offer a clear, binding definition of “vulnerable”, nor specifies the necessary measures to achieve the objective of accommodating the needs of vulnerable adults. The definitions that appear in the Recitals of two of the Directives analysed are broad and focus only on the effects of vulnerability, rather than on the relevant set of skills which is impaired. Although a more extensive discussion of the definition provided for in Recital 1 of the 2013 Recommendation will be carried out in the next Subsection, it can be noted that the choice of relegating a sketched definition of vulnerability in the Recitals could be interpreted as a deliberate, symbolic statement highlighting the lesser importance ascribed to this concept. Having regard to the negotiations of the Directives, it would seem like the choice of not defining adult vulnerability, nor detailing the appropriate safeguards, lies in the intention of the legislator to dedicate a separate overarching legal instrument to vulnerable persons. To date, however, this resulted in a binding instrument dedicated to children¹³⁴, and a non-binding instrument for adults (the 2013 Recommendation).¹³⁵

3.2.5 Recommendation on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings (2013)

After the failed attempt in 2004, the Commission was forced to significantly lower its ambitions, first with regards to the choice of instrument (1), namely a Recommendation instead of a Directive, and secondly with regard to the definition of vulnerability (2).¹³⁶ This subsection will address both aspects jointly, as they are strictly related.

¹³³ Vulnerability Recommendation, recital 1.

¹³⁴ Procedural Safeguard for Children Directive.

¹³⁵ Vulnerability Recommendation.

¹³⁶ European Parliamentary Research Service, ‘Initial Appraisal of Impact Assessment (SWD (2013) 480, SWD (2013) 481/final/2 (summary)) for a Commission Proposal for a

The aim of the measure is to strengthen the right to liberty, the right to a fair trial and the rights of the defence by offering appropriate assistance and support. Recital 1 clarifies that the Recommendation applies to “all suspects or accused persons who are not able to understand and to effectively participate in criminal proceedings due to age, their mental or physical condition or disabilities (“vulnerable persons”)”. This definition appears to be almost identical to the one employed in the 2004 draft Framework Decision, with the exception of one element: suspects whose understanding of the proceedings is hampered because of their emotional condition have been removed.¹³⁷ In this sense, it can be argued that the Commission had to narrow down the situations that can give rise to suspect vulnerability by excluding situational factors.

With regard to the detection of vulnerability, it is worth mentioning that the Recommendation suggests in Section 7 that Member States introduce a presumption of vulnerability for persons with “serious psychological, intellectual, physical or sensory impairments, or mental illness or cognitive disorders, hindering them to understand and effectively participate in the proceedings”. The focus of the presumption seems to be on the relevant set of skills that are impaired, in combination with the effect that the impairment has on the exercise and understanding of the rights. Presumptions are a useful tool to restrict the discretion of implementing authorities, even though the scope here is limited to ‘serious’ circumstances of vulnerability.¹³⁸ The reasons for this broad definition be found in the Executive Summary of the Recommendation’s Impact Assessment¹³⁹, according to which the introduction of a more specific definition for vulnerable adults was discarded as not feasible.¹⁴⁰

Directive on Procedural Safeguards for Children Suspected or Accused in Criminal Proceedings (COM (2013) 822 final)’ (2014).

¹³⁷ van der Aa (n 106) 44.

¹³⁸ Vulnerability Recommendation, section 7.

¹³⁹ Commission, Executive Summary of the Impact Assessment Accompanying the Proposal for a Directive on Procedural Safeguards for Children Suspected or Accused in Criminal Proceedings (Staff Working Document) SWD (2013) 481/final.

¹⁴⁰ Commission, Impact Assessment Accompanying the Document Proposal for a Directive of the European Parliament and of the Council on Procedural Safeguards for Children Suspected or Accused in Criminal Proceedings’ 2013 (Staff Working Document) SWD/2013/0480 final.

With regards to the choice of instrument, the Commission discarded the options of adopting soft law measures (options 1 and 2) on the ground that it is unlikely that significant progress could be made in the protection of vulnerable persons' rights 'in the absence of major legislative developments'¹⁴¹, and that 'the risk is high that in particular those Member States which currently do not comply with minimum international and ECtHR standards, will not fully implement the guidelines'.¹⁴² This would presumably imply that the introduction of a non-binding Recommendation may not be sufficient to achieve the desired result, unless, of course, all Member States decide to implement it.¹⁴³ This seems to be confirmed by the IA's own conclusions which state, in relation to the Recommendation option, that the lack of a common definition of vulnerable groups 'will have a certain negative impact on the efficiency of such a measure'¹⁴⁴, and that 'the absence of any method of enforcement might result in only a variable improvement in the Member States'¹⁴⁵. Despite this rather unsound reasoning justifying the choice of instrument, the Recommendation has been found to be the preferred option of the Commission. The choice of instrument much relates to the definition of vulnerability. In fact, in the Executive Summary¹⁴⁶ it is mentioned that stakeholders have indicated that it is very difficult, if not impossible, to find an overall definition of vulnerability, as such a definition would necessarily be very broad (in order to cover all potential groups of vulnerable persons).¹⁴⁷ This, according to the document, could turn out to be a "catch-all" provision with little substance and without real added

¹⁴¹ *ibid*, 31.

¹⁴² *ibid*, 44.

¹⁴³ European Parliamentary Research Service, 'Initial Appraisal of Impact Assessment (SWD (2013) 480, SWD (2013) 481/final/2 (summary)) for a Commission Proposal for a Directive on Procedural Safeguards for Children Suspected or Accused in Criminal Proceedings (COM (2013) 822 final)' (2014).

¹⁴⁴ Commission, Impact Assessment Accompanying the Document Proposal for a Directive of the European Parliament and of the Council on Procedural Safeguards for Children Suspected or Accused in Criminal Proceedings' 2013 (Staff Working Document) SWD/2013/0480 final.

¹⁴⁵ *ibid*, 50.

¹⁴⁶ Commission, Executive Summary of the Impact Assessment Accompanying the Proposal for a Directive on Procedural Safeguards for Children Suspected or Accused in Criminal Proceedings Staff Working Document SWD (2013) 481/final.

¹⁴⁷ Commission, Impact Assessment Accompanying the Document Proposal for a Directive of the European Parliament and of the Council on Procedural Safeguards for Children Suspected or Accused in Criminal Proceedings' 2013 (Staff Working Document) SWD/2013/0480 final.

value.¹⁴⁸ Moreover, stakeholders have stressed the risk of stigmatisation resulting from such a definition.¹⁴⁹ This line of reasoning is argued to be unconvincing for two reasons. Firstly, as argued by Van Der Aa, it should be noted that similar problems have not stopped the Commission from legislating in the field of (vulnerable) crime victimisation.¹⁵⁰ Secondly, a broad but binding definition flowing from a Directive would (1) force Member States which do not have a definition as of today to legislate on the matter, while still leaving them a choice as to the best definition, provided that it complies with the minimum standard; (2) constitute a symbolic acknowledgment of the equal importance of protecting all kinds of vulnerability, which is not limited to minors; (3) lay the foundations for a gradual expansion of the concept, which with practice and increased attention from the Member States, could eventually result in a sufficiently exhaustive and effective definition.

3.2.6 Council Conclusions on the protection of vulnerable adults across the European Union (2021)

The 2021 Council Conclusion on the protection of vulnerable adults across the European Union¹⁵¹ represents a useful document to have an overview of the developments that took place in this area up to 2021. The Conclusions have been redacted following the Covid-19 crisis, which was recognised as affecting “all of society, with a particular impact on those adults who were already vulnerable”.¹⁵² Furthermore, the phenomenon of population ageing is identified as another factor that is capable of affecting the legal capacity of vulnerable adults, who face challenges and difficulties in protecting their rights.¹⁵³ Combined with the role of free movement rights, as cornerstones of EU citizenship, the Council concludes that the protection of vulnerability has to be strengthened so that vulnerability does not hamper the exercise of such rights.¹⁵⁴ On the basis of the Roadmap, it is recalled that six Directives have

¹⁴⁸ *ibid.*

¹⁴⁹ European Parliamentary Research Service, ‘Initial Appraisal of Impact Assessment (SWD (2013) 480, SWD (2013) 481/final/2 (summary)) for a Commission Proposal for a Directive on Procedural Safeguards for Children Suspected or Accused in Criminal Proceedings (COM (2013) 822 final)’ (2014).

¹⁵⁰ van der Aa (n 106) 45.

¹⁵¹ Council, Conclusions on the Protection of Vulnerable Adults across the European Union [2021] OJ C 330I.

¹⁵² *ibid.*

¹⁵³ *ibid.*

¹⁵⁴ *ibid.*

been adopted, one of which relating to Measure E, namely Directive 2016/800 on procedural safeguards for children. Referring to the scattered provisions within the Directive package that here and there refer to vulnerability, the Council mentioned that “in so far as the particular needs of vulnerable suspects or accused persons are addressed in these directives, they must be taken into account in their implementation”.¹⁵⁵ Furthermore, the 2013 Recommendation is mentioned as an action taken in the context of Measure E.¹⁵⁶ However, the Council acknowledges that by its nature the Recommendation does not provide any legally enforceable right, and has been given effect only by one Member State.¹⁵⁷

In light of the measures taken so far, and having regard to the pressing and continuous need to support vulnerable adults, the Council calls on the Commission and the Member States to adopt a number of measures in criminal matters.¹⁵⁸ These include to ensure the correct and full implementation of the Directive package; sharing best practices, with particular regard to vulnerable adults; to endeavour to take into account the 2013 Recommendation; to ensure that vulnerable adults, whether suspects or accused persons or victims, are promptly identified and that their vulnerability is adequately assessed so that they can fully exercise their rights under EU law, in line with the CRPD.¹⁵⁹ Furthermore, the Council invites the Commission to examine whether there is a need to strengthen, in a comprehensive manner, the procedural safeguards for vulnerable adults who are suspects or accused persons in criminal proceedings, on the basis of a study which will allow reflection on how the European Union should go forward on the protection of vulnerable adults in line with the CRPD; carefully reflect on the need to identify uniform and common criteria for identifying vulnerable adults in criminal proceedings, taking into account the fact that vulnerability may be attributable to a wide range of circumstances and not necessarily have a single common cause; take the specific needs of vulnerable adults into account in the monitoring and in ensuring the correct and full implementation of the above-mentioned in so far as they refer to vulnerable

¹⁵⁵ *ibid.*

¹⁵⁶ *ibid.*

¹⁵⁷ *ibid.*

¹⁵⁸ *ibid.*

¹⁵⁹ *ibid.*

suspects or accused persons; liaise with the Member States to identify horizontal good practices in this regard.¹⁶⁰

3.2.7 Other Recent Instruments Mentioning Vulnerability

Vulnerability is also mentioned in a number of recent instruments. To start with, a recent document which is relevant to consider is the Opinion of the European Economic and Social Committee (hereafter: EESC) on the Commission Communication on a Strategy for the Rights of Persons with Disabilities¹⁶¹. The Opinion delineates a new EU Disability Rights Strategy for the years 2021-2030, aimed at the implementation of the CRPD at the EU level. Among the actions listed, the EESC also refers to a training strategy for justice professionals, which would focus on EU disability legislation and the CRPD, and which would include a study on procedural safeguards for vulnerable adults in criminal proceedings.¹⁶² For the operationalisation of this measure, the EESC points out that it could be beneficial to explore how the Member States proceeded in the implementation of the 2013 Recommendation.¹⁶³ Although this research only focuses on the conceptualisation of vulnerability and does not have the ambition of assessing the adequacy of the safeguards that are activated upon identification of vulnerable adults, this Opinion is relevant considering that one of the findings from Section 3.1 is that adequate training for law enforcement is a factor influencing identification accuracy.¹⁶⁴ Although this Strategy, on its own, will not probably bring about any significant improvement, if combined with a binding definition it could be considered as benefiting identification accuracy. In fact, although training is not enough to fully counterbalance the vagueness of legislative terms,¹⁶⁵ it is still significant in enhancing prompt and accurate detection of vulnerable suspects. Although it is not known yet what will be the quality of this training, it can be observed that, if the EU were to impose a broad

¹⁶⁰ *ibid.*

¹⁶¹ European Economic and Social Committee, Opinion on 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions — Union of Equality: Strategy for the Rights of Persons with Disabilities 2021-2030' (COM(2021) 101 final) [2021] OJ C 374.

¹⁶² *ibid.*

¹⁶³ *ibid.*

¹⁶⁴ Dehaghani and Mergaerts (n 62).

¹⁶⁵ *ibid.*

and vague definition, this initiative by the EESC would be a good way to complement such definition.¹⁶⁶

Furthermore, vulnerability is also mentioned in the context of the European Parliament Resolution on the implementation of the European Arrest Warrant and the surrender procedures between Member States¹⁶⁷ from 2021. In such an occasion, the Parliament urged the Commission to step up efforts to ensure the full implementation of all directives on procedural safeguards in order to make sure that requested persons have recourse to effective defence in cross-border proceedings, which also includes a broad mandate to take into account the needs of the vulnerable.¹⁶⁸ Finally, the Parliament emphasised the urgent need for the Commission to consider taking action due to the inadequate implementation of the 2013 Recommendation, specifically highlighting concerns related to vulnerable adults.¹⁶⁹

In addition, Commission Recommendation on procedural rights of suspects and accused persons subject to pre-trial detention and on material detention conditions¹⁷⁰ encourages the Member States to provide guidance “on safeguarding the rights of persons for whom deprivation of liberty constitutes a situation of particular vulnerability, such as women, children, persons with disabilities or serious health conditions, LGBTIQ and foreign nationals”.¹⁷¹ The choice adopted by the Commission in this context is to provide a non-exclusive list of examples of what could be a situation of particular vulnerability, starting from the idea that deprivation of liberty is in itself a situational factor giving rise to vulnerability. The problems of categorising, as outlined in Section 3.1, are indeed a risk of stigmatisation, under inclusivity but also over inclusivity. However, the fact this is not an exhaustive list also implies that a case by case assessment remains necessary. Although this combined approach has some

¹⁶⁶ European Economic and Social Committee, Opinion on ‘Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions — Union of Equality: Strategy for the Rights of Persons with Disabilities 2021-2030’ (COM(2021) 101 final) [2021] OJ C 374.

¹⁶⁷ European Parliament, Resolution on the implementation of the European Arrest Warrant and the surrender procedures between Member States [2021] 2019/2207(INI) final.

¹⁶⁸ *ibid.*

¹⁶⁹ *ibid.*

¹⁷⁰ Commission, Recommendation on procedural rights of suspects and accused persons subject to pre-trial detention and on material detention conditions [2022] OJ L 86.

¹⁷¹ *ibid.*

benefits, e.g. making it relatively easy for implementing authorities to check whether the suspect fits within a certain label, the risks of reducing the assessment to ticking the box are, again, over and under inclusivity. In any case, the instrument in question is again not binding, it is not specific to fair trial rights, and it only applies in situations when there is a deprivation of liberty.¹⁷²

Finally, Recital 21 of Proposal for a Regulation of the European Parliament and of the Council on the transfer of proceedings in criminal matters (2023)¹⁷³ provides that Member States should ensure that, when applying the Regulation, the needs of vulnerable persons are taken into account. For the purpose of this obligation, vulnerable suspects are again defined as per Recital 1 the 2013 Recommendation.¹⁷⁴

3.3 Fundamental Rights Instruments

In the European legal framework, the Charter and the ECHR provide for safeguards and fair trial rights in criminal proceedings, applicable to all suspects and accused persons. In particular, in this respect, Article 6 ECHR and Articles 47 and 48 CFR are relevant. Article 6 ECHR enshrines the right to a fair trial, the presumption of innocence, and a set of minimum procedural safeguards which should be awarded to suspects and accused persons involved in criminal proceedings. Articles 47 and 48 of the Charter lay down the right to an effective remedy, the presumption of innocence and the rights of defence, which have the same meaning and scope as the rights guaranteed by Article 6 ECHR.¹⁷⁵

In cases involving vulnerable suspects the ECtHR's main focus has been placed on the right to effective participation, which has been interpreted as flowing from Article 6 as the capacity to understand the "thrust of what is said in court"¹⁷⁶. The situational vulnerability of all suspects has been recognised by

¹⁷² Commission, Recommendation on procedural rights of suspects and accused persons subject to pre-trial detention and on material detention conditions [2022] OJ L 86.

¹⁷³ Commission, Proposal for a Regulation of the European Parliament and of the Council on the transfer of proceedings in criminal matters [2023] COM/2023/185 final.

¹⁷⁴ *ibid.*

¹⁷⁵ Charter of Fundamental Rights of the European Union (CFR) OJ C 326/391 Art. 53.

¹⁷⁶ *SC v. the United Kingdom*, App No. 60958/00 (ECtHR 29 July 2005); Commission, Impact Assessment Accompanying the Document Proposal for a Directive of the European Parliament and of the Council on Procedural Safeguards for Children Suspected or Accused in Criminal Proceedings' 2013 (Staff Working Document) SWD/2013/0480 final; Combined reading of *ZH v. Hungary*, App. No. 28973/11, (ECtHR 8 April 2014); *Hasalikova v.*

the ECtHR starting from *Salduz*.¹⁷⁷ However, while the Court emphasises that due care should be given to the vulnerability of suspects and their capacities for the purpose of effective participation of minors,¹⁷⁸ it falls short in providing a comprehensive definition for vulnerable adults. The ECtHR only acknowledges specific forms of vulnerability in adults, such as chronic alcoholism, physical disabilities, social disadvantages, medical conditions, and mental disorders.¹⁷⁹ Furthermore, the Court never gave specific guidance on handling vulnerability, except for the suggestion that the right to a lawyer should not be waived.¹⁸⁰ Moreover, a broad mandate to ensure that the needs of vulnerable persons, including adults, are taken into account can be derived from a joint reading of several cases,¹⁸¹ but it had never been set out in detail. However, the interpretation of the ECHR in case law dealing with vulnerable suspects in the context of a specific case makes it hard to generalise its applicability to other situations, leaving the standards uncertain.¹⁸² Moreover, the absence of any effective enforcement mechanism in the case of breaches of ECtHR decisions, makes national implementation dependent on the willingness of the Contract Parties to change their national laws.¹⁸³

With regard to the Charter, it has the same legal value of the Treaties¹⁸⁴ and it applies to EU institutions and Member States when implementing EU law.¹⁸⁵ Although the scope of application of the Charter appears to be limited by

Slovakia, App No. 21002/08 (ECtHR 24 June 2021); *SC v. the United Kingdom*, App No. 60958/00 (ECtHR 29 July 2005).

¹⁷⁷ *Salduz v Turkey*, App no. 244888/94 (ECtHR 27 November 2008).

¹⁷⁸ *SC v. the United Kingdom*, App No. 60958/00 (ECtHR 29 July 2005).

¹⁷⁹ Mergaerts, 'Defence lawyers' views on and identification of suspect vulnerability in criminal proceedings' (n 49) 285; *Plonka v Poland* App no 20310/02 (ECtHR 31 March 2009); *Bortnik v Ukraine* App no 39582/04 (ECtHR 27 January 2011); *Orsus and others v Croatia* App no 15766/03 (ECtHR 16 March 2010); *Blohkin v Russia* App no 47152/06 (ECtHR 23 March 2016); *Borotyuk v Ukraine* App no 33579/04 (ECtHR 16 December 2010).

¹⁸⁰ Dehaghani, 'Interrogating Vulnerability: Reframing the Vulnerable Suspect in Police Custody' (n 30) 189.

¹⁸¹ *ZH v. Hungary*, App. No. 28973/11, (ECtHR 8 April 2014); *Hasalikova v. Slovakia*, App No. 21002/08 (ECtHR 24 June 2021); *SC v. the United Kingdom*, App No. 60958/00 (ECtHR 29 July 2005).

¹⁸² Commission, 'Commission Staff Working Document, Impact Assessment Accompanying the Document Proposal for a Directive of the European Parliament and of the Council on Procedural Safeguards for Children Suspected or Accused in Criminal Proceedings' [2013] SWD/2013/0480 final.

¹⁸³ *ibid.*

¹⁸⁴ Consolidated Version of the Treaty on European Union (TEU) [2008] OJ C115/13 Art 6.

¹⁸⁵ CFR, art. 52(1).

the wording of Article 51, case law has interpreted this requirement rather broadly, in particular when it comes to criminal procedure.¹⁸⁶ In fact, the Charter does not only apply to national implementing legislation, but also to elements of domestic criminal procedure which are connected to EU law on procedural rights in criminal proceedings.¹⁸⁷ The legal value of the Charter, together with its broad scope of application, make it very relevant in the discussion of mutual trust in criminal procedural matters. Although the rights enshrined in the Charter are mostly broad, they are given a more specific shape and effect through secondary legislation and Court's interpretations. With regard to vulnerable suspects, there is no dedicated right stemming from the Charter. However, the right to a fair trial (Article 47) and the right of defence (Article 48) have the same meaning and scope as the rights flowing from the ECHR.¹⁸⁸ Although this means they must be read as imposing a broad mandate to accommodate suspect vulnerability, in the absence of a further specified obligation to protect vulnerable suspects the Charter does not seem to provide a sufficient framework to ensure adequate protection. It is however worth mentioning that the Charter is sensitive to the concept of vulnerability, as, although it is not explicitly mentioned, there is a specific focus on the particular vulnerability of some categories, namely children, elderly persons and persons with disabilities.¹⁸⁹

3.4 Recent Case Law Developments

Although at first sight it appears that the ECtHR and EU did not yet go as far as imposing any kind of standard to Member States specific to vulnerable adults, there is some indication suggesting a possible change in the direction of the ECtHR. Furthermore, the CJEU dealt with vulnerability of suspects in a recent

¹⁸⁶ Mitsilegas (n 70) 123.; Case C-617/10, *Åklagaren v Hans Åkerberg Fransson* [2013], Request for a preliminary ruling from the Haparanda tingsrätt lodged on 26 February 2013; and Case C-206/13, *Cruciano Siragusa v Regione Sicilia — Soprintendenza Beni Culturali e Ambientali di Palermo* [2014] Request for a preliminary ruling from the Tribunale amministrativo regionale per la Sicilia lodged on 6 March 2014.

¹⁸⁷ Mitsilegas (n 70) 122.

¹⁸⁸ CFR, art. 51(2).

¹⁸⁹ CFR, arts. 24, 25, 26; Francesca Ippolito, (De)Constructing Children's Vulnerability under European Law, in Francesca Ippolito and Sara Iglesias Sánchez, *Protecting Vulnerable Groups, The European Human Rights Framework* (Oxford: Hart Publishing, 2015) 39.

preliminary ruling, and it expected to rule on a similar topic within the next months. These developments will be addressed in two separate subsections.

3.4.1 ECtHR

In the case of *Hasáliková v. Slovakia*¹⁹⁰, the defendant, who had a slight intellectual disability characterised by infantile and simplistic thinking,¹⁹¹ was convicted of murder and sentenced to 15 years in prison.¹⁹² Despite the fact that no investigation was conducted to determine whether her intellectual impairment hindered her ability to comprehend the legal proceedings, the Court found that there were no sufficient signs warranting the authorities to treat her as particularly vulnerable or to implement special adjustments.¹⁹³ The Court ultimately determined that the defendant's right to a fair trial was not compromised by the absence of such measures.¹⁹⁴

Although this was the conclusion reached by the majority of the judges, in their dissenting opinion judges Turkovic and Schembri Orland strongly criticised this judgement. In their view the Court failed to consider the implications that can result if the needs of the defendant are not counterbalanced by sufficient adjustment. In particular, they do recognise the risk of wrongful convictions.¹⁹⁵ Furthermore, it is interesting to note that Judge Turkovic and Schembri Orland stated that the court should presume particular vulnerability of persons with intellectual impairments, unless domestic authorities can prove otherwise.¹⁹⁶ This presumption would have positive effects in that implementing authorities should prove that a person is able to understand and follow the proceedings, rather than checking whether their ability to do so is impaired. This would grant vulnerable suspects more protection in cases of uncertainty, where it is hard to carry out this assessment.

In conclusion, the Judges found that the Slovak court is in breach of Article 6, and that the failure of the ECtHR to come to the same conclusion is a

¹⁹⁰ *Hasáliková v. Slovakia* App no. 39654/15 (ECtHR, 24 June 2021).

¹⁹¹ *ibid*, para 21.

¹⁹² *ibid*, para 1.

¹⁹³ *ibid*, para 69.

¹⁹⁴ *ibid*, paras 77-78.

¹⁹⁵ *Hasáliková v. Slovakia* App no. 39654/15 (ECtHR, 24 June 2021), Dissenting Opinion, para 6.

¹⁹⁶ *ibid*, para 13.

missed opportunity to improve the protection of vulnerable individuals involved in criminal proceedings.¹⁹⁷

3.4.2 CJEU

Two preliminary rulings are interesting for the purpose of this discussion, as, although the Court is not explicitly asked to clarify who is to be considered vulnerable, some relevant issues are raised concerning suspect vulnerability.

The questions asked in *Baralo*¹⁹⁸ concern the interpretation of certain articles from Directives 2016/1919 and 2013/48, read in conjunction with the 2013 Recommendation. The questions referred to by the Sąd Rejonowy we Włocławku are 15, but only 3 are considered here. First, the Polish court asks whether there is a “directly effective and mandatory rule which makes it impermissible to carry out an act involving the questioning of a vulnerable person without the participation of a defence counsel where the conditions for granting legal aid are met”¹⁹⁹. Second, it is asked whether the failure to introduce a presumption of vulnerability as that envisaged in Section 3(7) of the Recommendation must be interpreted as preventing a suspect from enjoying the safeguards laid down in Article 9 of Directive 2016/1919, which concerns the obligation to accommodate the needs of vulnerable suspects and accused persons.²⁰⁰ Thirdly, it is asked whether certain articles from Directives 2016/1919 and 2013/48, read in conjunction with the 2013 Recommendation are to be interpreted as imposing an obligation on Member States to ensure that the vulnerability of a suspect is “immediately identified and recognised” so that legal aid is granted to suspects who are presumed to be vulnerable until a proper experts’ examination is carried out.²⁰¹

With regard to the second question considered, an answer in the positive would have the effect of imposing on the Member States an obligation to impose the ‘presumption of vulnerability’ for “persons with serious psychological, intellectual, physical or sensory impairments, or mental illness or cognitive disorders hindering them to understand and effectively participate in the

¹⁹⁷ *ibid*, para 27.

¹⁹⁸ Case C-530/23, Criminal proceedings against K.P. (*Baralo*) [2023] ECLI:EU:C:2025:322.

¹⁹⁹ *ibid*.

²⁰⁰ *ibid*.

²⁰¹ *ibid*.

proceedings” in order to allow them to benefit from Article 9 of the Directive on legal aid. Moreover, a positive answer to the third question would represent another important step in that an obligation to identify the vulnerable would force those Member States who do not have yet a definition to specify more precise rules that are capable of enhancing identification accuracy, including, possibly, a statutory definition of vulnerable suspects.

With regard to the first question, there appears to be a general understanding of the importance of the right to a lawyer as a crucial guarantee to safeguard equality of arms in cases where vulnerable suspects are involved.²⁰² This is also reinstated in the Opinion of AG Collins in the context of Case C-15/24²⁰³. However, the CJEU has reached a conclusion which seems to contradict the starting point. The case concerns an illiterate suspect who waived their right to a lawyer in writing and later claimed not to be informed of the consequences of such a waiver.²⁰⁴ The *Sofiyski rayonen sad* asks in this regard whether the safeguards provided in Article 9(1) of Directive 2013/48, read in conjunction with Recital 39 of the same, are respected in this scenario.²⁰⁵ The Court rightfully starts its analysis by identifying illiterate suspects as vulnerable for the purpose of Article 13 of the Directive, which requires the needs of vulnerable persons to be taken into account in order to benefit from the rights of the Directive.²⁰⁶ The definition which the Court uses to conduct this assessment is that contained in recital 51 of Directive 2013/48, according to which adjustments should be made for ‘suspects or accused persons who are in a potentially weak position’ due to ‘any potential vulnerability that affects their ability to exercise the right of access to a lawyer’.²⁰⁷ This definition appears to be very broad, not binding and it only relates to the exercise of the right to a lawyer. However, it is inclusive of ‘any potential vulnerability’, and, therefore, it does not seem to exclude situational and emotional factors. However, as illiteracy is a visible vulnerability, the precise meaning of this definition will be

²⁰² *Salduz v Turkey*, App no. 244888/94 (ECtHR 27 November 2008) para 58.

²⁰³ Case C-15/24 PPU, Criminal proceedings against CH (Stachev), Opinion of AG Collins [2024] ECLI:EU:C:2024:303.

²⁰⁴ Case C-15/24 PPU, Criminal proceedings against CH (Stachev) [2024] ECLI:EU:C:2024:399.

²⁰⁵ *ibid.*

²⁰⁶ *ibid.*, para 58.

²⁰⁷ *ibid.*

clearer when the CJEU will be called upon to assess whether situational vulnerability can also fall within this concept. However, after having concluded that the accused in case C-15/24 is vulnerable, the CJEU goes on by interpreting Article 13, read in conjunction with Article 9(1), as not preventing vulnerable suspects from waiving their right and bearing the consequences of such a choice, as long as special needs are taken into account.²⁰⁸ Therefore, in light of the Court's conclusion, reached on the basis of a literal reading of the Directive rather than teleological, there appears to be little hope that the first question referred to in *Baralo* is answered in the positive.

Having regard to these two recent judicial documents, although there appears to be no significant development for the conceptualisation of vulnerability they do indicate that Member States perceive a need to receive further clarification as to the precise meaning and scope of the rights that flow from the Directives which apply to vulnerable accused. The questions asked in *Baralo* are still to be answered by the Court. These questions do raise important issue as to a presumption of vulnerability and the obligation to immediately identify and recognise the vulnerable. However, it should be noted that the questions should first be rephrased by the Court, as they present various minor mistakes and typos, and at times refer to the wrong legislative instruments.²⁰⁹ It is hoped that these will not result in the questions' inadmissibility. Although it is not expected that the Court will define vulnerability in these rulings, an interpretation of the content and scope of the safeguards flowing from the Directive Package is a good way to give some more meaning to the provisions mentioning vulnerability, which would otherwise be illusory and ineffective. These references highlight an increased attention to the issue of suspect vulnerability, as well as the need of the Member States to receive further details

²⁰⁸ *ibid*, para 45.

²⁰⁹ According to case law, in order "to provide the national court with an answer which will be of use to it and enable it to determine the case before it" the Court has, where necessary, some leeway to reformulate the questions referred to it. In such cases, it is for the Court to extract from all the information provided by the national court, in particular from the grounds of the order for reference, the points of EU law which require interpretation, having regard to the subject matter of the dispute; see Judgments of 13 December 1984, *Haug-Adrión*, 251/83, ECLI:EU:C:1984:397, para 9, and of 18 May 2021, *Asociația 'Forumul Judecătorilor din România' and Others*, C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, EU:C:2021:393, para 131; Case C-670/22, Criminal proceedings against M.N. [2022] ECLI:EU:C:2024:372, para 78.

as to the content and scope of the safeguards flowing from the Directive Package.

3.5 An Overall Bitter Feeling

As Meysman puts it, the choices made so far in this area “leave a bitter feeling”²¹⁰. Having regard to all of the above, it can be argued that (1) the legislative fragments evaluated in this Section do not provide any binding definition of ‘vulnerable adult’, and (2) the case law did not offer any clearer guidance to date.

3.5.1 Legislative framework: ineffective and too broad!

The soft law documents analysed do provide some sort of definition, however, the conceptualisation of suspect vulnerability in EU law remains very broad and, as it lacks binding force, it does not influence the Member States’ frameworks.²¹¹ The techniques used are in essence categorisation, combined with the acknowledgement that a case by case assessment is necessary (e.g. Green Paper and Commission Recommendation on procedural rights of suspects and accused persons subject to pre-trial detention and on material detention conditions, ECtHR), or a focus on the effect of vulnerability on the exercise of procedural rights (the 2013 Recommendation). The risks of adopting these techniques in defining vulnerability are both under and over-inclusivity, as explained above. Furthermore, leaving too much discretion to the implementing authorities carries some risks if the latter are not sufficiently trained or unwilling to ‘waste time’. Finally, emotional factors were included as a cause of vulnerability only in the proposal for a Council FD in 2004, but not considered in any other instrument. Although vulnerability is mentioned in certain provisions from the Directive package, these are meaningless if not accompanied by a definition. The reason why these provisions do not offer an indication as to who is vulnerable can be found in the legislator’s intention to dedicate a separate instrument to vulnerable individuals. However, while this

²¹⁰ Michaël Meysman, ‘Quo vadis with vulnerable defendants in the EU?, A closer look at the recent initiatives for procedural safeguards for vulnerable suspects and offenders’ (European Criminal Law Review 179 2014) 19.

²¹¹ As evidence of this only one Member State gave effect to Vulnerability Recommendation (Council, Conclusions on the Protection of Vulnerable Adults across the European Union [2021] OJ C 330I).

resulted in a Directive²¹² for children, there remains a significant legislative gap with regards to the definition of vulnerable adults, and as to what are the precise measures to which they are entitled. This was also acknowledged by the Council and Parliament, as the Recommendation does not provide any legally enforceable right,²¹³ and has been inadequately implemented.²¹⁴ Finally, while human rights instruments impose a very broad mandate to accommodate the needs of the vulnerable, the lack of proper enforcement mechanisms, or the lack of specific rules detailing which are the safeguards to which the vulnerable are entitled adds up to the insufficiency of the system.

3.5.2 Case law? So far only missed opportunities

Indeed, some new developments point to an increased attention to the issues posed by suspect vulnerability, but do not add anything capable of curing the handicaps of the current legal framework with regard to adults. The judicial materials analysed seem to indicate that Member States need further guidance from the CJEU on the delimitation of the scope of the obligations concerning adult suspect vulnerability that stem from the Directives. However, so far the Court decided not to elaborate an autonomous concept of suspect vulnerability in the context of Case C-15/24, and it simply opted for the very broad definition provided by recital 51. While such definition could theoretically include situational and emotional factors, this depends on how the Court will interpret it in future cases. The questions asked in *Baralo* represent a further opportunity for the Court to establish a common definition, however, the solution adopted in the recent ruling seems to indicate prudence. What is hoped is that more preliminary rulings will prompt a stronger response at EU level in clarifying the obligations that the Member States have from the Directives, interpreted in light of other EU instruments. With regards to the ECtHR, although the dissenting opinion in *Hasalikova* is a truly important statement of the importance of accommodating vulnerability, it does not contain a definition of what counts as vulnerability and was not followed up by the majority of the judges.

²¹² Procedural Safeguards for Children Directive.

²¹³ Council, Conclusions on the Protection of Vulnerable Adults across the European Union [2021] OJ C 330I.

²¹⁴ European Parliament, Resolution on the implementation of the European Arrest Warrant and the surrender procedures between Member States [2021] 2019/2207(INI) final.

3.5.3 Conclusion: quite some pieces are missing to complete the puzzle

In a nutshell, it can be concluded that the legal framework analysed presents a significant gap as to the protection of vulnerable adult suspects. As a result, in the absence of additional measures specifically designed to protect vulnerable adults, the current legal framework fails to provide adequate safeguards for the most vulnerable and sensitive individuals facing criminal proceedings.²¹⁵ Having reached this conclusion, the next Section is dedicated to answering the remaining questions as to how to fill the gap that is left by the missing pieces of the puzzle, and as to what good reasons are there for the EU to provide a binding definition of adult suspect vulnerability in order to improve screening, detection and identification of vulnerable suspects.

²¹⁵ Meysman (n 210) 19.

4. Critical Considerations

After having highlighted that there is a legislative gap with regard to the definition of adult suspect vulnerability, in Subsection 4.1 two possibilities are discussed as to how to address this gap. Although this subsection is not aimed at concluding what is the best tool to fill the gap, it is suggested that an autonomous concept could be a suitable way. Finally, in Subsection 4.2 the research question is answered by pointing out some reasons why there is an added value if the EU takes a stronger role in defining adult suspect vulnerability effectively.

4.1 How to Fill the Gap

There are two main possibilities that the EU has at its disposal to define adult suspect vulnerability in a binding way, namely harmonisation through a legislative instrument, and harmonisation through an autonomous concept. These possibilities are respectively addressed in Subsections 4.1.1 and 4.1.2.

4.1.1 Harmonisation

The first possibility that exists is harmonisation through a legal instrument, namely a directive. The tool to build up the AFSJ in the context of criminal procedure, is represented by Article 82 TFEU. Paragraph 1 states that judicial cooperation in criminal matters shall be (1) based on the principle of mutual recognition of judgments and (2) shall include the approximation of the laws of the Member States. As noted by Allegrezza and Covolo, while mutual recognition is meant to be the cornerstone of judicial cooperation in criminal matters, approximation plays an ancillary role, as it is instrumental in achieving the goal of mutual recognition.²¹⁶

The specific legal basis allowing for harmonisation of procedural rights is provided in paragraph 2(b). Accordingly, minimum rules concerning the rights of individuals in criminal proceedings may be adopted by means of directives, to the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension. The procedure to adopt the measures envisaged is the

²¹⁶ Silvia Allegrezza, Valentina Covolo, 'Toward a European Constitutional Framework for Defence Rights in Effective Defence Rights in Criminal Proceedings, A European and Comparative Study on Judicial Remedies' (Wolters Kluwer 2018) 22.

ordinary legislative procedure, as per Article 294 TFEU, with the Council and the Parliament acting as co-legislators. According to Wieczorek, the requirements to legislate on the basis of Article 82(2)(d) are 3, namely (1) that legislation must facilitate mutual recognition, (2) that harmonisation must be confined to individual rights applying to the phase of criminal procedure , and (3) there must be 'cross-border' dimension.²¹⁷

The second requirement is a temporal requirement, which is easily fulfilled in the case of adult suspect vulnerability. With regard to the third requirements of 'cross-borderness'²¹⁸, it must be observed that, despite the specific reference in Article 82 to a 'cross-border dimension', it would be hardly possible to think of defence rights that apply only to cross-border situations²¹⁹. The reasons for this are that it is impossible to determine *ex ante* which criminal proceedings are cross-border or domestic in a significant number of cases,²²⁰ but also that there is a risk that, if only some suspects could benefit from a set of procedural rights, this would lead to discrimination.²²¹ Therefore, the scope of the EU's competence concerning the harmonisation of procedural rights extends to all proceedings within the Member States.²²² While the second and third requirements are quite straightforward, the third requirement can be understood in multiple ways. First, having regard to the relationship between mutual recognition and mutual trust, Article 82(2)(b) could be understood as meaning that harmonisation is justified when it contributes to the creation of an environment of mutual trust.²²³ In this case, it can be argued that smoothing out national legal systems to achieve an homogeneous level of fundamental rights protection can be always assumed to contribute to mutual trust.²²⁴ The choice of a legal basis, however, should rest on objective factors which are amenable to judicial review, in particular having regard to the aim and content

²¹⁷ Wieczorek (n 82) 469.

²¹⁸ *ibid.*

²¹⁹ Allegrezza and Covolo (n 216) 22.

²²⁰ Commission, Impact Assessment Accompanying the Document Proposal for a Directive of the European Parliament and of the Council on Procedural Safeguards for Children Suspected or Accused in Criminal Proceedings' 2013 (Staff Working Document) SWD/2013/0480 final.

²²¹ Wieczorek (n 82) 469.

²²² Klip (n 10) 301.

²²³ Wieczorek (n 82) 469.

²²⁴ *ibid.*

of the measure.²²⁵ Considering the character of mutual trust, which is a fictional concept and which can hardly be measured, it is unsurprising that this broad reading of Article 82 was subject to major criticism.²²⁶ In fact, although the Court has not clarified yet whether this interpretation is acceptable,²²⁷ it would appear that the generic claim that a measure contributes to mutual trust does not constitute a sufficiently 'objective factor amenable to judicial review'.²²⁸²²⁹ The second interpretation of the mutual recognition requirement is much narrower, according to which a legislative measure is justified if it can in practice contribute to the swift operation of mutual recognition instruments.²³⁰ In order to assess whether this is the case, three relevant considerations have been identified in the literature.²³¹

Firstly, there should be empirical evidence pointing at the negative impact that the differences in national law have on mutual recognition.²³² This could be for example data relating to delays and refusals to execute EAWs. In the context of adult suspect vulnerability, such evidence is missing at this stage. However, the analysis carried out by the Commission in the context of the Impact Assessment accompanying the proposal for a directive for children²³³ shows that the test is not particularly strict. In such a context the empirical data available consisted of stakeholder interviews and some quantitative data on the execution of arrest warrants.²³⁴ The interviews suggested that there is wide support on

²²⁵ Case 45/86, *Commission v Council* [1987] ECR 1493, para 11.

²²⁶ Wieczorek (n 82) 469.

²²⁷ *ibid.*

²²⁸ *ibid.*

²²⁹ Mitsilegas (n 70) 157.

²³⁰ *ibid.*

²³¹ *ibid.*, 471; see also Thea Coventry, 'Pretrial detention: Assessing European Union Competence under Article 82(2) TFEU' (New Journal of European Criminal Law, 8(1), 2017) 57.

²³² Wieczorek (n 82) 471; see also Elodie Sellier, Anne Weyembergh, 'Criminal procedural laws across the European Union – A comparative analysis of selected main differences and the impact they have over the development of EU legislation', Study Commissioned by the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (2018 August). Retrieved August 8, 2024, from: https://www.europarl.europa.eu/RegData/etudes/STUD/2018/604977/IPOL_STU%282018%29604977_EN.pdf.

²³³ Commission, Impact Assessment Accompanying the Document Proposal for a Directive of the European Parliament and of the Council on Procedural Safeguards for Children Suspected or Accused in Criminal Proceedings' 2013 (Staff Working Document) SWD/2013/0480 final.

²³⁴ *ibid.*

how laying down common minimum standards with regard to vulnerable persons will help mutual recognition instruments to work more smoothly.²³⁵ In addition, it was mentioned that there could be a clear link between the lack of minimum standards for fair trial rights at the EU level for vulnerable persons and the suboptimal functioning of judicial cooperation in the EU, with delays in recognition proceedings which have taken place on account of concerns about the procedural rights available to vulnerable persons in the Member States.²³⁶ The quantitative data on which the Commission relied upon is admittedly very limited and it only indicates that 1 in 12 EAWs are refused, and many more delayed, without however specifying whether this happened in cases involving vulnerable persons.²³⁷ In order to fulfil this first step in the case the EU wished to enact a directive dedicated to vulnerable adults, it would be first necessary to gather more up to date data which should show a proper link between the divergent approaches of the Member States and their influence on the working of mutual recognition. A generic statement such as that put forward by the Commission in the impact assessment does not seem to be sufficient proof that this link exists.

The second consideration which should be made is whether the hindrances to mutual recognition which results from the differences in the Member States' systems can be considered legitimate.²³⁸ According to Wiecezorek, legitimate hindrances are those that arise when the Member State which is supposed to execute for example an EAW refuses to do so on the ground that the requesting Member State's legislation offers less protection from the domestic one, and it falls below the ECHR and the EU Charter standard.²³⁹ In this context, although it has been established above that there is not a precise standard of protection imposed by the CFR or ECHR, this step could be fulfilled if the Member States' legislation does not suffice to accommodate the needs of the vulnerable and realise their fair trial rights, which are the broader mandates which flow from Article 6 ECHR and Articles 47 and 48 CFR. In order to carry

²³⁵ *ibid.*

²³⁶ *ibid.*

²³⁷ *ibid.*

²³⁸ Wiecezorek (n 82) 469.

²³⁹ *ibid.*; Joined Cases C-404/15 and C-659/15 PPU, *Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen* [2016] ECLI:EU:C:2016:198; see also subsequent case law.

out this assessment, an extensive comparative and empirical work should be carried out, taking into account as many Member States' systems as possible. In such a case, it would be possible to establish whether the frameworks are sufficient in light of the right to effective participation of vulnerable adult suspects flowing from the ECHR and EU law. Furthermore, what I have argued in this dissertation is that the definition is crucial in ensuring effective protection of vulnerable adult suspects. Consequently, empirical and comparative studies should be carried out in the Member States to compare their domestic definition of adult vulnerability and investigate how such definition impacts identification accuracy by implementing authorities. Only on the basis of this comprehensive research it will be possible to argue whether there is a need to establish common criteria for identification. While the Commission has been called by the Council to investigate whether this is the case,²⁴⁰ it is also crucial that academic attention is dedicated to this topic in order to inform the debate.

A final consideration that must be made, if the first two conditions are met, is as to whether a directive is the best way to achieve the desired result and remedy the situation.²⁴¹ In the context of adult suspect vulnerability, in order to reach this conclusion it should first be considered whether the 2013 Recommendation had the desired effect. The Commission was called to assess the implementation status of the Recommendation in a number of recent EU documents, first by the Council in 2021²⁴² and later by the EESC²⁴³ and Parliament²⁴⁴. What it appears *prima facie* is that only one Member State implemented the Recommendation so far²⁴⁵, a result that the Parliament considers "inadequate"²⁴⁶. Although this would seem to indicate that non-

²⁴⁰ Council, Conclusions on the Protection of Vulnerable Adults across the European Union [2021] OJ C 330I.

²⁴¹ Wieczorek (n 82) 469.

²⁴² Council, Conclusions on the Protection of Vulnerable Adults across the European Union [2021] OJ C 330I.

²⁴³ European Economic and Social Committee, Opinion on 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions — Union of Equality: Strategy for the Rights of Persons with Disabilities 2021-2030' (COM(2021) 101 final) [2021] OJ C 374.

²⁴⁴ European Parliament, Resolution on the implementation of the European Arrest Warrant and the surrender procedures between Member States [2021] 2019/2207(INI) final.

²⁴⁵ Council, Conclusions on the Protection of Vulnerable Adults across the European Union [2021] OJ C 330I.

²⁴⁶ European Parliament, Resolution on the implementation of the European Arrest Warrant and the surrender procedures between Member States [2021] 2019/2207(INI) final.

binding instruments did not have the desired effect so far, it should also be considered whether a more appropriate first step could be represented by the establishment of an autonomous concept of 'adult suspect vulnerability' via case law.

4.2.2 Autonomous Concept

Autonomous concepts have been used by the CJEU in order to enhance the protection of fundamental rights in the absence of harmonisation, but also to ensure a consistent application of EU law in areas where a degree of harmonisation already exists.²⁴⁷ On the basis of the analysis conducted in Section 3, it appears that in this area some degree of harmonisation already exists with regard to suspect vulnerability. While vulnerable suspects are mentioned in several directives, there appears to be a legislative gap as to the definition of vulnerable adults, and, therefore, the scope of application of the measures to which vulnerable adults are entitled. Establishing an autonomous concept of 'vulnerable adults' for the purpose of implementing the Directives would not be enough on its own to ensure that the right to a fair trial of vulnerable suspects is respected, but would be an effective, yet prudent solution, to facilitate a prompt identification of vulnerability. Not there being yet a legislative instrument pointing out the precise safeguards to which vulnerable adults are entitled, if the Court were to start by developing an autonomous definition, the Member States would still retain their procedural autonomy as to the best means to address such conditions of vulnerability. Furthermore, autonomous concepts can serve to enhance the protection of the rights enshrined in the CFR. As it has been established in Section 3.3, there is no separate and specific right for vulnerable adults that flows from the Charter, however the right to a fair trial (Article 47) and the right of defence (Article 48) do impose a broad mandate to take into account the needs of vulnerable persons (see Section 3.3). If the Court were to give an autonomous meaning to 'adult suspect vulnerability' for the purpose of the enjoyment of Articles 47 and 48, this would result in a more homogeneous application of the rights flowing from the CFR across the Member States.

²⁴⁷ Mitsilegas (n 70) 125.

In the absence of recent and exhaustive data, it is hard to conclude whether the adoption of a dedicated legislative instrument is needed, or whether an autonomous concept can suffice. What can be concluded in the context of this thesis, however, is that the development of an autonomous concept seems to be a good, yet prudent, starting point to cure the deficiencies in EU law. For this purpose, the questions referred to in *Baralo*²⁴⁸ (Subsection 3.4.2) could provide the CJEU with an opportunity to establish an autonomous concept of 'adult suspect vulnerability'.

4.2 (At Least) 5 Reasons Why it is Time for the EU to Take the Stage

Although the means to be chosen by the EU to strengthen the protection of vulnerable adult suspects are not discussed here, what is argued in this Section is that a common conceptualisation of 'adult suspect vulnerability' would be an added value to the current panorama. The reasons that support this conclusion are mainly 5, which will be unpacked below.

4.2.1 The impact of a definition

First of all, as concluded in Section 3.1, a definition plays a significant role in the process of identifying vulnerable persons. This is logical, as it is crucial that implementing authorities have clear what is 'vulnerability', before they can be tasked with identifying it. According to literature, implementing authorities are often not trained and are unprepared to carry out a psychological assessment, or may not be willing to do so for different reasons.²⁴⁹ Therefore, the definition is one of the main guidelines on which police officers or lawyers rely upon when detecting whether someone is vulnerable.²⁵⁰ If vulnerable suspects are successfully detected, it is more likely that the implementing authorities will make appropriate adjustments to ensure that the person can ensure their procedural rights in full. Furthermore, a definition limits implementing authorities' discretion in deciding not to act upon vulnerability in case they are unwilling to offer vulnerable adults the appropriate safeguards. Moreover, while some Member States do have a definition of 'adult suspect vulnerability', this

²⁴⁸ Case C-530/23, Criminal proceedings against K.P. (Baralo) [2023] ECLI:EU:C:2025:322.

²⁴⁹ Mergaerts, 'Defence lawyers' views on and identification of suspect vulnerability in criminal proceedings' (International Journal of the Legal Profession 29:3 2022) 284-285.

²⁵⁰ Mergaerts, 'Defence lawyers' views on and identification of suspect vulnerability in criminal proceedings' (n 49) 284-285.

step has not yet been taken by other Member States.²⁵¹ Consequently, an European autonomous definition of 'adult suspect vulnerability' would be an added value in light of the protection of vulnerable suspects, in that it is expected it would enhance and bring closer identification accuracy rates in the different Member States. Identifying vulnerability is particularly relevant when it comes to the investigative stages, where the procedure is particularly complex.²⁵² If a prompt identification takes place, followed by the award of the relevant safeguard, there are less chances that evidence will be inadmissible and that suspects will confess to crimes they did not commit.²⁵³ As it appears that there exists a close link between miscarriages of justice and cases involving vulnerable suspects,²⁵⁴ it is crucial that the detection of vulnerable suspects is improved within the EU.

4.2.2 Free movement

Frequent reference was placed in various instruments, starting from the Roadmap²⁵⁵ until the Council Conclusions in 2021²⁵⁶, on the importance of free movement rights as cornerstones of EU citizenship.²⁵⁷ The exercise of free movement rights results in an ever increasing number of EU citizens moving and travelling within the EU.²⁵⁸ This places non-nationals who do not speak or understand the language of another Member State in a situation of vulnerability in the event in which they become involved with a criminal trial. Furthermore, recent data on population ageing is another factor which highlights the considerable number of vulnerable adult suspects that move within the European Union.²⁵⁹ Although there is no recent data available showing the exact

²⁵¹ European Commission, 'Commission Staff Working Document, Impact Assessment Accompanying the Document Proposal for a Directive of the European Parliament and of the Council on Procedural Safeguards for Children Suspected or Accused in Criminal Proceedings' [2013] SWD/2013/0480 final.

²⁵² Gudjonsson (n 64) 120.

²⁵³ *ibid*, 121.

²⁵⁴ Morgavero Clark (n 4).

²⁵⁵ Council, Resolution for a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings [2009] OJ C 295.

²⁵⁶ Council, Conclusions on the Protection of Vulnerable Adults across the European Union [2021] OJ C 330I.

²⁵⁷ *ibid*.

²⁵⁸ Council, Resolution for a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings [2009] OJ C 295.

²⁵⁹ Council, Conclusions on the Protection of Vulnerable Adults across the European Union [2021] OJ C 330I; Commission, 'The 2021 Ageing Report: Economic & Budgetary Projections for the EU Member States (2019-2070)' [2021] Institutional Paper 148.

entity of the problem, it can be argued that different definitions of 'vulnerable adults' in the Member States result in a different scope of application of the safeguards.²⁶⁰ Since this appears to be the case across the EU,²⁶¹ it is possible that a suspect is considered vulnerable in one Member State and not in another. This would result in a situation in which a vulnerable adult would benefit from an adjustment of their criminal process only in some Member States, depending on what is understood to constitute 'adult vulnerability'. As the Council pointed out, a condition of vulnerability must not constitute a disadvantage to the exercise of free movement rights.²⁶² Consequently, an autonomous concept of suspect vulnerability at the EU level would be beneficial in smoothing these differences and avoiding barriers to the free movement of vulnerable adults.

4.2.3 Equality of arms

Another more theoretical reason as to why an EU definition would have an added value can be found in the principle of equality of arms, which implies that each party must be afforded a reasonable opportunity to present their case - including their evidence - under conditions that do not place them at a substantial disadvantage *vis-à-vis* the opponent.²⁶³ What flows from the latter principle, in the context of criminal proceedings, is that the state should ensure that the disadvantaged position of individuals against the coercive powers of the state is counterbalanced as much as possible, in particular through procedural safeguards. In the context of European criminal procedure, as noted above, mutual recognition instruments represent a strong enhancement of Member States' coercive powers, based on the assumption that all the Member States protect human trial rights to a similar extent. There exist limited grounds on which a Member State can rely to refuse the execution of these acts.²⁶⁴ The idea behind is, once again, that if the Member States' system complies with the ECHR and CFR, it is not possible for a Member State to refuse the execution of a

²⁶⁰ Commission, 'Commission Staff Working Document, Impact Assessment Accompanying the Document Proposal for a Directive of the European Parliament and of the Council on Procedural Safeguards for Children Suspected or Accused in Criminal Proceedings' [2013] SWD/2013/0480 final.

²⁶¹ *ibid.*

²⁶² Council, Conclusions on the Protection of Vulnerable Adults across the European Union [2021] OJ C 330I.

²⁶³ *Dombo Beheer B.V. v. The Netherlands*, App No. 14448/88 (ECtHR 27 October 1993) para 33.

²⁶⁴ *Mitsilegas* (n 70) 122.

procedure on the ground that the requesting Member State protects human rights to a lesser extent.²⁶⁵ In order to complement and detail the content of certain rights flowing from the Charter and ECHR, the EU also enacted the Directive package. This was a positive step towards the harmonisation of procedural standards, and a way to counterbalance the disadvantage to individuals which resulted from mutual recognition instruments. The AFSJ was in the beginning mostly focused at combating crime,²⁶⁶ closer to what Packer refers to as the 'crime-control model'²⁶⁷. The introduction of the Directive package served as a guarantee that Member States would have been forced to implement minimum safeguards in their legal systems, finally shifting the focus towards the protection of due process rights and providing individuals with concrete, defined and enforceable rights. The fact that the Directives refer to vulnerable suspects and impose a broad obligation to accommodate their special needs indicates that this is generally understood as being a minimum safeguard. However, in the absence of a clear scope of the obligations flowing from the Directives, it is still unclear how Member States are required to fully give effect to such provisions. Furthermore, the broad mandates that flow from the Directive package, ECHR and CFR do not constitute sufficiently precise rights that can be directly relied upon in front of national courts. On the basis of the above, an European conceptualisation of adult suspect vulnerability would be the first step towards giving individuals a practical and effective right flowing from EU law, which would represent an extra shield against the stronger coercive powers that Member States' have gained thanks to judicial cooperation in criminal matters.

4.2.4 Mutual Recognition

Protecting individual rights in European criminal procedure does not only enhance the legitimacy of the proceedings, but also supports the swift functioning of mutual recognition instruments.²⁶⁸ It has been concluded in the previous Section that there is insufficient quantitative data showing that the absence of a definition of vulnerability plays a role in the hampered functioning

²⁶⁵ Wieczorek (n 82) 468.

²⁶⁶ Mitsilegas (n 70) 122.

²⁶⁷ Herbert L. Packer, 'Two models of the criminal process' (University of Pennsylvania Law Review Vol. 113 No. 1 1964).

²⁶⁸ Mitsilegas (n 70) 112.

of mutual recognition instruments. However, it is logical to think that, if it is true that suspect vulnerability poses major issues to the exercise of fair trial rights, as established in Section 2, and if it is true that a Member State can deny or delay judicial cooperation on a human rights ground (including fair trial rights)²⁶⁹ it follows that the protection of suspect vulnerability must be relevant to mutual recognition proceedings. Although it cannot be established what is the extent of the role played, it is possible to point out, once again, that a failure to detect vulnerability may result in false confessions, misleading and inadmissible evidence, and miscarriages of justice.²⁷⁰ The possible consequences that this could have on the functioning of mutual recognition in instruments are mainly two: (1) that the execution of certain acts is delayed, challenged or refused;²⁷¹ (2) that the legitimacy of these proceedings is undermined, possibly resulting in scepticism and criticism towards the operation of the system of European criminal procedure. It follows that, because of the role that a definition of adult suspect vulnerability has on detection, a common European conceptualisation which enhances identification accuracy rates would minimise the threats that adult suspect vulnerability poses to mutual recognition.

4.2.5 A Symbolic Statement

Having investigated the relation between a definition of vulnerability and identification accuracy in England and Wales, Dehaghani concludes that a binding definition only for children points to the lesser importance of protecting vulnerable adults.²⁷² She found that this is also reflected in the practice, whereby police officers prioritise the protection of children and tend to neglect the need of vulnerable adults.²⁷³ Similarly, at the EU level it appears that, despite there being a general recognition of the importance of protecting

²⁶⁹ Case C-216/18 PPU, *Minister for Justice & Equality v LM* [2018] ECLI:EU:C:2018:586; Joined Cases C-404/15 and C-659/15 PPU, *Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen* [2016] ECLI:EU:C:2016:198.

²⁷⁰ Kassir, 'False Confessions: Causes, Consequences, and Implications for Reform' (n 52) 113; Gudjonsson (n 64) 120.

²⁷¹ Commission, Impact Assessment Accompanying the Document Proposal for a Directive of the European Parliament and of the Council on Procedural Safeguards for Children Suspected or Accused in Criminal Proceedings' 2013 (Staff Working Document) SWD/2013/0480 final.

²⁷² Dehaghani, 'He's Just Not That Vulnerable: Exploring the Interpretation of the Appropriate Adult Safeguard in Police Custody' (n 53) 13.

²⁷³ *ibid.*

vulnerable suspects,²⁷⁴ binding measures have been enacted only for children²⁷⁵. Furthermore, also considering the fact that since 2013, despite various calls from different institutions,²⁷⁶ there is to date no precise information on the implementation status of the 2013 Recommendation. In fact, all we know about the implementation of the latter instrument is that it was followed up only by one Member State,²⁷⁷ and that its implementation is considered “inadequate” by the Parliament.²⁷⁸ For these reasons this appears to be a policy area which is being neglected by the EU. In line with this, by analogy with the analysis conducted by Dehaghani in the context of England and Wales, one could hypothesise that the lack of interest demonstrated at EU level could also point at the minor importance of the issue. Yet, there are clear risks that can arise because of the insufficient protection of the most vulnerable, that are capable of threatening the smooth functioning of mutual recognition, but also the faith in the legitimacy of such procedures. Consequently, a common conceptualization of ‘adult suspect vulnerability’ would constitute a symbolic statement, capable of affecting the approaches of the Member States and, eventually, the practice of implementing authorities. It would constitute the recognition that the protection of the most disadvantaged with a view to ensure justice for all, children and adults, is a pressing need that the EU views as a priority.

²⁷⁴ Commission, Impact Assessment Accompanying the Document Proposal for a Directive of the European Parliament and of the Council on Procedural Safeguards for Children Suspected or Accused in Criminal Proceedings' 2013 (Staff Working Document) SWD/2013/0480 final.

²⁷⁵ Procedural Rights for Children Directive.

²⁷⁶ Council, Conclusions on the Protection of Vulnerable Adults across the European Union [2021] OJ C 330I; European Economic and Social Committee, Opinion on 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions — Union of Equality: Strategy for the Rights of Persons with Disabilities 2021-2030' (COM(2021) 101 final) [2021] OJ C 374; European Parliament, Resolution on the implementation of the European Arrest Warrant and the surrender procedures between Member States [2021] 2019/2207(INI) final.

²⁷⁷ Council, Conclusions on the Protection of Vulnerable Adults across the European Union [2021] OJ C 330I.

²⁷⁸ European Parliament, Resolution on the implementation of the European Arrest Warrant and the surrender procedures between Member States [2021] 2019/2207(INI) final.

5. Conclusion

This dissertation has critically examined the current conceptualization of adult suspect vulnerability within the policy area of European criminal procedure. The reason why this research focused on the definition of vulnerability, is that it is argued that a definition has a major impact on the detection of vulnerable persons by implementing authorities during the investigative stage. After having delineated the importance of safeguarding the vulnerable, as well as having situated the protection of vulnerability in the European criminal procedural panorama (Section 2), the current EU framework was analysed (Section 3). The lens through which the existing fragments shaping the conceptualisation of vulnerability were analysed is the outcome of a literature review of several studies which empirically considered the impact of various features of a statutory definition of vulnerability on identification accuracy by lawyers or police officers (Section 3.1). On such a basis, the legal framework analysed revealed significant flaws, in that it fails to provide an adequate definition of 'vulnerable adults'. Moreover, neither the ECtHR nor the CJEU to date have yet taken the chance to clarify the concept further. In Section 4.2 the possibility of filling this gap through an harmonised concept was presented, highlighting the potential of the EU to act, but also the open questions that remain as to the principle of subsidiarity. Although a dedicated binding instrument could have positive effects, it is suggested that a first, more cautious, step could be the establishment of an autonomous concept of 'adult suspect vulnerability' through a CJEU judgement. Finally, in Subsection 4.2 the research question as to whether there is an added value in having an European concept of adult vulnerability in criminal procedural matters was answered in the positive. Furthermore, 5 reasons as to why the EU should take this step have been identified. In a nutshell, it is argued that a common conceptualization of adult suspect vulnerability would (1) improve identification accuracy, (2) ensure that vulnerability does not hamper the exercise of free movement rights, (3) constitute an extra safeguard to protect vulnerable suspects against the enhanced prosecutorial powers of the Member States within the AFSJ, (4) possibly facilitate mutual recognition and the faith in the legitimacy of such procedures, and, finally, (5) constitute a symbolic statement of the pressing need to protect more concretely vulnerable adults. An autonomous concept of

'adult suspect vulnerability' would not only symbolise the equal importance of protecting all vulnerable groups but also lay the groundwork for effective and unified procedural safeguards across the EU.

The only instrument that has been dedicated to vulnerable adults involved in criminal proceedings has been so far the 2013 Recommendation. However, this was widely acknowledged to be too shy of an attempt to practically enhance the protection of vulnerable persons. In fact, the inadequacy of the instrument was already implicitly pointed out by the Commission itself in the Impact Assessment accompanying the proposal for a Directive for children, whereby it was observed that significant progress in protecting the rights of vulnerable persons is unlikely without substantial legislative advancement,²⁷⁹ considering that there were little chances that those Member States which did not comply with minimum international and ECtHR standards would implement non binding guidelines. Yet, no significant improvement has been made since 2013.

This appears surprising, considering that both the Member States and the EU institutions seem to have acknowledged the relevance of the issue in this policy area. From the wording used in various legislative and non-legislative documents, the inherent link between the protection of the most disadvantaged and the concepts of justice and democracy is generally acknowledged. It is also recognised that the impairments that vulnerability poses to the exercise of procedural rights are major and are capable of resulting in miscarriages of justice. There is awareness that the role of the state in this context is to support, protect and accommodate vulnerability, bearing in mind that everyone is potentially vulnerable and weakened by the experience of a criminal trial. However, the slow development of a European framework capable of effectively accommodating the needs of vulnerable persons indicates that the way towards reaching this goal is still long.

Despite these findings, it is acknowledged throughout this dissertation that in the absence of updated empirical data it is not possible to appreciate the extent of the problem, and, in particular, its effects on the functioning of mutual

²⁷⁹ Commission, Impact Assessment Accompanying the Document Proposal for a Directive of the European Parliament and of the Council on Procedural Safeguards for Children Suspected or Accused in Criminal Proceedings' 2013 (Staff Working Document) SWD/2013/0480 final.

recognition instruments. Furthermore, in order to propose a definition which would be effective and inclusive, while respecting the procedural differences of the Member States, the legal frameworks of as many Member States as possible must be compared, in order to find out whether there exists some common ground. Finally, empirical research is crucial in this area, as it allows us to understand the correlation between a certain definition and its effect on identification accuracy. Studies of this kind have been conducted by Prof. Dr. Mergaerts and Dr. Dehaghani in Belgium and England and Wales, whereby implementing authorities have been interviewed to investigate their perception of how vulnerability can be understood in light of the statutory definition and which suspects fall within such a category. Similar studies should be conducted in various Member States, categorising the definition that each Member State adopted, in order to conclude which solution is more suitable to the achievement of an homogenous level of protection.

In light of the dire need to improve the European legal framework on adult suspect vulnerability, it is necessary that continued academic and legislative efforts are dedicated to the development of effective solutions to this issue, with a view to eventually ensure the fair treatment of all individuals in the European criminal justice system.

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