Protecting the fair trial rights of mentally disordered defendants in criminal proceedings: exploring the need for further EU action

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Abstract

Using the new legal basis provided by the Lisbon Treaty, the Council of the European Union has endorsed the 2009 Procedural Roadmap for strengthening the procedural rights of suspected or accused persons in criminal proceedings as the foundation for future action in the European Union. The Roadmap sets out a step-by-step process that has so far resulted in six formulated measures from which specific procedural minimum standards have been and will be adopted or negotiated. While all of the measures flowing from the Roadmap are aimed at improving procedural rights, it is, so far, only Measure E that directly touches on the specific issue of vulnerable persons. Measure E has, only very recently, produced a tentative result through a Commission Recommendation on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings.

This contribution aims to discuss the need for the introduction of binding minimum standards throughout Europe to provide additional protection for mentally disordered defendants¹ in criminal proceedings. In line with the Procedural Roadmap's dual intention, the paper will examine whether or not the member states adhere to existing fundamental norms and standards in this context, and whether the application of these existing norms and standards should be made more uniform. For this purpose, the procedural situation of mentally disordered defendants in both Belgium and England and Wales will be thoroughly explored against this backdrop.

The research establishes that Belgian law, both in theory and in practice, is unsatisfactory in the light of the Strasbourg case law, and that the situation in practice in England and Wales indicates not only that there is justifiable doubt about whether fundamental principles are always adhered to, but also that these fundamental principles should become more anchored in everyday practice. It will therefore be argued that there is an evident need for putting the Procedural Roadmap's Measure E into practice. The Commission Recommendation, though

¹ Throughout this contribution the term 'defendant' will be used, and no difference will be made in terminology between suspected and accused persons. This contribution only covers the situation of mentally disordered *adult* defendants.

by its nature only suggestive, may serve as a necessary and inspirational vehicle to improve the procedural rights of mentally disordered defendants throughout Europe and to ensure that member states are able to cooperate within the mutual recognition framework without being challenged on the grounds that they are collaborating with other member states who do not respect defendants' fundamental fair trial rights.

Keywords

European Union - mutual recognition - minimum standards - fair trial - mental disorder - screening - effective participation - Commission Recommendation

1. Introduction

As early as 2003, the European Commission (the Commission) suggested that member state authorities should consider a defendant's potential vulnerability during the earliest stages of criminal proceedings, and take appropriate measures to ensure the fairness of these proceedings (European Commission, 2003). Over ten years later, the Commission finally seems to be ready to embark on a mission to provide a sufficient level of procedural protection to vulnerable defendants, by introducing minimum protection standards for this population throughout Europe. The weapon of choice newly selected for this matter might seem like a bit of a dud, as it is an inherently non-binding Recommendation (European Commission, 2013b). Nonetheless, it constitutes a formal EU instrument with an influential position for the protection of vulnerable defendants.

In order to outline the potential of the Commission's recent work in this area for mentally disordered defendants, it is necessary to take a closer look at the recent European developments that lie at the origin of the work. In addition to the renewed interest the European Union (EU) has shown in this population, the Strasbourg institutions have elaborated on the contours of fair trial rights for mentally disordered defendants.

This contribution aims to discuss the necessity for this mission to introduce binding minimum standards throughout Europe to provide additional protection for mentally disordered defendants in criminal proceedings. The paper will examine whether or not the member states adhere to the existing fundamental norms and standards in this context, whether the actual application of the existing norms and standards should be made more uniform and, lastly, whether and, if so, how the Commission Recommendation connects to all of this.

For this purpose, the procedural situation of mentally disordered defendants both in Belgium and in England and Wales will be thoroughly explored against this backdrop. The legal systems of these countries encapsulate differing traditions for the procedural position of defendants. On the one hand, the Belgian legal system is situated within a continental civil law legal tradition. The pre-trial aspects of criminal procedure there have an inquisitorial nature. The legal system in England and Wales, on the other hand, derives from common law principles that require the prosecution to be situated in an adversarial context. As a result, this legal tradition inherently puts more emphasis on the importance of individual procedural rights (Jörg, Field, & Brants, 1995; Reichel, 2005; Vander Beken & Kilching, 1999). By examining the position of mentally disordered defendants in criminal proceedings in these distinctive jurisdictions, the contribution will be able to draw conclusions that are valid at both national and European levels.

2. Evolutions from Brussels

At the Tampere Council of 1999 (European Council, 1999), the EU adopted the principle of mutual recognition (MR) as the bedrock for judicial cooperation. The introduction of this concept for criminal matters symbolises the member states' commitment to accept the differences between their respective criminal justice systems and to cooperate in spite of these differences. Obviously, such a cooperation framework strongly depends on a common level of trust, since it requires the recognition and execution of judicial decisions made in other member states without a national judicial test of their lawfulness or legitimacy (Vermeulen & van Puyenbroeck, 2011). The aftermath of the 9/11 attacks in 2001 provided the perfect climate for progress in the area of judicial and police cooperation within the established MR framework. The decision of the Tampere Council was therefore given practical expression in the criminal law context in a well-structured twenty-four measure programme adopted in 2001 (Council of the European Union, 2001) that has placed mutual recognition high on the EU's justice and home affairs agenda ever since. Nonetheless, the battle against cross-border criminality in general, and terrorism in particular, implied that the European criminal policy was primarily aimed at facilitating prosecution (Anderson, 2008; Cape, Hodgson, Prakken, & Spronken, 2007). The adoption of the Framework Decision on the European Arrest Warrant (EAW) (Council of the European Union, 2002) was a striking example of this.

The downside of this prosecution-oriented focus was that the effects of intensified European cooperation on the procedural rights of defendants were largely neglected. Large-scale studies

clearly demonstrate that the member states do not all protect the procedural position of defendants to the same extent (Spronken & Attinger, 2005; Spronken, Vermeulen, de Vocht, & van Puyenbroeck, 2009). The protection of individuals' procedural rights may therefore be affected by the application of (a) different legal system(s). As a result, a debate was initiated on the introduction of minimum standards that would achieve an acceptable level of procedural protection for all member states so that they could trust one another (Brants, 2005).

The fact that the levels of trust regarding the protection of procedural rights within the EU needed to be increased was first officially accepted in 2004, when an ambitious Proposal for a Framework Decision on certain procedural rights in criminal proceedings throughout the EU (the 2004 Proposal) was adopted (European Commission, 2004). After years of (political) disagreement, the 2004 Proposal was eventually abandoned in 2007 for two main reasons. First, member states seemed to be divided on the question of whether the EU was (sufficiently) competent to legislate on purely domestic proceedings or should restrict its legislation to cross-border cases (see the press release on the 2807th Session of the Council on 12th and 13th June 2007, p. 37). Secondly, it was argued that the rights were too vague and that their threshold was too low, or that the proposal would have added little value to the existing protections under the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). The European Commission, however, remained convinced of the need for EU action on this subject, and a study carried out for the Commission between 2007 and 2009 (Vernimmen-Van Tiggelen & Surano, 2009) showed that almost all practitioners involved in cross-border proceedings considered an instrument of this sort to be essential. In recent years, the EU has further strengthened its ambition for the introduction of EU-wide minimum procedural rights. Using the new legal basis provided by the Lisbon Treaty,² the Council endorsed a Roadmap to strengthen the procedural rights of suspected or accused persons in criminal proceedings (the Procedural Roadmap) (Council of the European Union, 2009) as the foundation for future action. The Procedural Roadmap was later incorporated into the 2009 Stockholm Programme (European Council, 2010); this programme sets out the EU's priorities concerning justice, freedom and security for the period between 2010 and 2014. The intention of the 2004 Proposal and of the Procedural Roadmap was first and foremost to ensure that

² Article 82 of the Treaty on the Functioning of the European Union (TFEU) makes it possible to adopt minimum standards to strengthen the procedural rights of citizens of the EU.

existing fundamental norms and standards would be adhered to by all member states (Council of the European Union, 2009, Recitals 1 and 2).

On a European level, the protection of a defendant's rights in criminal proceedings was/is primarily based on the ECHR, on its Protocols and on the case law promulgated by the European Court of Human Rights (ECtHR). Although the rights conferred by the ECHR are recognised in EU law as a constituent element of the general principles of the Union's law³ and of the Charter of Fundamental Rights of the EU,⁴ it was agreed in the Procedural Roadmap that there is room for further action to ensure the full implementation and respect for these standards, as well as, if appropriate, to expand the existing standards or to make their application more uniform (Council of the European Union, 2009, Recital 2). The results of the studies mentioned above also raise serious doubts as to whether the practice in all member states corresponds with the ECHR standards. Vermeulen and van Puyenbroeck (2011, pp. 1018-1019) clearly state that: "The ECHR is implemented to very differing standards in the Member States and there are many violations. The number of applications is growing every year and the ECtHR is seriously overloaded. (...) Moreover, Member States have not always amended their legislation to adapt them to the condemnatory judgments of the ECtHR, which, in essence, are not of an enforceable nature. (...) The fundamental question, however, relates to whether the procedural rights provided for by the ECHR are effectively implemented in the EU Member States. At this point, an important distinction should be made between the mere legal recognition of these rights in the criminal justice systems of the Member States and their (effective) implementation in everyday practice."

Minimum standards would hence help to avoid the risk of a member state refusing to cooperate because it has established that another member state does not pay sufficient respect to (fundamental) procedural norms and standards. In addition, clear and uniform minimum procedural standards implemented in all member states⁵ would make it easier for defendants to claim that their right to a fair trial will be or has been affected, since it may prove difficult

³ The general principles of EU law have been developed by the Court of Justice in order to assist in the interpretation of EU law and in the testing of its validity.

⁴ Charter of Fundamental Rights of the European Union. OJ C/364, 18.12.2000. Some of the rights set out in the Charter correspond directly to those in the ECHR. Articles 4 and 47 of the Charter cover the prohibition of torture and inhuman or degrading treatment or punishment, and the right to an effective remedy and to a fair trial. These correspond to Articles 3 and 6 of the ECHR.

⁵ It may be argued that a strict reading of Article 82 of the TFEU implies that the EU does not have the competency to introduce minimum standards in a purely domestic context, but only has the ability to adopt minimum standards in cross-border criminal proceedings and to the extent necessary to facilitate mutual recognition. Until now, however, the minimum standards that have already been adopted have been applied in merely domestic contexts, and it may be expected that this will be the case for all minimum standards envisaged by the Procedural Roadmap.

in practice for an individual to establish a breach of the ECHR. In the context of the EAW, for example, it is only a risk of a flagrant denial of justice after surrendering to the other member state, which is particularly difficult to prove with respect to cross-border criminal proceedings since it involves arguing about something that might happen in the future in another country, that can constitute a basis for an individual's claim⁶ (House of Lords, 2012).

The Procedural Roadmap sets out a step-by-step process in which specific measures, six so far, have been and will be adopted or negotiated: Measure A on translation and interpretation,⁷ Measure B on information on rights and information about charges,⁸ Measure C on legal advice and legal aid, Measure D on communication with relatives, employers and consular authorities,⁹ Measure E on special safeguards for suspected or accused persons who are vulnerable (European Commission, 2013a; European Commission, 2013b)¹⁰ and the Measure F Green Paper on pre-trial detention (European Commission, 2011). Although the introduction of common minimum procedural standards definitely enhances the protection of procedural rights throughout Europe, only Measure E directly touches upon the specific procedural problems for those with particular mental conditions. Neither Measure A on the right to translation and interpretation nor Measure B on the right to information provides specific safeguards for people suffering from a mental disorder. Measures C and D on the right to legal advice and the right to inform relatives could have more impact on the situation of those with a mental disorder, since legal representatives and relatives may point out that the suspect is mentally ill, which may have major repercussions on the nature of the interrogation procedures and on the perceived significance and veracity of the person's statements. Apart from improving the procedural rights that apply to everyone, regardless of their mental or emotional state, Measure E objectifies the general understanding that specific attention should be given to vulnerable defendants in order to safeguard the fairness of the proceedings,

⁶ Soering v. The United Kingdom, 7 July 1989 (14038/88), Shamayev and others v. Georgia and Russia, 14 April 2005 (36378/02) and Mamatkulov and Askarov v. Turkey, 4 February 2005 (46827/99).

⁷ Directive 2010/64/EU of the European Parliament and the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings. OJ L/280, 26 October 2010.

⁸ Directive 2012/12/EU of the European Parliament and the Council of 22 May 2012 on the right to information in criminal proceedings. OJ L/142, 1 June 2012.

⁹ Directive 2013/48/EU of the European Parliament and the Council of 22 October 2013 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. OJ L/294, 6 November 2013.

¹⁰ Measure E aims to pay special attention to suspected or accused persons who, due to their age or mental or physical condition, cannot understand or follow the content or the meaning of the proceedings. Only very recently – 27th November 2013 – the European Commission announced in a press release (European Commission, 2013a) its Commission Recommendation on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings (European Commission, 2013b).

because individuals who are not capable of fully understanding or fully participating in the proceedings are a special category of defendants and, therefore, require a higher degree of protection. This is a logical consequence of the equality of arms concept, which requires a fair balance between the parties in court proceedings.

3. Evolutions from the United Nations

The introduction of Measure E in the Roadmap and its objective to ensure equality of arms for vulnerable defendants is consistent with another recent instrument focused on people with disabilities. The United Nations Convention on the Rights of Persons with Disabilities¹¹ prescribes that *reasonable accommodation* is necessary for people who are disabled. This reasonable accommodation means: “necessary and appropriate modification and adjustments where needed in a particular case, in order to ensure that persons with disabilities enjoy or exercise on an equal basis with others all human rights and fundamental freedoms.”¹² Within the context of legal proceedings, Article 13 of this Convention states that “States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages”. In order to help to ensure effective access to justice for persons with disabilities, “States Parties shall promote appropriate training for those working in the field of administration of justice, including police and prison staff”.¹³ As will be indicated infra, the Convention’s principles tend to echo across Europe, not just with reference to the Union’s Roadmap, but also in the human rights case-law coming from Strasbourg.

4. Evolutions from Strasbourg

Relatively recent ECtHR case law clarifies that Article 6 of the ECHR guarantees the right of defendants to participate effectively in criminal proceedings from the earliest stage of police interrogation. Since the case law of the Court has clarified that people who are being questioned in relation to offences but who have not yet been formally charged should be

¹¹ United Nations Convention on the Rights of Persons with Disabilities and its optional protocol. 13.12.2006. <http://www.un.org/disabilities/default.asp?navid=13&pid=150>. The instrument was adopted by the United Nations General Assembly in 2006, opened for signature in 2007 and came into force in 2008, so – especially considering the preceding negotiations – around the same time as the developments leading up to the Roadmap on an EU level.

¹² United Nations Convention on the Rights of Persons with Disabilities and its optional protocol. 13.12.2006, Article 2.

¹³ United Nations Convention on the Rights of Persons with Disabilities and its optional protocol. 13.12.2006, Article 13.

covered by Article 6 of the ECHR, people arrested or detained in connection with a criminal charge also come within the ambit of this provision. This right starts to apply when the person is informed that (s)he is suspected of having committed an offence.¹⁴ Mental health conditions may cause significant problems in the light of this principle. A common feature of people suffering from a mental disorder or disability is that they may suffer from permanent or temporary reduced mental capacity. Hence, they are more likely than others to be confused and entangled, especially when additional stress factors, such as police questioning, arrest, trial and detention, come into play. People suffering from emotional problems (e.g. depression, psychosis or post-traumatic stress) and/or behavioural problems (e.g. autism, attention deficit hyperactive disorder, and maybe also individuals suffering from drug and/or alcohol related problems, such as severe withdrawal symptoms) are at risk of not being able to grasp the weight and consequences of the proceedings fully. Some of these individuals are likely to have difficulties in understanding and veraciously responding to questions, since they may have difficulties in recalling and processing information. They are also more likely to make damaging assertions, including false confessions, since they may be acquiescent and suggestible and, under pressure, may try to appease other people or incriminate themselves (Nemitz & Bean, 2001). The Court has held, however, that the right to a fair trial in criminal cases includes the right for anyone charged with a criminal offence to remain silent and not to contribute to incriminating himself.¹⁵ All of this could, of course, have an impact on the safety of the final judgment. In order to establish whether or not the effects of mental disorders could genuinely obstruct the fairness of the proceedings in the light of the ECtHR case law, however, it is first necessary to explore the legal boundaries of the concept of effective participation.

The principle of effective participation was first developed in the case of *Stanford v. The United Kingdom* (16757/90, 1994). During the trial the defendant was placed in a specific dock rendering him unable to hear, *inter alia*, some of the evidence given. Applications by Mr. Stanford for leave to appeal against conviction on the grounds, *inter alia*, that he could not hear the proceedings were refused by a single judge and subsequently by the Court of Appeal. It was not in dispute between those appearing before the Court that the applicant had difficulty in hearing some of the evidence given during the trial. The Court also made it clear that Article 6 of the ECHR guarantees the right of an accused to participate effectively in a

¹⁴ See, *inter alia*, *Panovits v. Cyprus*, 11 December 2008 (4268/04), para. 67.

¹⁵ See, *inter alia*, *Funke v. France*, 25 February 1993 (10828/84), para. 44; *Saunders v. The United Kingdom*, 17 December 1996 (19187/91).

criminal trial. This right not only includes the right to be present, but also the right to hear and follow the proceedings. Nonetheless, the Court held that the applicant was represented by a solicitor and counsel who had no difficulty in following the proceedings and who would have had every opportunity to discuss with the applicant any points that arose out of the evidence and that had not already appeared in the witness statements. Hence, no violation of Article 6 was established.¹⁶

In the joint cases of *T. v. The United Kingdom* (24724/94, 1999) and *V. v. The United Kingdom* (24888/94, 1999),¹⁷ T and V were 11 years old when they were tried for and convicted of murder and abduction in circumstances that attracted considerable media and public interest. Their trial took place in the Crown Court and was conducted with the full formality of an adult trial. Court procedures were, however, modified to a certain extent given the defendants' ages at the time. The measures taken included arranging for the defendants to visit the courtroom prior to trial and giving them a 'child witness pack' to introduce them to court procedures, seating them next to social workers in a dock raised for the occasion so they were able to see the courtroom, having their parents and lawyers seated nearby and shortening the hearing times to reflect the school day, with regular breaks. Despite all these special measures, part of the applicants' claim before the Court was that they were denied a fair trial because they had not been able to participate effectively in the criminal proceedings against them, not only because of their young age, but also because of their mental conditions.

In T's case, there was psychiatric evidence that he was suffering from post-traumatic stress disorder and that this, combined with the lack of therapeutic work after the offence, meant that he had limited ability to instruct his lawyers and to testify in his own defence. In V's case, there was evidence that he had the emotional maturity of a younger child, that he was too traumatised and intimidated to give his account of events to his lawyers or the court, and that he was not able to follow or understand the proceedings. In finding that the applicants had been denied a fair trial, the Court felt that, unlike in *Stanford*, it was not sufficient that skilled and experienced lawyers could offer assistance to counterbalance the limitations resulting from their mental conditions so that they could effectively participate in the trial. Even the combination of legal representation with a specific package of measures to assist the defendants was deemed by the Court to be insufficient to guarantee the fairness of the proceedings. The Court found, *inter alia*, that it was unlikely that the applicants would have

¹⁶ *Stanford v. The United Kingdom*, 23 February 1994 (16757/90).

¹⁷ *T. v. The United Kingdom* (24724/94) and *V. v. The United Kingdom* App. (24888/94), joint decision of 16 December 1999.

felt sufficiently uninhibited to consult their lawyers during the trial. The Court gave particular weight to the public attention that the case attracted. In addition, some measures, such as the raised dock, may have heightened the applicants' feelings of discomfort during the trial. Moreover, their immaturity and disturbed emotional states meant that they would not have been capable of cooperating with their lawyers outside the courtroom and of giving them information for the purposes of their defence (T. & V. v. The United Kingdom, para. 88). Hence, the mere representation by a lawyer *may* not be sufficient to guarantee the fairness of the proceedings when the defendant is not inherently capable of actively participating in the proceedings (Law Commission, 2010, para. 2.96).

The Court's reasoning suggests that the Strasbourg institutions view effective participation as requiring *a sufficient level* of active involvement from the defendant in his/her trial and in its preparation. In S.C. v. The United Kingdom (60958/00, 2005),¹⁸ a case that bears much resemblance to those mentioned above, the Court further elaborated on the effective participation standard, and explicitly noted that: effective participation presupposes that the accused has a broad understanding of the nature of the trial process and of what is at stake for him or her, including the significance of any penalty which may be imposed. It means that he or she, if necessary with the assistance of, for example, an interpreter, lawyer, social worker or friend, should be able to understand the general thrust of what is said in court. The defendant should be able to follow what is said by the prosecution witnesses and, if represented, to explain to his own lawyers his version of events, point out any statements with which he disagrees and make them aware of any facts which should be put forward in his defence (S.C. v. The United Kingdom, para. 29).

The Court, however, also stated that Article 6 of the ECHR does not require defendants to understand or to be capable of understanding every point of law or evidential detail (S.C. v. The United Kingdom, para. 29). Given the sophistication of modern legal systems, many adults of normal intelligence are unable to comprehend fully all the intricacies and exchanges that take place during proceedings. This is why the ECHR, in Article 6(3)(c), emphasises the importance of the right to legal representation (Mowbray, 2012, p. 426).

Although the aforementioned judgments concerned trials of minors who were committed to an adult court for jury trial, the considerations of the Court are general in nature and apply to all defendants (Law Commission, 2010, para. 2.95). Similarly, the considerations of the Court

¹⁸ S.C. v. The United Kingdom, 15 June 2004 (60958/00).

also apply to civil law countries, even when the case law mentioned belonged within the context of a common law system that was characterised by adversarial procedures. This was endorsed in the cases of *Liebreich v. Germany* (30443/03, 2009)¹⁹ and *G. v. France* (27244/09, 2012).²⁰ In these cases, the Court reconfirmed the several cumulative conditions that ensure there is effective participation (*G. v. France*, para. 52), as described in *S.C. v. The United Kingdom*.

Although the case law is clear on the fact that this principle is to be followed during both the pre-trial and the trial phase, the Court has not yet set clear-cut conditions as to when (and which) measures need to be instigated in order to assist mentally disordered defendants to participate in the proceedings. There is some logic to this, in the light of the many ways in which psychiatric disorders may externalise and impact on an individual's cognitive abilities. As a result, assessments on a case-by-case basis will have to be made in order to determine whether or not defendants will need to be granted measures, other than the mere assistance of a legal representative, to be able to participate effectively in the proceedings (*G. v. France*, para. 53). When additional measures are needed, it is up to the member states, and not the defendant, to provide the necessary assistance (*G. v. France*, para. 52). This mirrors the aforementioned concept of the reasonable accommodation stemming from the UN Convention on the Rights of Persons with Disabilities. Notably the Court has since the Convention's entry, more than once, made reference to the latter to support its judgments.²¹

Naturally, there are limits to the positive measures member states may put in place to assist mentally disordered defendants during the proceedings. It follows from the case law that when, despite all the measures that are taken, the individual's cognitive capacities are insufficient to allow him/her to answer questions or to instruct his/her legal representatives, member states will have to provide a procedural solution to avoid the trial being labelled as unfair in the light of Article 6 of the ECHR. In these cases, a suspension of the trial (until the medical condition of the defendant has improved sufficiently so that he/she has the ability to stand trial) or a disposal of the case by diverting the defendant out of the criminal justice system seem to be the only just solutions. Continuing the proceedings in this context could lead to untruthful information being given, which would put the whole trial at risk. In addition, forcing people who are not able to do so to give their views on what happened or

¹⁹ *Liebreich v. Germany* admissibility decision, 8 January 2008 (30443/03).

²⁰ *G. v. France*, 23 February 2012 (27244/09).

²¹ See: *Glor v. Switzerland*, 30 April 2009 (13444/04); *Z.H. v. Hungary*, 8 November 2012 (28973/11).

who do not understand what is happening to endure the proceedings would not reflect well on a civilised legal system (Law Commission, 2010, para. 1.10).

Determining whether or not a mentally disordered defendant is able to participate effectively in the proceedings, and the additional procedural measures that need to be instigated, will depend on how the defendant's mental condition manifests itself during the criminal investigation and trial. The mere diagnosis of a mental disorder or disability does not imply that the person involved is unable to participate actively in the proceedings. Whether extra procedural protection measures are taken will therefore depend on the presence of thorough screening mechanisms to evaluate whether or not the mental state of the defendant begs for additional procedural aid. Although it is of crucial importance that these mental states are identified as early as possible, screening mechanisms should be available throughout the proceedings (since it is possible that, over time, the mental condition of the defendant could evolve, for better or worse).

It is possible that the need for extra protection is immediately identified. Suspicion may be raised by disturbed behaviour, by the contents of witness statements or by the specific circumstances surrounding the case. In addition, the defendant him/herself, as well as his/her legal representative and/or relatives may point to the existence of a mental disorder or disability that will have an impact on the fairness of the proceedings (Salize & Dressing, 2005, p. 43). In order to make the proceedings thoroughly safe, however, the police, prosecutors and judiciary need to introduce and apply targeted screening procedures and protocols so that individuals are not able to slip through the net. It is alarming to notice that no international norms and standards specifically address screening upon questioning and arrest. Even though no recent results are available on how screening procedures in the pre-trial and trial phases are implemented throughout Europe, the results of recent EU-wide studies (Vermeulen et al., 2011a; Vermeulen et al., 2011b), which indicate that qualitative screenings for mental disorders within European prisons do not take place in a consistent manner, are discouraging in this regard.

5. Effective participation in Belgium and in England and Wales

Based on the conclusions drawn from the Strasbourg case law, the focus of the comparative exercise will be limited to an analysis of the presence and rigour of early detection mechanisms and the availability of extra-legal assistance for mentally disordered defendants.

5.1. Early screening mechanisms

The English and Welsh regulations specifically address the importance of early detection mechanisms. The Police and Criminal Evidence Act 1984 (PACE) and the accompanying Code C of the Codes of Practice²² state that it is the custody officer's responsibility to take the necessary measures once (s)he *suspects or is told in good faith that*, or is even *only unsure whether*²³ a person may be mentally disordered or mentally handicapped or mentally incapable of understanding the significance of the questions or of his/her own replies. Hence, if a solicitor is in any doubt about a detainee's mental state, he is allowed to make a request to the custody officer for assistance from an appropriate adult.

The manner in which these provisions are formulated tends to be so non-specific that the provisions cover nearly anyone who looks vulnerable. Since it is not necessary for the custody officer to obtain a professional diagnosis or guidance from a healthcare professional, this, at least legally, sets a very low threshold for treating defendants as vulnerable and, therefore, in need of extra procedural attention.

This focus on early identification was further intensified by the conclusions of the Bradley Report (Bradley, 2009). In 2007, Lord Bradley was commissioned to undertake a review of the treatment of people with mental health problems or learning disabilities in the criminal justice system. The report was published in April 2009, and set out eighty-two recommendations, which were all accepted in principle by the government. The overarching recommendation of the report was the need for even better and earlier identification and assessment of mentally vulnerable people in the criminal justice system, by means of better

²² Police and Criminal Evidence Act 1984 (PACE) <http://www.legislation.gov.uk/ukpga/1984/60/contents>
Code C Revised - Code of Practice for the detention, treatment and questioning of persons by police officers (Home Office 2012) <http://www.homeoffice.gov.uk/publications/police/operational-policing/pace-codes/>

²³ Para. 1.4 of the Code of Practice states that "if an officer has any suspicion, or is told in good faith that a person of any age may be mentally disordered or mentally handicapped or mentally incapable of understanding the significance of the questions put to him or his replies, then that person should be treated as a mentally disordered or mentally handicapped person for the purposes of the code".

implementation of diversion schemes (James, 2000, 2010), coupled with improved sharing of information. The process of diversion implies that at various times on the offender's pathway dedicated services should make an assessment regarding the proper disposal of a specific case in terms of prosecution, remand, sentencing and resettlement. Diversion may occur at any stage of the criminal justice process: before arrest, after proceedings have been initiated, instead of prosecution, or when a case is being considered by the courts. Consequently, diversion schemes, which are run by medical staff, may be found in police stations, remand prisons and courts.

In stark contrast to the English and Welsh legislation and Codes of Practice, which are complemented by implementation schemes and training opportunities, regulations in Belgium concerning the identification of mentally disordered defendants do not have a 'fair-trial-rights-finality'. When there are reasons to believe that a person is suffering from a mental disorder that could have an impact on, or nullify, the control of his/her actions, and in respect of whom there is a risk of reoffending because of this mental disorder, the Belgian prosecution authorities or courts may order a psychiatric expert report. In essence, this psychiatric report aims to establish whether or not the defendant is criminally accountable for the act(s) (s)he committed. In other words, the aim of this report is to establish whether or not this individual should be referred to a (secure) forensic psychiatry setting, instead of applying the Criminal Code to his/her case.²⁴ However, neither the identification by the police, prosecuting authorities or the courts, nor the identification by the psychiatrist, of a severe mental disorder is made with the aim of granting the defendant additional extra-legal assistance in order to be able to participate in the proceedings properly.

5.2. Extra-legal assistance

English and Welsh custody officers who suspect or are told in good faith, or have doubts about whether it is the case, that a person may be mentally disordered, mentally disabled or mentally incapable of understanding the significance of the questions put to him/her or his/her replies, are under a duty to appoint an appropriate adult (the AA)²⁵. The underlying rationale

²⁴ Articles 1 and 10 'Wet van 9 april 1930 tot bescherming van de maatschappij tegen abnormalen en de gewoontemisdadigers' as changed by the Law of 1 July 1964 + Cass. 11 January 1983, R.W., 1982-83, 2114. http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=nl&la=N&cn=1930040930&table_name=wet. See also Articles 8 and 13 'Wet van 21 april 2007 betreffende de internering van personen met een geestesstoornis'; this law is intended to replace the 1930/1964 law, but is not yet in force. Given the series of delays, it is even doubtful whether it will ever become operational without some radical changes. http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=nl&la=N&table_name=wet&cn=2007042101

²⁵ Para. 3.15 of the Code of Practice.

for this protection measure is clearly indicated in the Note for Guidance 11C: Although juveniles or people who are mentally disordered or otherwise mentally vulnerable are often capable of providing reliable evidence, they may, without knowing or wishing to do so, be particularly prone in certain circumstances to provide information that may be unreliable, misleading or self-incriminating. Special care should always be taken when questioning such a person, and the appropriate adult should be involved if there is any doubt about a person's age, mental state or capacity. Because of the risk of unreliable evidence it is also important to obtain corroboration of any facts admitted whenever possible.

The appointment of the AA is therefore merely procedural in nature and is consistent with the effective participation principle as elaborated by the Strasbourg Court. Hence, the AA is not appointed in order that he/she might give guidance on whether the defendant should be diverted out of the criminal justice system because of his/her clinical needs.

There are three categories of individuals who qualify for acting as an AA²⁶: a relative, guardian or other person responsible for the defendant's care or custody; someone who has experience of dealing with mentally disordered or mentally handicapped people, but is not a police officer or employed by the police; and, if neither of the above requirements are met, another responsible adult aged 18 or over who is not a police officer or employed by the police. The Code of Practice, however, excludes solicitors as well as legal advisers from acting as the AA.²⁷ Currently no statutory authority is responsible for providing an AA service for vulnerable adults. The services therefore vary across the country. In nearly half of the country, some sort of organised project similar to services for juveniles is run, with appropriate adults (either paid or voluntary) being trained and supported. In other areas the service is ad hoc at best; the local social services emergency duty team (EDT) responds to requests only if they have no higher priority (National Appropriate Adult Network, 2010, 2011b).

Although they undoubtedly depend on how the defendant's mental condition manifests itself during the criminal proceedings, the duties of the AA are given specific content in the Code of Practice. The AA must, first of all, ensure that the defendant is informed of his/her rights and that (s)he has been cautioned, by insisting that this is repeated if the AA was not present at the police station at the time.²⁸ Secondly, the AA is allowed to request a legal adviser to assist in

²⁶ Para. 1.7(b) of the Code of Practice - Notes for Guidance 1D.

²⁷ Notes for Guidance 1F.

²⁸ Paras. 3.15, 3.17 and 10.12 of the Code of Practice.

the defendant's case.²⁹ Thirdly, the AA plays an important role during police interviews. Save in exceptional circumstances, mentally disordered defendants must not be interviewed regarding their involvement or suspected involvement in a criminal offence or offences, or be asked to provide or sign a written statement, in the absence of the AA.³⁰ In addition, the AA does not have to act as a simple observer, and is allowed to advise the person being interviewed as well as to facilitate the communication between the defendant and the police. If the AA believes the interview is not being conducted fairly, (s)he is even allowed to interrupt or stop it (National Appropriate Adult Network, 2011a)³¹.

The situation in Belgium is, again, very different. Even if a psychiatric expert report states that the defendant is mentally disordered (whether or not this report also states that (s)he should be diverted from the criminal justice system), the regulations do not mention the possibility of instigating extra-legal procedural protection involving a relative, a social worker or a healthcare professional in order to safeguard the fairness of the proceedings.

5.3. The law in practice

Although the written law in the compared jurisdictions seems to differ considerably, the situation in everyday practice may not be so different. Because of the very low threshold above which the police custody officer in England and Wales should call for an AA, it has been argued that a possible 25% of all suspects at police stations should receive this extra attention (Nemitz & Bean, 2001). This conclusion is, however, somewhat contrary to what happens in practice, since these provisions are used quite infrequently (Nemitz & Bean, 2001). This conclusion is backed up by the National Appropriate Adult Network report of 2010, which states that “there appears to be a clear disparity between the number of adults identified as vulnerable in police custody and morbidity levels of mental disorder in prisons and offenders with either learning difficulties or disabilities”, which suggests “that mental vulnerability is massively under-identified in police custody” (National Appropriate Adult Network, 2010, p.12). It is also clear from the Bradley Report and a Prison Reform Trust report of 2007 that many offenders end up in prison before any learning difficulties or mental

²⁹ Paras. 3.19 and 6.5(a) of the Code of Practice: “In the case of a person who is a juvenile or is mentally disordered or otherwise mentally vulnerable, an appropriate adult should consider whether legal advice from a solicitor is required. If the person indicates that they do not want legal advice, the appropriate adult has the right to ask for a solicitor to attend if this would be in the best interests of the person. However, the person cannot be forced to see the solicitor if they are adamant that they do not wish to do so.”

³⁰ Paras. 11.15 and 11.18 of the Code of Practice.

³¹ Para. 11.17 of the Code of Practice.

health problems are identified (Prison Reform Trust, 2007). These reports therefore rightly conclude that the apparent under-identification of mental vulnerability among adults in custody is concerning (National Appropriate Adult Network, 2010, p. 15).

Nemitz and Bean (2001) put forward three reasons for this phenomenon. First, they argue that the police have for too long simply been allowed by the courts to get away with ignoring these provisions. A second possibility may be that instigating additional protection measures is seen as disruptive, in the sense that calling an appropriate adult in a busy custody suite, making provisions for the visit, and delaying interviews is time-consuming. A third reason may be that police training is defective, and that custody officers are simply unaware of the legal requirements placed upon them or fail to detect vulnerable defendants. A solution to this latter problem, adopted in several large English and Welsh cities, has been the introduction of police station projects in which psychiatric nurses from the National Health Service are attached to police station custody suites. Their role is, *inter alia*, to improve the identification of mental problems (James, 2010). In this regard, it is also encouraging to see that training events are continually being planned for police officers, improving their ability to detect mental disorders as quickly as possible.

Although these findings are worrying, the legislators in England and Wales closely monitor the case law from Strasbourg, and this has prompted a public debate on legal change. The Law Commission's consultation paper on unfitness to plead (2010) and the Prison Reform Trust's report on vulnerable defendants in the criminal courts (2012) are two textbook examples of the ongoing discussions in this context (Law Commission, 2010; Prison Reform Trust, 2012). In addition to the detection schemes mentioned above and the appointments of AAs, this debate has already led to more concrete results on extra-legal protection for mentally disordered defendants. Although the Strasbourg case law has largely developed with respect to child defendants, its principles were applied in relation to all categories of vulnerable defendants in England and Wales, by virtue of the Practice Direction³² on vulnerable defendants. This Direction aims to assist the judiciary in making trial processes more accessible to vulnerable defendants by establishing that ordinary trial processes should “*so far as necessary*” be adapted and “*all possible steps*” should be taken to “*assist a vulnerable defendant to understand and participate*” in criminal proceedings.³³ Although the

³² Criminal Practice Directions are handed down from time to time by the Lord Chief Justice and they apply in all criminal courts in England and Wales.

³³ Practice Direction (Criminal Proceedings: Consolidation October 2011), para. III.30.

Practice Direction seeks to consolidate the procedure in relation to vulnerable defendants, a number of other practices have also been developed in the courts on a more or less ad hoc basis (Law Commission, 2010).

In Belgium, on the other hand, no public debate has yet been initiated on this issue, and no measures have been put in place to provide for extra procedural protection for mentally disordered defendants.

6. Need for further EU action

The research results clearly demonstrate the different approaches towards the protection of the procedural rights of this population in England and Wales and in Belgium. The fact that the two jurisdictions differ is, however, insufficient for the EU to adopt minimum standards across Europe. As mentioned in the Procedural Roadmap, minimum standards should only be adopted when the effective participation principle is not adhered to by the member states or when its application should be made more uniform in practice. The research has clearly shown that both these criteria are met. Belgian law, both in theory and in practice, is unsatisfactory in light of the Strasbourg case law. The situation in practice in England and Wales not only indicates that there is justifiable doubt that the effective participation principle is always followed, but also shows that the principle should become better anchored in everyday practice.

Recent research indicates that these conclusions may be extrapolated throughout Europe. Fair Trials International, together with the Dutch NGO EuroMoS, conducted a survey involving over one hundred defence lawyers from across the EU, including many LEAP³⁴ members, about the barriers to a fair trial existing in practice in their countries. The survey was questionnaire-based, and practitioners were not asked to set out legal rules but to concentrate on what happens in practice. The research also suggested that, in many member states, there are inadequate safeguards in place to ensure that children, suspects with mental or physical conditions, or suspects with another kind of vulnerability, are able understand the proceedings in which they are involved and are treated fairly (Fair Trials International, 2012).

<http://www.justice.gov.uk/courts/procedure-rules/criminal/practice-direction/part3#id6328221>

³⁴ Fair Trials International (FTI) formed the Legal Experts Advisory Panel (LEAP) in 2008 to provide an opportunity for experts in criminal justice, fundamental rights and access to justice in the EU to meet and discuss issues of mutual concern, and to provide advice, information and recommendations to inform FTI's European policy position. LEAP now has more than 80 members from 24 member states.

These findings indicate the necessity for specific attention and EU action addressed to defendants with mental disorders. Hence, Measure E of the Procedural Roadmap was designated as the indispensable vehicle for improving the procedural rights of vulnerable suspected or accused persons across Europe and for ensuring that member states are able to cooperate within the mutual recognition framework without being challenged on the grounds that they are collaborating with member states who do not respect the fundamental fair trial rights of defendants. Unlike the previous measures (A to D, encapsulated in three Directives), Measure E appears to have been split along the fault line of its definition of vulnerability: while the Commission released a Proposal for a Directive on special safeguards for children suspected or accused of a crime (European Commission, 2013e), thus specifically envisioning safeguards for persons who were vulnerable because of their age³⁵, mentally disordered adult defendants will, at least for now, have to make do with the previously mentioned general Recommendation (European Commission, 2013b).³⁶ Moreover, the Recommendation aims: “to encourage Member States to strengthen the procedural rights of 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.” As such, two instruments currently envision special safeguards for defendants under the age of eighteen years, while vulnerable adult defendants remain with a sole and moreover mere suggestive instrument.

The Commission, in the Executive Summary of the Impact Assessment accompanying the proposed Directive and the Recommendation, explains its choice to stick to a recommendatory instrument for by stating that the difficulty to determine an overarching definition – since there is no International or European legal instrument defining a vulnerable adult – and the existence of fewer relevant international standards and provisions for vulnerable adults ruled out taking legally-binding action (European Commission, 2013c, p. 7 para. 1). Contradictory, the Commission *does* provide with a suggestive definition of presumed vulnerability for: “[in particular] persons with serious psychological, intellectual, physical or sensory impairments, or mental illness or cognitive disorders, hindering them to

³⁵ In the Proposed Directive, the age is set at a maximum of eighteen years. The Commission refers in its Impact Assessment (European Commission, 2013d, p. 18, point 4.2.1) to the general consensus on this criterion among practitioners, but also refers to article 1 of the United Nations Convention on the Rights of the Child. 20.11.1989. <http://www.ohchr.org/en/professionalinterest/pages/crc.aspx>.

³⁶ The Recommendation, in contrast to the Proposal for the Directive, aims to strengthen the procedural rights of *all* suspected or accused persons who are vulnerable due to age or mental or physical condition or disability.

understand and effectively participate in the proceedings”³⁷ in the Recommendation, seemingly undermining its own reasoning not to engage in a legally binding instrument.

Notwithstanding the above, the Recommendation requires examination in the light of its possible contribution to the subject of this paper: whether or not the introduction of minimum standards across Europe will improve the position of mentally disordered defendants will depend both on the screening and protection mechanisms that are already in place in the member states and on the elaboration and strength of the specific standards that will be adopted. Given the divergence of screening/detection procedures, (extra-)legal assistance and the resulting differences in guaranteed effective participation across Europe, the fact that there are specific provisions in the Recommendation dealing with this subject is laudable. First of all, the Commission recommends that member states include a presumption of vulnerability for certain persons in their (legal) systems. Furthermore, it promotes the prompt and qualitative identification and recognition of such persons by suggesting that all competent authorities should have recourse to a medical examination by an independent expert, and that police officers, law enforcement authorities and judicial authorities competent in criminal proceedings should receive specific training on dealing with vulnerable persons.³⁸ Secondly, the Recommendation seems to draw inspiration from the English and Welsh method (see *supra*), since it promotes the presence and assistance of a(n) (appointed) legal representative or appropriate adult during police station and court hearings.³⁹

Notwithstanding their generality and haziness,⁴⁰ the recommendations noted above (may) all have a beneficial effect on the identification of vulnerable persons and, therefore, may ameliorate their (procedural) rights and increase their effective participation while potentially facilitating mutual recognition through, albeit very minimal, recommended uniformity. The biggest obstacle to achieving effective results and improvements remains, however, the

³⁷ Recommendation 7 of the Commission Recommendation.

³⁸ Recommendations 7 (under section 3), 4 (under section 2) and 17 (under section 3) of the Commission Recommendation.

³⁹ Recommendation 10 (under section 3) of the Commission Recommendation. The added value of this explicit reference in the Recommendation is debatable, as the Directive based on Measures C and D already, at least partially, resolves the issue of legal representation and communication with relatives.

⁴⁰ For instance, no specific and qualitative definition of an independent expert is provided, the presumption of vulnerability that should be introduced by the member states leaves room for interpretation as to how and where this presumption needs to be embedded, adequate training remains unspecified etc. The immense variety of ways in which mental disorders may have an impact on proceedings implies, however, that additional safeguards will have to be concretised and tailor-made in order to ensure active participation on behalf of the defendant. Measures envisaged could, *inter alia*, include the exchange of best practices on forensic training for all actors involved, shorter police interviews or court sessions to assure that the defendant's concentration span will not be impaired, extra-legal assistance and the introduction of (mental health) courts for mentally disordered defendants (along the lines of youth courts).

instrument's form: non-binding by nature, it leaves the member states with the mere suggestion that they report back and inform the Commission of the follow-up on the recommendations within 36 months of its notification, throwing the ball back into the Commission's camp to monitor and assess the measures taken.

Given the European diversity (and inadequacy) both in law and practice identified in this paper, which has detrimental effects on the procedural rights of mentally disordered defendants while hindering effective and just European cooperation, the urgency for an effective approach is evident. The Recommendation (which, all things considered, is meagre) may yet prove to be an inspirational instrument, creating the momentum for (a) concrete and effective initiative(s) when both the member states and the European Commission decide to step up their game.

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