

**Protecting vulnerable suspects in police investigations in Europe: lessons learned from
England & Wales and Belgium**

Lore Mergaerts, PhD researcher, Leuven Institute of Criminology, KU Leuven

Corresponding author – E-mail: lore.mergaerts@kuleuven.be

Dr. Roxanna Dehaghani, Lecturer in Law, School of Law and Politics, Cardiff University

E-mail: Fatemi-dehaghaniR@cardiff.ac.uk

I. Introduction and the context of procedural safeguards

Within this paper we examine the Belgian and English and Welsh¹ provisions relating to vulnerable suspects, focusing on the origins of the provisions, the provisions themselves, and some hurdles arising in practice. In doing so, we discuss the law in the books, but also draw together the findings of two separate studies: one that examined how the decisions were made in relation to the vulnerability of the suspect in England and Wales and another that addresses the definition and identification of a suspect's vulnerability in Belgium, with a particular focus on the role of the defence lawyer.² The purpose of doing so is to draw comparisons between the two in order to highlight the different approaches adopted when seeking to protect vulnerable suspects on the one hand and to highlight the problems in how vulnerable suspects are protected in these two jurisdictions on the other. We will focus predominantly on vulnerability in respect of adult suspects as this is where the identification and definition of vulnerability is particularly problematic, although references will be made to minors where appropriate. We initially explore the European context, before examining the domestic provisions in the two respective jurisdictions and comparing these provisions.

1.1. The protection of vulnerable suspects as part of European developments on strengthening procedural safeguards in criminal proceedings

For years, emphasis has been placed on enhancing and intensifying police and judicial cooperation across Europe and within the European Union in particular. In order to counterbalance this primary focus on measures to promote such cooperation, more recently the protection of procedural rights of suspects and accused persons has received increasing attention as well. As a result, procedural rights – and in particular defence rights – have been strengthened across Europe over the past years.³

¹ Whilst the appropriate adult safeguard is available across the three jurisdictions within the United Kingdom ((i) England and Wales, (ii) Scotland, and (iii) Northern Ireland), there are distinct differences between the three jurisdictions, both in terms of their legal systems and in terms of how the appropriate adult safeguard operates. These differences would necessitate separate examination in a further paper.

² The English and Welsh research examines vulnerability from a theoretical, legal and empirical perspective, focussing on how vulnerability was identified and defined in the law (including an analysis of case law) and by custody officers in practice, as well as an analysis of how decisions were made in respect of adult vulnerable suspects – see Roxanna Dehaghani, *Vulnerability in Police Custody: police decision-making and the appropriate adult safeguard* (Routledge 2019). The Belgian research consists of a theoretical, legal and exploratory qualitative empirical analysis of the definition and identification of a suspect's vulnerability in Belgium in the context of the European legal developments (in progress).

³ For a detailed analysis, see Jacqueline S Hodgson, 'Safeguarding suspects' rights in Europe: a comparative perspective' (2011) 14 New Crim L Rev 611.

In light of these developments, special attention is also given to so-called vulnerable suspects, both within the Council of Europe and the European Union (EU).⁴ With regard to all suspects involved in criminal proceedings, the European Court of Human Rights (hereafter ECtHR) in the leading case of *Salduz v. Turkey* – and in subsequent case law⁵ – stressed that during the investigative stage ‘*an accused often finds himself in a particularly vulnerable position [...], the effect of which is amplified by the fact that legislation on criminal procedure tends to become increasingly complex, notably with respect to the rules governing the gathering and use of evidence*’.⁶ In addition, the ECtHR recognizes that certain suspects are to be considered ‘particularly vulnerable’. In this regard, the Court appears to make a distinction between adults and minors. On the one hand, in order to ensure the minor’s right to an effective participation, it emphasizes that the “vulnerability” and capacities of minors should be taken into account from the very beginning of a criminal investigation, and in particular during a police interview.⁷ Special attention is also needed in case the minor is being held in custody.⁸ On the other hand, the ECtHR considers a number of relevant factors that may render an adult suspect “particularly vulnerable”, such as chronic alcoholism and/or an acute alcohol intoxication, a physical disability or medical condition, belonging to a socially disadvantaged group and a mental disorder (e.g. ADHD).⁹

Increased attention towards vulnerable suspects can also be observed at an EU level. In a 2003 Green Paper, the European Commission developed minimum procedural safeguards for suspects and defendants in criminal proceedings throughout the EU.¹⁰ More specifically, the Green Paper contains a non-exhaustive list proposing eight groups of potentially vulnerable suspects and defendants: ‘(1) *foreign nationals*, (2) *children*, (3) *persons suffering from a mental or emotional handicap, in the broadest sense*, (4) *the physically handicapped or ill*, (5)

⁴ See also Lore Mergaerts, Dirk Van Daele and Geert Vervaeke, ‘Challenges in defining and identifying a suspect's vulnerability in criminal proceedings: What's in a name and who's to blame?’ in Penny Cooper and Linda Hunting (eds.), *Access to justice for vulnerable people* (Wildy, Simmonds & Hill Publishing 2018).

⁵ See for instance also *Panovits v. Cyprus* App no 4268/04 (ECtHR, 11 December 2008); *Shabelnik v. Ukraine* App no 16404/03 (ECtHR, 19 February 2009); *Pishchalnikov v. Russia* App no 7025/04 (ECtHR 24 September 2009); *Dayanan v. Turkey* App no 7377/03 (13 October 2010).

⁶ *Salduz v Turkey* App no 36391/02 (ECtHR 27 November 2008).

⁷ See for instance *Panovits v. Cyprus* App no 4268/04 (ECtHR, 11 December 2008); *S.C. v United Kingdom* App no 60958/00 (ECtHR 10 November 2004); *T. v United Kingdom* App no 24724/94 (ECtHR 16 December 1999); *V. v United Kingdom* App no 24888/94 (ECtHR 16 December 1999).

⁸ *Salduz v Turkey* App no 36391/02 (ECtHR 27 November 2008); *Blokhin v Russia* App no. 47152/06 (ECtHR 23 March 2016).

⁹ *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); *Blokhin v Russia* App no. 47152/06 (ECtHR 23 March 2016); *Borotyuk v Ukraine* App no. 33579/04 (ECtHR 16 December 2010).

¹⁰ Green Paper from the Commission on procedural safeguards for suspects and defendants in criminal proceedings throughout the European Union [2003] COM(2003) final, def.

mothers/fathers of young children, (6) persons who cannot read or write, (7) refugees and asylum seekers, (8) alcoholics and drug addicts'.¹¹ In addition, the question was raised by the Green Paper whether this list should be extended with other potentially vulnerable groups and whether the authorities involved should assess this potential vulnerability.¹²

After a failed attempt in 2004 to adopt a Council Framework Decision¹³, in 2009 the next step was taken with regard to the protection of vulnerable suspects and defendants. On 30th November 2009 – one day before the entry into force of the Treaty of Lisbon – the Council adopted a Resolution on a roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings.¹⁴ The fifth measure of this roadmap – Measure E – is specifically dedicated to special safeguards for suspected or accused persons who are vulnerable. It is stated that special attention is required in respect of suspected or accused persons *'who cannot understand or follow the content or the meaning of the proceedings, for example because of their age, mental or physical condition'*.¹⁵ Until now, this aspect of the roadmap has been included in several European legal instruments; one such instrument is the Recommendation of 27 November 2013¹⁶, in which the Commission specifically encourages Member States to strengthen the procedural rights of so-called vulnerable persons in criminal proceedings.¹⁷ The other instruments that were adopted are Directives focusing on procedural safeguards for all suspects, but these also include a provision that the special needs of vulnerable persons have to be considered by Member States when implementing the Directive.¹⁸

The Recommendation of 27 November 2013 aims at strengthening the right to liberty, the right to a fair trial and the rights of defence by offering vulnerable persons appropriate

¹¹ Ibid., p. 32-34.

¹² Ibid., p. 35.

¹³ European Commission Proposal for a Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union, April 28, 2004, COM(2004) 328 final.

¹⁴ OJ 2009, C 295/1. The fresh impetus to adopt common minimum procedural safeguards across the EU was primarily sparked by the *Salduz* case of the ECtHR (see Jacqueline Hodgson and Ed Cape, 'The right of access to a lawyer at police stations: making the European Union Directive work in practice' (2014) 5 NJECL 450, 451).

¹⁵ Annex, Measure E, Resolution Roadmap for strengthening procedural rights.

¹⁶ Recommendation of the Commission on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings [2013] OJ C 378/8.

¹⁷ Recital no. 1.

¹⁸ Directive 2010/64/EU of the European Parliament and of the Council on the right to interpretation and translation in criminal proceedings [2010] OJ L 280/1, recital 27; Directive 2012/13/EU of the European Parliament and of the Council on the Right to Information in Criminal Proceedings [2012] OJ L 142/1, recital no. 26, art. 1, art. 3.2.; Directive 2013/48/EU of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings and in 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, recital no. 51; Directive (EU) 2016/343 of the European Parliament and of the Council 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, recital no. 42.

assistance and support.¹⁹ Whilst the other instruments do not contain a description of what is to be understood by the term ‘vulnerable person’, the Recommendation does provide a definition: vulnerable persons are ‘*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*’.²⁰ However, it should be noted that this definition is not commonly accepted among Member States of the EU; this is precisely the reason why the Commission opted for a (non-binding) Recommendation.²¹

Nevertheless, there exists a consensus that minors are particularly vulnerable. From that perspective, the binding Directive of 11 May 2016 contains procedural safeguards for children suspected or accused in criminal proceedings.²² Whereas children, by virtue of their age, are generally considered to be vulnerable and not always able to fully understand and follow criminal proceedings, it is also explicitly stated that children are in a particularly vulnerable position when they are deprived of liberty.²³ As such, it can be argued that there is an unequal level of attention given to the vulnerability of adult suspects and defendants compared to suspected or accused children.²⁴

1.2. The rationale for comparing England and Wales and Belgium

Examining the criminal justice provisions within respective jurisdictions has the benefit of enabling further understanding of domestic provisions, yet it also illustrates how systems can be influenced by and can learn from one another. Another benefit is examining how to facilitate harmonisation across the European Union, in pursuance of its third pillar (justice). Whilst Brexit potentially calls into question the harmonisation between the UK (including England and Wales) with other European jurisdictions, many jurisdictions nevertheless look to England and Wales for answers, due to its much longer tradition of protecting vulnerable suspects.²⁵ Such questions are also interesting as EU member states have been said to have been experiencing a convergence of adversarialism (typified through the Anglo-American criminal justice system where the State is the opponent of the suspect/defendant/accused and the courts are

¹⁹ Recommendation of the Commission on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings [2013] OJ C 378/8, recital no. 18.

²⁰ Ibid, recital no. 1.

²¹ European Commission proposal for a Directive of the European Parliament and of the Council on procedural safeguards for children suspected or accused in criminal proceedings, Nov. 27, 2013, COM(2013) 822 final, 3.

²² Directive (EU) 2016/800 of European Parliament and the Council on procedural safeguards for children who are suspects or accused persons in criminal proceedings [2016] OJ L 132/1.

²³ Ibid., recital no. 25 and 45.

²⁴ See also Michaël Meysman, ‘Quo Vadis with Vulnerable Defendants in the EU?’ EuCLR (2014) 179, 191-193.

²⁵ Giannouloupoulos has suggested that Brexit has signalled a ‘moving away’ from Europe - <https://www.fairtrials.org/unit-1-aims-and-objectives-training-0>.

(purportedly) impartial arbiters) and inquisitorialism (typified through jurisdictions such as the Netherlands, Belgium, and France amongst others where the court is actively involved in the investigation of the crime).²⁶

The aforementioned European developments imply that specific attention needs to be given to vulnerable suspects in the member states of the Council of Europe and the EU, including the United Kingdom (UK) (which includes the jurisdiction of England and Wales) and Belgium. Whereas the EU-recommendation on vulnerable suspects does address all member states, the UK, however, has decided not to opt in to some Directives that stem from the Roadmap of 2009: specifically Directive 2013/48/EU on access to a lawyer²⁷ and Directive (EU) 2016/800 on procedural safeguards for children.²⁸ At first glance, it could be suggested that the UK decided not to participate in these Directives on the assumption that the right of access to a lawyer and the procedural guarantees for children, as set out in both Directives, are already in place, including the specific attention required for minors and adult vulnerable suspects. However, it appears that the decision of the UK not to opt in was based on concerns that the Directive did not strike the appropriate balance between suspects' rights on the one hand and the interests of the State on the other. Of particular concern was the rights of victims (which the UK saw as equivalent to the interests of the state).²⁹

The jurisdiction of England and Wales indeed has had a long tradition of protecting vulnerable suspects; since the coming-into-force of the Police and Criminal Evidence Act 1984 (PACE) and the accompanying Codes of Practice, England and Wales has required that vulnerable suspects are protected through the provision of the appropriate adult (AA) safeguard (similar provisions exist in Northern Ireland under the Police and Criminal Evidence (NI) Order 1989; and more wide-ranging provisions are being considered in Scotland, following a

²⁶ Brants has argued that this distinction is oversimplified and not necessarily helpful – Chrisje Brants, 'Comparing Criminal Process as Part of Legal Culture' in David Nelken (ed), *Comparative Criminal Justice and Globalization* (Taylor and Francis 2011). See also Chrisje H Brants and Allard Ringnalda, *Issues of Convergence: Inquisitorial Prosecution in England and Wales?* (Wolf Legal Publishers 2011) 9.

²⁷ In this paper, lawyer is used to denote solicitors and accredited police station or probationary representatives in England and Wales (although it can also be used to refer to barristers), and to refer to lawyers ("advocaat" or "raadsman") who are entitled to assist and represent persons in legal matters in Belgium, either at the pre-trial stages of the proceedings or in court.

²⁸ Recital 58 Directive 2013/48/EU and recital 69 Directive (EU) 2016/800.

²⁹ See <https://eucrim.eu/articles/directive-right-access-lawyer-criminal-proceedings/>. JUSTICE, however, have argued that the Directive does not go far enough in protecting suspects' rights – see <https://justice.org.uk/directive-right-legal-aid/>. The United Kingdom – particularly the largest of its jurisdictions (England and Wales) – has adopted particularly punitive criminal justice responses to the accused since the 1990s (known as the punitive turn) – see Anthony Bottoms, 'The Politics of Sentencing Reform' in Chris Clarkson and Rod Morgan (eds.), *The Philosophy and Politics of Punishment and Sentencing* (OUP 1995); David Garland, *The Culture of Control* (OUP 2001). Given the commitment to promoting suspects' rights under the PACE framework, Giannouloupoulos has deemed the opt out 'paradoxical' – <https://www.fairtrials.org/unit-1-aims-and-objectives-training-0>.

consultation in 2018). Being influenced by the case law of the ECtHR and the EU-Directive on access to a lawyer,³⁰ in Belgium, however, procedural safeguards to compensate for a suspect's vulnerability have only existed for about ten years.

The starting point for this paper is not strictly comparative; to compare the provisions would, we posit, require a much broader starting point with consideration and discussion of the wider system within which they operate.³¹ To do so would warrant more than article-length treatment. Instead, we are aiming to expose the problems within both systems – one that has had a longstanding tradition of protecting vulnerable suspects, at least in theory (England and Wales) and the other that is relatively new to introducing a legislative commitment to protecting vulnerable suspects (Belgium). The purpose is to consider the provisions side by side, taking a collaborative approach where we, the authors (writing and researching from the English and Welsh perspective, and the Belgian perspective), reflect upon the provisions in each other's and their 'home' jurisdictions, and upon any preconceived notions that stem from our 'primary (legal and cultural) socialisation'.³² That is to say, we have the benefit of understanding our 'own' system through this lens. The purpose is therefore not to consider which system is 'better' but rather to learn about each system through critical reflection and to explore their similarities and differences.³³

There is perhaps one notable challenge to the approach taken in this article, in addition to some of the matters addressed above (which we argue have been overcome), and that is the issue of language.³⁴ The other point to note is that there is a dearth of academic literature and policy reports examining the protection of vulnerable suspects in Belgium.³⁵ This is most likely because these provisions are in their infancy and we certainly hope that the body of work examining the protection of vulnerable suspects in Belgium will grow in forthcoming years. Research in Belgium therefore looks to lessons learned and issues exposed in England and Wales, but also relevant research from the Netherlands on vulnerable suspects and comparative

³⁰ See footnotes 5, 6 and 18.

³¹ David Nelken, *Comparative Criminal Justice: Making Sense of Difference* (Sage 2010) 18-24; See also Brants (n 26) 51.

³² David Nelken, 'Virtually there, researching there, living there' in David Nelken (ed) *Contrasting Criminal Justice: Getting from here to there* (Dartmouth 2000) 23-46 as cited in Brants (n 26) 57.

³³ David Nelken, *Comparative Criminal Justice: Making Sense of Difference* (Sage 2010) 18-24; See also Brants (n 26) 51.

³⁴ Nelken cites the example of the Dutch term 'gedogen': whilst it can be loosely translated as tolerance, this word does not quite capture the essence of what 'gedogen' means to the Dutch – Nelken, *Making Sense of Difference* (n 27) 68-69. See also Brants (n 26) 54 and 59.

³⁵ It should, however, be noted that there is a lot of Belgian doctrine and many case notes on the (impact of the) introduction of the right to legal assistance prior to and during police interviews – too many to mention within this paper – but Belgian literature on vulnerable suspects remains scarce.

research on procedural safeguards for young suspects, since these safeguards also need to be applied to adult vulnerable suspects in Belgium (this will be elaborated upon below in II.2.4.).³⁶ That said, this article seeks to serve as a starting point for research, debate, and discussion both from a (Belgian) domestic perspective and from a comparative perspective.

The drive for greater protection of suspects in the English and Welsh system will be addressed further below, but it could be suggested that where the suspect is pitted against the State, as is the case in the adversarial tradition, greater protection is needed so as to balance the scales towards the suspect, particularly where that suspect is vulnerable. In contrast to Anglo-American approaches, Belgium has – within the civil law tradition – a mixed system in which characteristics of both inquisitorial and adversarial criminal proceedings are expressed. On the one hand, the inquisitorial nature of the Belgian criminal proceedings is apparent from the pre-trial criminal investigation, which in principle has a predominantly secret, written and non-contradictory character. On the other hand, the procedure before the courts is, in principle, oral, public and contradictory, and therefore somewhat adversarial.³⁷ It should be noted, however, that the emphasis of Belgian criminal proceedings lies in the pre-trial phase, which is carried out under the responsibility of the public prosecutor's office (as far as the police investigation is concerned) or the investigating judge (as far as the judicial inquiry is concerned). The suspect has a rather passive role in this, which implies, amongst other things, that he can be 'obliged' to be interviewed, whilst account must be had of the various procedural rights.³⁸ Moreover, it should be noted that the importance of the adversarial model in Belgium has increased under the influence of the case law of the ECtHR concerning the right to a fair trial, as guaranteed by Article 6 ECHR. A striking example of this is undoubtedly the right of access to a lawyer for suspects during police interviews since the *Salduz* judgment. It is precisely this increasing interaction between the inquisitorial and adversarial model of criminal procedure that makes the findings from Anglo-American countries considerably relevant for continental countries, including Belgium. England and Wales, in relation to its various protections for suspects (such as the right to legal advice, the right not to be held incommunicado, and the additional

³⁶ See for the Netherlands Koen Geijssen, *Persons at risk during interrogations in police custody. Different perspectives on vulnerable suspects* (Ipskamp Printing 2018). See for European, comparative research on young suspects: Michele Panzavolta, Dorris de Vocht, Marc Van Oosterhout, Miet Vanderhallen (eds.), *Interrogating young suspects: procedural safeguards from a legal perspective* (Intersentia 2015) and Miet Vanderhallen, Marc Van Oosterhout, Michele Panzavolta, Dorris de Vocht (eds.), *Interrogating young suspects: procedural safeguards from an empirical perspective* (Intersentia 2016).

³⁷ Raf Verstraeten, *Handboek strafvordering* (Maklu 2012).

³⁸ Bart De Smet, *Internationale samenwerking in strafzaken tussen Angelsaksische en continentale landen* (Intersentia 1999).

safeguards for vulnerable suspects)³⁹, has been lauded as leading the way and, indeed, many other European jurisdictions look towards England and Wales when considering how to implement these protections.⁴⁰

II. Procedural safeguards to protect vulnerable suspects

II.1. England and Wales

II.1.1. The origins of procedural safeguards for vulnerable suspects

The provisions for vulnerable suspects in England and Wales can be principally found in Code C to PACE; these provisions came about through a major miscarriage of justice in 1972 – the Confait case – and, in particular, the attention this case drew towards the lack of enforceability of the Judges’ Rules (which were directions to the police on how the police should collect evidence so that the evidence would be admissible at trial). Following the Fisher Report – which highlighted numerous deficiencies with the Judges’ Rules – a Royal Commission on Criminal Procedure was established to examine police powers and duties and the rights of suspects in relation to the investigation of criminal offences. PACE can largely be viewed as a relic of the Judges’ Rules and this, at least in part, explains the problems with the implementation of the AA safeguard (to be discussed later).⁴¹ The Codes of Practice, and particularly the provisions on vulnerability, have also been heavily influenced by the research conducted within the field of psychology and law, and in particular the work of Gisli Gudjonsson.⁴²

The vulnerability provisions under Code C were introduced in 1986 as part of the PACE framework. They have, however, been updated every few years, with the most significant of developments occurring in 2018 after the conclusion of the Working Group on Vulnerable Adults and the subsequent Home Office consultation.⁴³ In these changes, *inter alia*, the definition of vulnerability was reframed, the AA’s role was expanded upon, and the threshold applied in respect of adult suspects was changed from ‘any suspicion or told in good faith’ to

³⁹ See PACE and Code C.

⁴⁰ An alternative suggestion may be that England and Wales sees itself as holding the solutions to these problems. It is that assumption that we wish to challenge.

⁴¹ See Dehaghani (n 2).

⁴² For instance: Gisli H Gudjonsson, ‘Confession Evidence, Psychological Vulnerability and Expert Testimony’ (1993) 3 *Journal of Community and Applied Social Psychology* 117; Gisli H Gudjonsson, *The Psychology of Interrogations and Confessions: A Handbook* (Wiley: 2003); Gisli H Gudjonsson, ‘Psychological vulnerabilities during police interviews: Why are they important?’ (2010) 15 *Legal and Criminological Psychology* 161. Gisli H Gudjonsson, Isobel Clare, Susan Rutter and John Pearce, *Persons at Risk During Interviews in Police Custody: The Identification of Vulnerabilities*. Royal Commission on Criminal Procedure Research Study No 12 (HMSO: 1993).

⁴³ See Roxanna Dehaghani and Chris Bath, ‘Vulnerability and the appropriate adult safeguard: examining the definitional and threshold changes within PACE Code C’ (2019) *Crim LR* 213.

‘reason to suspect’.⁴⁴ In relation to vulnerability, Code C does three main things: it provides a definition of vulnerability, it sets out how vulnerable suspects are to be protected, and it sets out who is responsible for ensuring that the protection is provided.

II.1.2. Who is considered vulnerable by law?

On the question of definition, Code C deems vulnerable those suspects who are below the age of 18. Prior to the changes to Code C in July 2018, a vulnerable suspect could also be an adult who was mentally vulnerable (that is ‘because of their mental state or capacity, may not understand the significance of what is said, of questions or of their replies’⁴⁵) or mentally disordered (someone who has ‘any disorder or disability of the mind’⁴⁶). Since July 2018, Code C recognizes as vulnerable those adults who, because of a mental health condition or mental disorder, may be unable to do one (or more) of a few things, referred to as the ‘functional test’⁴⁷. These things include that the suspect may struggle to understand or communicate effectively ‘about the full implications for them’ in relation to various procedures and processes connected with arrest and detention or voluntary attendance, or the exercise of their rights and entitlements; ‘does not appear to understand the significance of what they are told, of questions they are asked or of their replies’; or may be prone to ‘becoming confused and unclear about their position’, ‘providing unreliable, misleading or incriminating information without knowing or wishing to do so’, or being suggestible or compliant.⁴⁸

II.1.3. The appropriate adult (AA)

On the matter of protection, all vulnerable suspects are entitled to an AA. The AA function may be performed by various individuals – those permitted by Code C are separated according to whether the suspect is a minor or an adult. For young suspects, an AA may be a parent, guardian, social worker, or, where the young person is under the care of a local authority⁴⁹ or voluntary organisation, someone working for the local authority or voluntary organisation. In the event that any of these individuals are unavailable, subject to some exceptions, the AA may be any

⁴⁴ Dehaghani and Bath (n 38).

⁴⁵ Home Office, *Revised Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers. Police and Criminal Evidence Act (PACE) 1984. Code C*. (London, TSO: 2017), Note for Guidance 1G.

⁴⁶ Ibid.

⁴⁷ Although the provisions are slightly more complicated – for a critique see Dehaghani and Bath (n 38).

⁴⁸ Home Office, *Code C, Revised Code of Practice for the detention, treatment and questioning of persons by Police Officers* (London, TSO: 2018), para 1.13(d). For a critique of these provisions see R. Dehaghani, ‘Interrogating Vulnerability: reframing the vulnerable suspect in police custody’ (forthcoming) Social and Legal Studies.

⁴⁹ A local authority is responsible for the delivery of public services in a specific geographical area.

‘responsible adult’ aged 18 or above. For an adult, an AA may be, subject to some exceptions, a parent, guardian or another person who cares for the adult, or someone trained in dealing with the vulnerable. Whilst it is typically preferred that an AA who acts for an adult is someone with qualifications relating to the care of the vulnerable, the suspect’s wishes are respected (i.e. a family member will be called if that is what the suspect prefers). The Code also contains clear guidance on who the AA should not be: for example, legal representatives, independent custody visitors, victims and witnesses, those involved in the offence, and those employed by the police are excluded from acting as AAs.⁵⁰ Where a vulnerable suspect has not been provided with an AA, evidence could be held inadmissible at court, under PACE ss 76 (confession evidence where unreliable) or 78 (any evidence where admission would have an adverse impact on the fairness of the proceedings), or, in limited circumstances, a direction given to the jury in a Crown Court case (under s 77 PACE).

The AA’s functions are mapped out within Code C. The most recent version of Code C has expanded upon the AA’s role. Currently, the role includes providing support, advice and assistance to the vulnerable suspect in relation to any aspect of any Code of Practice, or when the suspect is ‘given or asked to provide information or participate in any procedure’.⁵¹ This includes, *inter alia*, when the police issue a charge, caution, or warning in relation to adverse inferences, when samples such as fingerprints, photographs and DNA are taken, when detention is reviewed, and when intimate searches are conducted.⁵² The AA is also required to observe whether the police are acting properly and fairly, and to advise an officer of at least rank inspector if the police are not, and must ensure that the suspect’s rights are being complied with whilst also enabling the suspect to understand those rights. Finally, the AA must facilitate communication between the suspect and the police.⁵³

There are problems with the AA’s role. The role is, in practice, typically limited to interview, and often AAs are ineffective even during interview. The AA, when a parent or relative, may be unsupportive, may pressurize the suspect to confess, may turn a blind-eye to police malpractice, could act in a confrontational manner, may exhibit negative attitudes towards the police, or may be too distressed and so may act in a passive manner. Volunteer AAs tend not to be representative of the suspect population (as volunteers are often drawn from

⁵⁰ Home Office, *Code C 2018*: para 1.7; Note for Guidance 1D.

⁵¹ Home Office, *Code C 2018*: para 1.7.

⁵² Home Office, *Code C 2018*: para 16.1; para 10.12; 10.11A read alongside para 10.11; Annex A para 2B. 11.17; para 1.4.

⁵³ This is the aspect of the role which arguably receives the most attention in research and which tends to be the focus of the police.

affluent areas), may have a tendency towards being pro-police (and, accordingly, anti-suspect), or may fail to intervene (whether through reluctance or a lack of knowledge) when faced with police malpractice. Moreover, whilst the Code (as noted above) prefers those with qualifications relating to the care of the vulnerable in respect of adult suspects, questions can arise in relation to the adequacy of training of some AAs.⁵⁴ AAs may also have to navigate complex power dynamics between the police and others, such as legal representatives, and may themselves feel the need to maintain amiable relations with the police (this has been noted particularly with social workers).⁵⁵ AAs may also not be able to meet the specific needs of the suspect, for example, when assisting a suspect with Autism Spectrum Disorder with communication needs, the AA may be unaware of or unable to adapt to the specific communicative needs of the suspect.⁵⁶ The role is further undermined by the lack of legal privilege attributed to the AA, and may also be subject to significant interpretation. AA provision across England and Wales is also patchy and inconsistently organised, raising questions of independence, effectiveness and availability.⁵⁷

II.1.4. Special care when interviewing a vulnerable suspect

In addition to general provisions that relate to all detained suspects (such as audio and/or visual recordings of interviews and healthcare provision) and the AA safeguard, Code C urges that interviewing officers take special care when questioning vulnerable suspects and the officers are encouraged to obtain corroboration of facts when possible.⁵⁸ Whilst the responsibility for implementing the appropriate AA is left with the custody officer,⁵⁹ other individuals can – and do – have input into the decision-making process. This will be discussed in greater detail in the section below (see III.2.1.).

II.2. Belgium

II.2.1. Recent scattered legal attention for vulnerable suspects

The attention given to the vulnerability of suspects in Belgian legislation is explicitly related to the European developments concerning the right of access to a lawyer during police interviews (see I.1.), which has led to a radical change in the Belgian legislation on police interviews over

⁵⁴ For discussion see Dehaghani (n 2).

⁵⁵ *ibid.*

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*

⁵⁸ Home Office, *Code C 2018*.

⁵⁹ Home Office, *Code C 2018*. The custody officer is a police officer of at least rank sergeant who is responsible for protecting the rights and welfare of suspects whilst they are detained in police custody - PACE s 36.

the past decade. However, continental countries in particular – such as Belgium – initially appeared to be very cautious about the evolution of the ECtHR's case law as a result of the *Salduz* judgment.⁶⁰ The lawyer was somewhat considered to be an "adversarial outsider"⁶¹ who would disrupt the course of the interview, and it was also feared that the interview would lead to an early plea and/or to a debate between the lawyer and the police.⁶² This resistance was also motivated by a certain fear that the effectiveness of the criminal investigation and the truth finding process would be hampered. It was assumed, for example, that suspects would no longer confess and would only invoke their right to remain silent.⁶³ Budgetary and practical concerns were also raised.⁶⁴ Consequently, no immediate initiative was taken to adapt the Belgian legislation to the case law of the ECtHR, and it was assumed that an amendment of the law would not be necessary in order to meet the requirements set by the Court.⁶⁵

The right to consult with and be assisted by a lawyer during police interviews was eventually guaranteed in 2011 – three years after the *Salduz* judgment. The Consultation and Assistance Law Act of 13 August 2011, which entered into force on 1 January 2012, amended article 47*bis* of the Belgian Criminal Procedure Code, introducing (i) general rules that apply to all police interviews, and (ii) specific rules that apply specifically to suspect interviews on the other, including to right to legal assistance.⁶⁶ These regulations again were amended by the

⁶⁰ Dimitrios Giannouloupoulos, 'Strasbourg jurisprudence, law reform and comparative law: a tale of the right to custodial legal assistance in five countries' (2016) HRLR 103, 104; John D. Jackson, 'Responses to *Salduz*: procedural tradition, change and the need for effective defence' (2016) MLR 987, 999.

⁶¹ Jacqueline Hodgson, 'Constructing the pre-trial role of the defence in French criminal procedure: an adversarial outsider in an inquisitorial process?' (2002) *The International Journal of Evidence & Proof* 1, 7.

⁶² Tom Decaigny, Maarten Colette and Paul De Hert, 'Wet consultatie- en bijstandsrecht. Wet van 13 augustus 2011 als antwoord op *Salduz*-rechtspraak' (2011) *NjW* 522, 528.

⁶³ Ilias Anagnostopoulos, 'The right of access to a lawyer in Europe: a long road ahead?' (2014) EuCLR 3, 4; Hodgson, 'Constructing the pre-trial role of the defence' (n 41) 12.

⁶⁴ Government Bill on amendment of the Pre-trial Detention Act of 20 July 1990 and of the Code of Criminal Procedure, in order to grant rights to any person interviewed and to any person deprived of his or her liberty, including the right to consult a lawyer and to be assisted by him or her 2011.

⁶⁵ Philip Traest, 'Toegang tot een advocaat bij het verhoor in de recente Belgische rechtspraak' in Paul De hert and Tom Decaigny (eds.), *De advocaat bij het verhoor. Een stand van zaken* (UGA 2010); see also Olivier Michiels, 'La réception des arrêts *Salduz* et *Dayanan* de la Cour européenne des droits de l'homme par la Cour de cassation' (case note to CoC 26 May 2010) (2010) *JLMB* 1274.

⁶⁶ For some general edited work on this amendments, see Franky Goossens, Henri Berkmoes, Frank Hutsebaut and Alain Duchatelet (eds.), *De Salduz-regeling. Theorie en praktijk, vandaag en morgen* (Politeia 2012); Emilie Michaux, Pieter Tersago, Miet Vanderhallen and Geert Vervaeke (eds.), *Het Salduz-arrest: tussen uniform en toga. De gevolgen van het Salduz-arrest voor politie, justitie en advocatuur* (Politeia 2011). See also Aurélie Kettels, 'L'assistance de l'avocat dès l'arrestation ou comment repenser la phase préparatoire du procès pénal sur un mode plus accusatoire' (2009) *Rev.dr.pén* 989; Olivier Nederlandt and Damien Vandermeersch, 'Deux ans après la loi *Salduz*: inventaire critique de la jurisprudence et des pratiques' in Paul Martens (ed.), *Les droits de la défense* (Larcier 2014).

Act of 21 November 2016 on certain rights of persons questioned in order to comply with the aforementioned Directive 2013/48/EU.⁶⁷

Although the introduction of the right of suspects to consult with and be assisted by a lawyer during a police interview was undoubtedly a radical change, the legislature intended only minimal adjustments to meet the requirements set by the ECtHR.⁶⁸ The restrictive interpretation given to both the right of access to a lawyer and the role of the lawyer during police interviews is illustrative of this Belgian reticence.⁶⁹ Against this background, a rather limited level of attention given to a suspect's vulnerability can be observed in the Belgian legislation.⁷⁰ The first legislative development on access to a lawyer in 2011 was devoid of any measures for vulnerable suspects, and whilst there are now general safeguards relevant to – but not aimed at – protecting vulnerable suspects (such as the right to medical assistance for detained suspects, optional audiovisual recordings of interviews and the right to request that a third party be informed of the deprivation of liberty)⁷¹, there still is a relative paucity of provisions specifically intended to protect vulnerable suspects.

II.2.2. Who is considered vulnerable by law?

In light of the *Salduz* judgment – and subsequent judgments – of the ECtHR, the Belgian legislation and the case law of the Belgian Court of Cassation (CoC) seem to focus on the vulnerable position of all suspects with a view on the need for the right to assistance by a lawyer during the pre-trial investigation – and the police interview in particular – and less so on vulnerable suspects as referred to in the EU-instruments. However, a Circular of the Board of Procurators General stipulated that the regulations for minors should be applied when an adult person is recognized as being vulnerable, for example because of an intellectual disability.

⁶⁷ See for instance: François Koning, 'Directive 2013/48/EU : présence et rôle actif de l'avocat à toute audition durant l'enquête pénale d'un suspect' (2014) *JT* 655; Yves Liégeois, 'De 'Salduz+' wet van 21 november 2016: een nieuw hoogtepunt in het recht van toegang tot een advocaat onder dictaat van Europa' (2017) *NC* 105. An overview of the current legislation, including references to all relevant case law, case notes and doctrinal literature concerning the Salduz reforms can be found in the following annotated codex: Franky Goossens, Henri Berkmoes, Joost Huysmans, Maarten Colette and Kurt Stas (eds.), *Wetboek Salduz 2019-2020* (Die Keure 2019).

⁶⁸ Government Bill on amendment of the Pre-trial Detention Act of 20 July 1990 and of the Code of Criminal Procedure, in order to grant rights to any person interviewed and to any person deprived of his or her liberty, including the right to consult a lawyer and to be assisted by him or her 2011.

⁶⁹ See also Dimitrios Giannouloupoulos, 'Strasbourg jurisprudence, law reform and comparative law: a tale of the right to custodial legal assistance in five countries' (2016) *HRLR* 103, 110.

⁷⁰ Catherine Van de Heyning, 'Het verhoor van kwetsbare personen na de Salduz-Bis-Wet: context, controversie en uitsluiting van het bewijs' (2018) *T.Str.* 71, 72. See also: Lore Mergaerts, Dirk Van Daele and Geert Vervaeke, 'Naar specifieke procedurele rechten voor kwetsbare verdachten en beklaagden: een nieuwe stap in de europeanisering van de Belgische strafprocedure' (2015) *NC* 459.

⁷¹ See art. 112ter of the Belgian Code of Criminal Procedure and art. 2bis, § 3, 7 and 8 of the Belgian Pre-trial Detention Act.

These provisions were retained after the amendment of 21 November 2016 to comply with Directive 2013/48/EU. Since then, the Belgian Code of Criminal Procedure also explicitly states that the language used by the police to inform a person about his rights should be adapted to the person's 'age or potential vulnerability which hampers his ability to understand these rights' (see II.2.3.).⁷² Furthermore, it is recognized that assistance of an interpreter is required for persons who are vulnerable because of language barriers or a speech or hearing disability.⁷³

II.2.3. The words used to inform a vulnerable suspect of the procedural rights

Regarding the protection of vulnerable suspects, the Code of Criminal Procedure solely states that the language used by the police to inform a person about his rights should be adapted to the person's age or potential vulnerability which hampers his ability to understand these rights.⁷⁴ This should be mentioned in the police report.⁷⁵ Although this has only been legally required since 2016 – in particular to implement Article 13 of the aforementioned Directive 2013/48/EU – this regulation had already been applied in practice.⁷⁶ The way in which the wording should be adapted is not, however, specified and is therefore left to the discretion of police officers, while the form and content of the letter of rights to be used (in all other cases) is predetermined.⁷⁷ Whereas such freedom allows the information of rights to be tailored to meet the needs of the individual (to be) questioned, some guidance in this respect might nevertheless improve the comprehensibility of the communication.⁷⁸ In addition, it should be noted that this provision applies to all persons questioned by the police, including suspects, victims and witnesses.

II.2.4. The application of the regulation for minors

In 2011, the Board of Procurators General stated that, in connection with the original Consultation and Assistance Law Act, the regulation concerning the police interview of minors should be applied if the police have reasons to think that an adult to be interviewed is 'weak or vulnerable, for example because of a mental weakness'.⁷⁹

⁷² See art. 47bis, § 6, 2) Belgian Criminal Procedure Code.

⁷³ See art. 47bis, § 6, 4) Belgian Criminal Procedure Code.

⁷⁴ Art. 47bis, § 6, 2) Belgian Criminal Procedure Code. See also Circular no. COL 8/2011, 24 November 2016 (second revised edition), 13 and 30.

⁷⁵ Art. 47bis, § 6, 2), point 2 Belgian Criminal Procedure Code.

⁷⁶ Government bill on certain rights of persons questioned 2016. See also Circular no. COL 8/2011, 18 October 2018 (fourth revised edition), 66.

⁷⁷ Royal Decree in implementation of Article 47bis, § 5 of the Belgian Code of Criminal Procedure 2016.

⁷⁸ See, for example, in the English context: Frances Rock, *Communicating Rights: The Language of Arrest and Detention*. Palgrave Macmillan: 2007.

⁷⁹ Circular no. COL 8/2011, 18 October 2018 (fourth revised edition), 67 and 133-134.

First of all, this regulation implies that adult vulnerable suspects, just like minors, may not waive the right of access to a lawyer granted to them in accordance with Article 47*bis* of the Code of Criminal Procedure.⁸⁰ Furthermore, this regulation implies that a suspect who is considered vulnerable and is interviewed following a written request, but who shows up without a lawyer, should still be able to have a confidential consultation with a lawyer prior to his interview and will also need to be able to benefit from the assistance of his lawyer during that interview.⁸¹ However, in view of the practical implementation of this regulation, it should be kept in mind that the vulnerability of a suspect can often only be established after a medical or psychological examination, which may be time-consuming. Considering that, until December 2017, Article 12 of the Belgian Constitution stipulated that the deprivation of liberty following a police arrest should in principle not last longer than twenty-four hours, in practice situations will inevitably have occurred in which a vulnerable suspect, whose vulnerability has not yet been established, has waived his right to a prior confidential consultation with a lawyer and/or his right to the assistance of a lawyer during the interview. Even now, by means of a revision of Article 12 of the Belgian Constitution, the period of twenty-four hours was extended to forty-eight hours before the intervention of the investigative judge is required,⁸² such situations are by no means excluded. If it is subsequently established at a later stage of the proceedings that a vulnerable suspect is involved, his waiver of the right to assistance from a lawyer will have to be regarded as invalid. If the suspect – or his legal representative – does not choose a lawyer, he will have to be assigned one.

If the suspect's vulnerability is identified rather late in the proceedings, the question then arises as to what extent the statements made without prior consultation and/or assistance of a lawyer can be used as evidence against the person concerned. By way of comparison, reference can be made to the current regulation for minors, who cannot validly waive their right to prior confidential consultation with a lawyer and to the assistance of a lawyer during police interviews. Non-compliance with this rule means that their statement will be inadmissible at court.⁸³ It should be noted, however, that determining whether a person is a minor is considerably easier than assessing the vulnerability of an adult person. We will reflect on questions of identification (and definition) later in the paper (see III.).

⁸⁰ Art. 47*bis*, § 3, paragraph 2 and 5 Belgian Code of Criminal Procedure and art. 2*bis*, § 3, paragraph 1 and § 6 Belgian Pre-trial Detention Act.

⁸¹ Circular no. COL 8/2011, 18 October 2018 (fourth revised edition), 103 and 171.

⁸² See also art. 2 and art. 16 Belgian Pre-trial Detention Act.

⁸³ Article 47*bis*, § 6, paragraph 9 of the Belgian Code of Criminal Procedure.

Furthermore, in Belgium, any suspect deprived of his liberty is currently only entitled to request that a third party be informed of the deprivation of liberty.⁸⁴ In the case of a minor, the police officer responsible for the deprivation of liberty must, as soon as possible, inform the father and mother of the minor, his guardian or the persons holding him in law or in fact, in writing or orally, of the arrest, the reasons for it and the place of detention of the minor.⁸⁵ The Board of Procurators General states that this regulation must also be applied if the police have reason to think that an adult person to be interviewed is weak or vulnerable, for example because of a mental weakness.⁸⁶

II.3. Comparative remarks

There are clear distinctions between England and Wales and Belgium when examining the origins of the provisions for vulnerable suspects: whilst England and Wales has procedural safeguards in place for over 30 years, safeguards that compensate for a suspect's vulnerability have been introduced in Belgium only very recently (and have also manifested in a different way). The PACE safeguards in England and Wales stemmed from a miscarriage of justice in 1972 and the resulting Fisher Report and RCCP. By comparison, to date, there have been no officially recognized miscarriages of justice in Belgium.

Further, whereas the English and Welsh provisions on vulnerability even have been heavily informed by academic research, particularly from the legal psychology literature, developments in Belgium have been adopted in a reserved and reluctant manner with minimal revisions to the existing Code of Criminal Procedure to comply with the case law of the ECtHR and the EU-Directive on the right of access to a lawyer. In this regard, England and Wales and Belgium also adopted safeguards with a "different kind" of vulnerability in mind: the provisions in Code C in England and Wales (both in the historical and contemporary contexts) aim to protect suspects who are to be considered vulnerable because of individual characteristics. Whilst this is also true for Belgium, the legal changes at first instance focused on assessing the need for access to a lawyer prior to and during police interviews to compensate for a vulnerability stemming from the mere involvement as a suspect in a criminal procedure (thus implying a vulnerable position for all (detained) suspects, as suggested in the *Salduz* judgment). However, as will be demonstrated below (see III.1.2.), it can be questioned whether a lawyer is

⁸⁴ Art. 2*bis*, § 7 Belgian Pre-trial Detention Act.

⁸⁵ Art. 48*bis*, § 1 Act on the protection of minors, on taking charge of minors who have committed an offence defined as a criminal offence and on the compensation of the damage caused by this offence.

⁸⁶ Circular no. COL 8/2011, 18 October 2018 (fourth revised edition), 67.

best placed to compensate for the vulnerability of an (adult) suspect and whether this responsibility should be assigned to them.

Aside from the more general provisions that apply to all (detained) suspects, the safeguards to protect vulnerable suspects are markedly different in both jurisdictions. For Belgium, the provisions for vulnerable suspects remain rather vague, especially with regard to who is considered to be vulnerable; provisions in England and Wales seem much more detailed. England and Wales also has a distinct safeguard to address the vulnerability of suspects – the AA safeguard; Belgium, by contrast, has no distinct provision. Yet, there are indeed problems in England and Wales in relation to the protection of vulnerable suspects: the AA safeguard is limited in law and in practice.⁸⁷ For example, as noted above, the safeguard is not enshrined within PACE proper but instead included within Codes of Practice (principally Code C). As soft law, the provisions are open to quite significant interpretation and it has thus far been the role of the courts to fill in some of the gaps (for example, on the definition of vulnerability and the manner in which police decisions have been made).⁸⁸ For young suspects, a statutory duty for AA provision is contained within s 38(4)(a) of the Crime and Disorder Act (CDA) 1998, although there is no comparable duty for adults. That the safeguards do not exist on a statutory basis is not necessarily in itself a cause for concern, however, the problem then arises with the implications (such as exclusion of evidence) for breach, *i.e.* where an AA is not called for a vulnerable suspect. Non-implementation of the AA safeguard for adult suspects has been well-documented.⁸⁹ These are important constraints to bear in mind when contemplating the introduction of the AA safeguard in Belgium (or another jurisdiction).

III. The complexity of implementing the procedural safeguards in practice: the reality

In the section that follows we will examine the reality of the protection of vulnerable suspects in Belgium and England and Wales based on a literature review and our own empirical studies, focussing specifically on identification, definition, and decision-making in relation to vulnerability. Although, and as noted above, the provisions in England and Wales are considerably detailed, this does not mean that suspects are always afforded the protection that the provisions provide. Indeed, whilst England and Wales has a considerable history of

⁸⁷ Roxanna Dehaghani, 'He's just not that vulnerable': exploring the implementation of the appropriate adult safeguard in police custody' (2016) *Howard Journal of Crime and Justice* 396.

⁸⁸ See Dehaghani (n 2).

⁸⁹ See *ibid.*

protecting vulnerable suspects in law in books, the law in action exposes a different picture altogether.

III.1. Identifying vulnerability

III.1.1. England and Wales

The first issue is that of the identification of vulnerability. As noted earlier, adult suspects prior to 2018 were deemed vulnerable if they were either mentally vulnerable or mentally disordered. Since 2018, it is those adults who meet the functional test and may have a mental health condition or mental disorder who are deemed vulnerable according to the Code and therefore should have an AA called to assist them. Whilst it may be relatively easy to identify whether a person is below the age of 18 (although this is certainly not problem-free), it is not always easy to identify whether a suspect has a mental health condition or mental disorder and meets the functional test or, as was the case prior to 2018, was mentally vulnerable or mentally disordered.⁹⁰ There is some research (although less in recent years) on how vulnerability is identified and what the barriers are to identification. This research has typically pointed towards the difficulties in identifying vulnerability in adult suspects.⁹¹ In research conducted in the years immediately following the implementation of PACE, Irving and McKenzie found that custody officers experienced difficulty when identifying vulnerability but reasoned that the AA safeguard was ‘working as the exigencies of the problem allow’.⁹² Gudjonsson et al’s research later in 1993 (as part of the Royal Commission on Criminal Justice) found that ‘the police were very good at identifying the most disabled and vulnerable suspects, and ensured that an AA was called when they considered it necessary’.⁹³ A NAAN report in 2015 highlighted the various obstacles to identifying vulnerability, which included:

[A] lack of effective and systematic screening, a lack of training for the police, ...no visual or behaviour clues..., the influence of alcohol or drugs complicating the assessment, a disregard of self-reporting, the failure to use historical information... to

⁹⁰ *ibid.*

⁹¹ Roxanna Dehaghani, ‘He’s just not that vulnerable’: exploring the implementation of the appropriate adult safeguard in police custody’ (2016) *Howard Journal of Crime and Justice* 396.

⁹² Barry Irving and Ian McKenzie, *Police Interrogation: The Effects of the Police and Criminal Evidence Act 1984*. (Police Foundation 1989) 203.

⁹³ Gisli Gudjonsson, Isobel Clare, Susan Rutter and John Pearse, *Persons at Risk During Interviews in Police Custody: The Identification of Vulnerabilities* (Royal Commission on Criminal Procedure Research Study No 12). (Home Office 1993), 26.

identify learning disabilities, [suspect reluctance to disclose], [the use of standardised questions].⁹⁴

Many research studies,⁹⁵ with the notable exception of Bean and Nemitz's research,⁹⁶ suggested that the police were not necessarily at fault when failing to identify vulnerability. However, more recent research has illustrated that whilst there are significant barriers to identifying vulnerability, the police do indeed often have various mechanisms and sources through which to identify vulnerability.⁹⁷ The risk assessment (an assessment of risk of harm to the detainee or others caused by/as a result of the detainee's health or behaviour), for example, whilst limited, does provide custody officers with an opportunity to ask questions and gather information, but it is instead what they choose to do with this information that presents obstacles to the implementation of the AA safeguard. Custody officers can also check through the Police National Computer, which can be particularly helpful if the suspect has been detained before and information pertaining to that person's vulnerability has been recorded. Information provided by the various healthcare professionals present in the custody suite can also be helpful, however, it is recognised that these healthcare professionals are not necessarily trained appropriately in relation to the needs of suspects or the legal requirements for an AA. Information can also be provided by family and friends of the suspect as well as legal representatives and arresting officers, particularly if the circumstances of the arrest would suggest that the suspect is vulnerable (such as a mental health crisis that has turned into a criminal offence – or been constructed as one). Finally, custody officers may pick up on clues when talking to the suspect either during 'booking-in' or during the suspect's time in detention.⁹⁸

III.1.2. Belgium⁹⁹

⁹⁴ National Appropriate Adult Network (2015), *There to help: Ensuring provision of appropriate adults for mentally vulnerable adults detained or interviewed by police*. National Appropriate Adult Network. Available at http://www.appropriateadult.org.uk/images/pdf/2015_theretohelp_complete.pdf, p. 4. See also Ian McKinnon and Don Grubin, 'Health screening in police custody' (2010) 17 *Journal of Forensic and Legal Medicine* 209. McKinnon and Don Grubin, 'Health screening of people in police custody— evaluation of current police screening procedures in London, UK' (2013) 23 (3) *European Journal of Public Health* 399, 402.

⁹⁵ See Dehaghani (n 2).

⁹⁶ Philip Bean and Teresa Nemitz, *Out of depth and out of sight*. (University of Loughborough 1995).

⁹⁷ Dehaghani (n 2).

⁹⁸ *Ibid.*

⁹⁹ This paragraph is based on results of the ongoing PhD research of the first author (see footnote 2 on the methodology used).

In Belgium, too, it can be assumed that in the first instance the police need to identify the vulnerability of a suspect. This is not as such enshrined in law but can be delineated from the aforementioned provisions regarding the vulnerability of suspects in Belgium (II.2.). From the *Salduz* code of conduct for lawyers, promulgated by the Flemish Bar Association, it can be deduced that the lawyer, as a primary actor, also has an important role whereby he must (be able to) assess during a first conversation whether the client is mentally or physically capable of being interviewed. If a lawyer has doubts about whether the client is physically and/or mentally capable of being interviewed, he must first report this to the police officers involved. In addition, he must, if necessary, insist on providing medical assistance. Furthermore, the lawyer is expected to ask the police officers to mention this in the case file and to postpone the interview.¹⁰⁰

The identification of a suspect's vulnerability, however, also poses some challenges in practice. First, this seemingly shared responsibility can lead to the risk of the police and lawyers shifting the responsibility to identify a suspect's vulnerability onto each other. Second, both the police and the lawyer in Belgium are, arguably, still adapting to the lawyer's involvement in interviews (which, as noted earlier, is a relatively new development). Third, the results of a legal and exploratory empirical analysis of how lawyers identify vulnerability illustrate that it is not evident or unequivocal for a lawyer (but also not for a police officer or magistrate) to verify whether a suspect should be considered vulnerable¹⁰¹ (and vulnerability is determined by numerous elements which are rather complex to assess and are not always easy to discern). Given the time pressure inherent within a criminal investigation, the lack of specific (psychological) knowledge and training - added to the fact that identifying a suspect's vulnerability is not their primary task - lawyers (and police officers) are probably not fully capable of being able to identify all suspects' vulnerabilities.

In addition, the existing legal framework in Belgium does not provide for clear and specific guidance on the approach to be taken to identify a suspect's vulnerability.¹⁰² The legal framework in Belgium does, to some extent, provide possibilities to identify a suspect's vulnerability during the pre-trial investigation. For example, opportunities arise prior to and during police interviews, and during reconstructions, identity parades, and confrontations

¹⁰⁰ Flemish Bar Association, 'Salduz code of conduct revised edition' (2017), 3.2.

¹⁰¹ See also Lore Mergaerts, Dirk Van Daele and Geert Vervaeke, 'Challenges in defining and identifying a suspect's vulnerability in criminal proceedings: What's in a name and who's to blame?' in Penny Cooper and Linda Hunting (eds.), *Access to justice for vulnerable people* (Wildy, Simmonds & Hill Publishing 2018).

¹⁰² See also Michaël Meysman, 'Quo Vadis with Vulnerable Defendants in the EU?' (2014) *EuCLR* 179, 188-190.

(where, in case of important discrepancies, a suspect is brought together with one or more witnesses or victims).¹⁰³

With regard to suspects held in police custody, however, one must recognize the short duration of the confidential consultation prior to a police interview – in principle, this confidential consultation may not last longer than thirty minutes.¹⁰⁴ Given the limited knowledge about vulnerability possessed by lawyers and the lack of screening instruments, this timeframe is insufficient to support adequate identification. In exceptional cases, however, the confidential consultation can be extended, but only if the police agree to this (and even then it is limited).¹⁰⁵ Although such an extension could be requested if there are indications of vulnerability, this does not solve the problem: a prior confidential consultation will be used primarily to inform the suspect about the procedure and his rights and, in light of the case, to determine the appropriate defence strategy and, so, allowing a limited extension of the duration of the prior confidential consultation between the suspect and his lawyer is a step in the right direction, but is in itself insufficient. After all, asking for a limited extension still presupposes a first suspicion of vulnerability within the original duration of thirty minutes. Furthermore, the confidential consultation prior to the police interview can also take place by telephone. This occurs at the request of the lawyer – and with the consent of the suspect – or when the confidential consultation cannot take place within two hours after the permanency service or the lawyer chosen by the suspect was contacted.¹⁰⁶ However, in the case of such a consultation by telephone only, it can be assumed that the possibilities to determine any vulnerability are more limited compared with a face-to-face consultation as telephone consultation excludes the possibility of observing the suspect's behavior.

What's more, the right of access to a lawyer can be waived thus posing further limitations on the potential for a defence lawyer to identify vulnerability. And, whilst the case file and audio-visual recordings of police interviews (when available) may provide valuable information to identify vulnerability, the variable quality of case files and the legal possibilities (and restraints) to have access to these files should be taken into account as potential barriers. Lawyers also seem to rely on readily observable indicators (such as manner of speech and behaviour), experience and human knowledge to identify vulnerability; they are not actively

¹⁰³ In Belgium, however, these investigative acts, other than 'traditional police interviews', are carried out much less frequently, with virtually no assistance subsequently being provided. In practice, therefore, these legal possibilities appear to be rarely used.

¹⁰⁴ Art. 2*bis*, § 2, second paragraph Belgian Pre-trial Detention Act.

¹⁰⁵ Ibid.

¹⁰⁶ Art. 2*bis*, § 2, second and third paragraph Belgian Pre-trial Detention Act.

vigilant in identifying a suspect's vulnerability, and the attention given to a suspect's vulnerability is implicit or even accidental. Lastly, when deciding whether or not to intervene or take certain measures during a police interview, lawyers appear to keep the future 'working relationship' with the police and judicial authorities in mind. The relationship between the suspect's lawyer and the police and judicial authorities is therefore important, and can vary greatly depending on the police service and the investigating judge involved.

III.2. Defining and deciding upon vulnerability

III.2.1. England and Wales

Perhaps a greater challenge, as addressed elsewhere, is presented by how custody officers define vulnerability for the purposes of the AA safeguard. In qualitative work conducted across two police custody suites in England it was highlighted that custody officers often do not consult Code C, are not aware of Code C definition of vulnerability in respect of adults, and often do not use the definition contained under Code C when determining whether the suspect is vulnerable but instead, have their own definition of vulnerability (which is largely limited to that of whether the suspect understands what is happening).¹⁰⁷ The police were rather dismissive of suspects who, for example, reported depression and often denied the suspect's vulnerability on that basis. Moreover, when making decisions, custody officers considered whether a legal representative would be present (as the legal representative could, in effect, 'replace' the AA) or whether the case was going to reach the Crown Court¹⁰⁸ and thus whether the evidence was going to be scrutinised (evidence is more likely to be scrutinised at the Crown Court as the stakes are typically higher and barristers are more likely to be instructed at the Crown Court). Custody officers also took into account whether the healthcare professional deemed it necessary for an AA to be called and/or whether the legal representative requested an AA (in the latter instance, it could be suggested that if a legal representative were to demand that an AA be called and the custody officer refused to do so, then questions may be raised at trial). Custody officers therefore considered whether the decisions they made would be subject to scrutiny and whether it would benefit the police to call an AA. This also meant that even where a suspect was vulnerable according to Code C or even according to the custody officer's own estimations, custody officers used their discretion so as not to implement the safeguard.¹⁰⁹

¹⁰⁷ Dehaghani (n 2).

¹⁰⁸ The Crown Court is the highest court of first instance in England and Wales.

¹⁰⁹ Dehaghani (n 2).

The effectiveness of these rules is also impacted upon by the broader framework of PACE, as noted above. Because the provisions on vulnerability and the AA safeguard are contained within Code C, issues arise with enforceability. Importantly, a breach of the Codes of Practice cannot result in criminal or civil sanction (s 67(10) PACE). Instead, as noted earlier, PACE provides a remedy for breach of these rules by way of exclusion of evidence at trial under ss 76 or 78, or a jury direction (in a Crown Court trial) under s 77. Yet, the courts have not excluded confessions in all cases involving non-implementation of the AA safeguard nor have they often found that a jury direction is required. The courts can take into account the wider circumstances, and indeed do so. They have therefore, for example, refused to exclude evidence where a legal representative was present but an AA was not.¹¹⁰ For the purposes of the exclusionary rules of evidence, the courts have, in essence, implied that the legal representative can replace the AA.¹¹¹ It therefore stands to reason that custody officers, considered principally with the admissibility of evidence (they are nevertheless police officers and have ‘institutional and collegial ties’¹¹² with other police officers and with the police mission),¹¹³ will consider factors such as whether the case is to get to Crown Court (where evidence is more likely to be scrutinised) or whether a legal representative is present.

III.2.2. Belgium

Difficulties in identifying a suspect’s vulnerability are further exacerbated because of the lack of a clear understanding of what should be understood by a vulnerable suspect. The Belgian provisions remain rather limited and vague, especially with regard to defining a suspect’s vulnerability. In this regard, it should be noted that “vulnerable” (in Dutch “kwetsbaar”) in fact does not really have a meaning in the Dutch language. It is merely an adjective that can be used in any context, with a meaning similar to “being susceptible to” or “prone to” or being at risk of being hurt. This implies that the concept requires further explanation when addressing suspects involved in criminal proceedings. The Belgian Criminal Code of Procedure, however, solely includes the term “potential vulnerability” and the Circular of the Board of Procurators General only provides a few examples by referring to age and mental weakness.

¹¹⁰ See for example *R v Lewis* [1996] Crim LR 260; *R v Aspinall* [1999] 2 Cr App R 115; *R v Brown (Delroy)* [2011] EWCA Crim 1606.

¹¹¹ Roxanna Dehaghani and Daniel Newman, ‘Can – and Should – Lawyers be Considered ‘Appropriate’ Appropriate Adults?’ (2019) *Howard Journal of Crime and Justice* 3.

¹¹² Mike McConville, Andrew Sanders and Roger Leng, *The Case for the Prosecution: Police Suspects and the Construction of Criminality* (Routledge 1991) 42.

¹¹³ See Dehaghani (n 2).

The case law of the CoC does not provide any more clarity on this point either. Although the Court acknowledged as early as 2013 that the particularly vulnerable position of a suspect results not simply from his deprivation of liberty, more recent case law has not yet shown which other factors could also be considered. In this regard, the CoC has thus far not considered statements provided by a suspect without access to a lawyer to be inadmissible because of vulnerability. Until now, the CoC has ruled that the complainant was not vulnerable and therefore provides guidance on what is *not* included under the term vulnerability. Although the CoC to some extent does define the scope of the particularly vulnerable position of a suspect in this way, it does not provide much insight into the precise demarcation of the concept. Given that the CoC has thus far ruled that the complainant did not find himself in a particularly vulnerable position – although in some cases psychological elements were at play that could suggest otherwise. This suggests that the vulnerability of a suspect so far has been interpreted rather narrowly.¹¹⁴

The need for more guidance on who needs to be considered as such is also recognized by police officers and defence lawyers in Belgium.¹¹⁵ Divergent views on the scope and meaning of a suspect's vulnerability are observed in practice, resulting in a lack of uniformity, clarity, and awareness of the problem. There is also insufficient knowledge of and training about the potential vulnerability of suspects.

III.3. Comparative remarks

There are some marked differences in how vulnerability is identified and defined in England and Wales as compared with Belgium. First, in England and Wales the responsibility for implementing the safeguard is left to the police. This is particularly problematic within an adversarial system where the police are, in essence, the combatants of the (vulnerable) suspect. This produces an inherent tension between the need or desire to protect a suspect and the need to win the case by proving the case against the suspect. It could be argued that this problem does not apply to Belgium, where the lawyer has a primary role in identifying a suspect's vulnerability. However, even within a predominantly inquisitorial system, where the police and

¹¹⁴ For a more detailed analysis of the case law of the Belgian CoC regarding the vulnerability of suspects, see Lore Mergaerts, Dirk Van Daele en Geert Vervaeke, 'Het recht op bijstand door een advocaat bij het verhoor als compensatie voor de kwetsbare positie van verdachten: een dwarsdoorsnede van de Europese en Belgische rechtspraak' (2018) P&R 155.

¹¹⁵ Carl Piron, Ariane Deladrière and Emilie Deveux, *Wet Salduz+: kwalitatieve evaluatie 2017-2018* (Criminal Policy Department 2018). See also Franky Goossens, Sven Bollens, Wilfried De Schepper and Vicky De Souter, 'Salduzplus gewikt en gewogen door de praktijk (verslag van een panelgesprek van 29 november 2018)' (2018) P&R 23, 26.

prosecutor explicitly need to gather both inculpatory as exculpatory evidence, this tension exists. Risks of presumption of guilt, tunnel vision and confirmation bias cannot be excluded, regardless of the type of legal system. In addition, there are problems that emerge in both jurisdictions: a large body of research in England and Wales has long highlighted the issues with identification of vulnerability, and more recent research has explored the issues posed by definition (and discretion or interpretative judgment¹¹⁶) and decision-making.¹¹⁷ These issues indeed arise in practice, notwithstanding the much more detailed guidance on the identification and definition of vulnerability in England and Wales in comparison with Belgium. In Belgium, whilst the provisions and the research thereon are in their relative infancy, there are also problems with identification and definition, with practitioners – either police or lawyers – struggling to define, but also to identify, a suspect’s vulnerability.

IV. Conclusions

This paper has examined the procedural safeguards for adult vulnerable suspects in both law and practice in Belgium and England and Wales alongside one another, drawing out similarities and differences where appropriate. These safeguards are quite different, although there are some similar safeguards in both countries that apply to any suspect – not just the vulnerable – which may also be relevant to compensate for or ameliorate that vulnerability. These fundamentally different safeguards for vulnerable suspects are to some extent based on a different approach to the definition of vulnerability, with a more detailed definition available in England and Wales compared with Belgium. This shows that while England and Wales appears to be used as a “gold standard” or inspiration for procedural safeguards, interpretation – in the light of a common European framework – can vary greatly among Member States.

Despite the significant difference in the origin and interpretation of safeguards and approaches to vulnerability, the same problems appear to be encountered in practice in both jurisdictions. In this regard, it is important to recognise that whilst England and Wales has a much longer tradition of protecting vulnerable suspects (at least with the law in books), it does not necessarily live up to these expectations in practice. Detailed legislative provisions are insufficient when ensuring compliance with safeguards and therefore protection of suspects; these must be reinforced in practice. This is especially true for the implementation of the AA safeguard, as police officers do not always call an AA when needed. Such lessons are important

¹¹⁶ Simon Bronnit and Phillip Stenning, ‘Understanding Discretion in Modern Policing’ (2011) 35 Criminal Law Journal 319, 321.

¹¹⁷ Dehaghani (n 2).

when considering (the need or desire for) introducing an AA safeguard in Belgium. In light of the problems with the AA discussed in this paper, a ‘transplant’ of this safeguard to any other jurisdiction, such as Belgium, requires serious consideration and planning, as the mere provision of this safeguard does not guarantee that those who need it will eventually benefit from it.

The definition of vulnerability also requires further consideration. Indeed, even the EU legal instruments use similar, although neither identical nor exhaustive descriptions of vulnerability. Likewise, whilst the case law of the ECtHR points to a number of factors that put a suspect in a ‘(particularly) vulnerable position’ during a criminal procedure, it neither offers a specific definition nor a description of vulnerability. The analysis of the Belgian legislation demonstrates that a rather limited level of attention is given to a suspect’s vulnerability. The provisions are sparse, especially with regard to who is considered vulnerable and how this vulnerability should be identified. Nevertheless, the (particular) vulnerability of a suspect appears to be an important, but abstract and vague, factor in the case law of the Belgian CoC when it comes to (the demarcation of) the right of access to a lawyer during police interviews in respect of the right to a fair trial. In England and Wales, similarly, whilst the definition is more detailed than that existing at an ECtHR, EU or Belgian domestic level, it should nevertheless be refined or entirely reworked.

In this regard, it can be noted that the extent to which a suspect can be regarded as vulnerable must always be assessed on the basis of the concrete circumstances of the case. In our opinion, it is important that the interactive and dynamic nature of a suspect's vulnerability is always taken into account. An overly restrictive view, in which merely individual characteristics of the suspect are considered, should be avoided. In that respect, it is good in itself to draw attention to vulnerable suspects and what should be understood by it, as occurs in more detail in England & Wales compared to Belgium, but in both jurisdictions too little attention is paid to that interactive and dynamic nature of vulnerability. Although in Belgium the vulnerability of each suspect was the starting point, it now seems to focus more on purely individual factors and the safeguards seem to merely address individual risk factors, which is predominantly also the case in England and Wales.

Despite the more detailed provisions in England and Wales compared to the limited guidance in Belgian law, practitioners in both countries seem to encounter difficulties with the definition and identification of vulnerability in a similar way. Indeed, in both jurisdictions there is a need for adequate and specific training for police officers, law enforcement, and judicial authorities on the vulnerability of suspects. This is also recognised in the EU-

Recommendation.¹¹⁸ In this regard, questions remain as to who should be tasked with the responsibility of identifying vulnerability. This task in Belgium is principally left to the lawyer and whilst this has its benefits – that arguably a lawyer would have his or her clients’ best interests in mind – it may be problematic for the reasons outlined above. In England and Wales, by contrast, this task is left to the police custody officer who may not always have the suspect’s best interests in mind. There could therefore be some benefit to highlighting the importance of procedural protections to lawyers and encouraging lawyers to ask that such safeguards are implemented if they believe their client to be vulnerable. The benefit of placing the ultimate responsibility with police, however, is such that they are accountable. Moreover, lawyers may be reluctant to challenge the admissibility of evidence if they could be seen to be responsible for failing to highlight their client’s vulnerability. There is therefore a case to be made that lawyers should have input into the process, but that ultimate responsibility should rest with the police. Whatever the proposed outcome, further research is required in both jurisdictions in respect of definition, identification and appropriate procedural safeguards. This paper serves as a starting point for discussion.

¹¹⁸ See recital 17 and Article 17.