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DEFINITION OF VULNERABLE PERSONS IN CRIMINAL PROCEEDINGS: EU AND LITHUANIAN PERSPECTIVES

“When we were children, we used to think that when we were grown-up we would no longer be vulnerable. But to grow up is to accept vulnerability... To be alive is to be vulnerable.”

Madeleine L’Engle

Abstract

In democratic societies, human rights play a pivotal role and every person is entitled to certain rights and freedoms. The question arises of whether and how society should help protect the rights of the most vulnerable persons who are not in the same position as the remaining part of society. The EU and other regional and international organizations enact various legal acts, recommendations, and programmes aimed at the protection of vulnerable persons, but they still lack some consistency. The aim of this article is twofold: (1) to discuss whether and how vulnerable persons are defined in EU legal acts, and to examine the special protections granted to them by comparing two categories of participants in criminal proceedings - suspects/accused persons versus victims of crime; (2) to evaluate whether EU requirements and recommendations are implemented in Lithua-

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nian criminal procedure law and whether additional national legislation applies to the rights of these individuals, making some comparisons with other EU countries.

Keywords

Vulnerable person; criminal proceedings; vulnerable suspect; vulnerable accused; vulnerable victim; Human rights.

INTRODUCTION

“A legal system is only legitimate if it is in line with human rights.”¹

Already 10 years ago, in 2013, the European Union (hereafter referred to as EU) Commission stated, “At present, the fair trial rights of children and other vulnerable persons are not sufficiently guaranteed in the EU - no overarching protections exist. The Stockholm Programme explicitly foresees that a specific measure should be adopted to provide common minimum rules for vulnerable persons.”² Since then, the EU has adopted 6 directives on procedural rights for suspects and accused persons, including the right to information (Directive 2012/13/EU),³ the right to interpretation and translation (2010/64/EU),⁴ the right to have a lawyer (2013/48/EU),⁵ the right to be presumed innocent and to be present at trial (2016/343),⁶ special safeguards for children suspected

¹ P. Tiedemann, *Philosophical foundation of human rights*, Springer, 2020, p. 13.

² Green Paper from the Commission, Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the European Union, COM (2003) 75 final.

³ Directive 2012/13/EU of the European Parliament and the Council of 22 May 2012 on the right to information in criminal proceedings, OJ L 142, 1.6.2012.

⁴ Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings, OJ L 280, 26.10.2010.

⁵ Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while-deprived of liberty, OJ L 294, 6.11.2023.

⁶ Directive 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal procedure, OJ L 65, 11.3.2016.

and accused in criminal proceedings (2016/800),⁷ and the right to legal aid (2016/1919).⁸ Also there are recommendations of the EU Commission on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings. However, there is still no universal definition of vulnerable persons: EU legal acts leave much discretion to Member States for transposition of directives. The latest EU documents undoubtedly show that the rights of this group of people are not sufficiently ensured, which prompts authors to evaluate the existing legislation and check its implementation at the national level to provide insights and conclusions regarding vulnerable persons.

The question arises whether it is possible to formulate a definition of vulnerable persons, whether a systemic analysis of EU legal acts is sufficient for this purpose, and what special protection is granted to vulnerable persons by comparing two categories of participants in criminal proceedings – suspects/accused persons versus victims of crime, as analysed in the first part of the article. The second goal, discussed in the second part of the article, is to evaluate whether EU requirements and recommendations are implemented in Lithuanian criminal procedure law (further CPL) and what additional national legislation applies to the rights of these individuals.

The following research methods are used in the article: analytical, comparative, logical, linguistic, and systematic. The analytical method is designed to evaluate information provided in national and EU legal acts. The comparative approach is used to compare the implementation of EU legal acts in the national (Lithuanian) law. The logical approach aims to reveal the concepts and the appropriateness of implementing Union provisions. The linguistic method analyses the concept and the meaning of vulnerability. Finally, the systematic method is used to analyse vulnerable persons protection comparing two categories of participants *suspects/accused persons* versus *victims* of crime.

⁷ Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on the procedural safeguards for children who are suspects or accused persons in criminal procedure, OJ L 132, 21.5.2016.

⁸ Directive (EU) 2016/1919 of the European Parliament and of the Council of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings, OJ L 297, 4.11.2016.

I. PROTECTION OF VULNERABLE PERSONS IN THE EU

To address the questions of how vulnerable people are defined in EU legal acts, whether these definitions are sufficient, whether there are differences when discussing victims versus suspects, and what actions should be taken or changed, we must first analyse the historical evolution of EU legal acts.

Considering that the turning point in the evolution of EU criminal law is associated with the Treaty of Lisbon,⁹ the analysis will primarily focus on the period after the Treaty entered into force. This focus is also supported by the fact that the period before the Treaty of Lisbon has already been extensively analysed by the following legal scientists at the scientific level in Lithuania: Zajančkauskienė (2014, 2012),¹⁰ Ažubalytė and Zajančkauskienė (2014),¹¹ Levon and Veršakys (2012).¹² The need for such an analysis is grounded in the idea that by assessing a longer time frame, deeper analytical conclusions can be drawn – specifically, how far member states have advanced in recognising the rights of individuals within this particular group, what has been regulated, where problems persist, and what guidelines are provided to address these issues.

1. PROTECTION OF VULNERABLE SUSPECTS AND ACCUSED PERSONS

It could be stated that the main significant attempt to establish specific procedural rights for the proper protection of vulnerable suspects

⁹ Treaty of Lisbon Amending the Treaty on European Union and the Treaty establishing the European Community, OJ C 306, 17.12.2007.

¹⁰ J. Zajančkauskienė, Speciali pažeidžiamųjų įtariamųjų ar kaltinamųjų apsauga, [in:] J. Prapiestis et al., *Globalizacijos iššūkiai baudžiamajai justicijai*, Vilnius: Registrų centras, 2014; J. Zajančkauskienė, *Asmens turinčio negalią, teisės gintis padedant gynėjui*, "Social Innovation for Global Growth", No. 1(1), 2012.

¹¹ R. Ažubalytė, J. Zajančkauskienė, *Vulnerability assessment of participants in Lithuanian criminal proceedings in the context of EU regulations*, "Baltic Journal of Law & Politics", Vol. 7(2), 2014.

¹² J. Levon, P. Veršekys, Įtariamųjų ir kaltinamųjų teisių Lietuvos baudžiamajame procese stiprinimas: perspektyvinė analizė Europos Sąjungos teisėkūros kontekste, [in:] R. Merkevičius (ed.) *Lietuvos Respublikos baudžiamojo proceso kodeksui – 10 metų*, Vilnius: Lietuvos teismo ekspertizės centras, 2012.

was expressed in the European Commission Green Paper in 2003.¹³ In this consultation document, the European Commission indirectly proposed an initial, non-exhaustive list of potentially vulnerable groups, including: foreign nationals; children; persons with mental, emotional, physical conditions; those vulnerable owing to having children or being defendants (e.g. pregnant women, single parents, etc.); persons who cannot read or write; persons with refugee status, or other beneficiaries of international protection and asylum seekers; persons dependent on alcohol or drugs.¹⁴

According to Suzan Van Der Aa, these people could be broadly clustered into three categories, as the vulnerability of the aforementioned groups relates to the influence their respective conditions could have on:

- (1) cognitive and physical ability to understand the proceedings or to explain their version of events;
- (2) emotional and volitional ability to make a free and independent choice relating to their conduct over the proceedings;
- (3) physical ability to endure interrogation or incapacitation.¹⁵

In this working document the European Commission precisely explained why persons in these groups were potentially vulnerable and proposed that Member States have a general obligation to ensure that their legal systems have recognised the higher degree of protection that must be offered to all categories of vulnerable suspects and accused in criminal proceedings. However, the Commission also acknowledged that the assessments of vulnerability could be difficult to make and that simply using a category-based method may not always be appropriate. Furthermore it drew attention to ECtHR case law pointing out that personal information of the suspect or defendant should be taken into account.¹⁶

¹³ Green Paper from the Commission, Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the European Union, COM (2003) 75 final.

¹⁴ Ibid., para 6.

¹⁵ S. Van Der AA, *Variable vulnerabilities? Comparing the rights of adult vulnerable suspects and vulnerable victims under EU*, "Law New Journal of European Criminal Law", Vol. 7(1), 2016.

¹⁶ Green Paper from the Commission, Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the European Union, COM (2003) 75 final.

Just a year after the Green paper was presented, in 2004, the European Commission followed with a proposal for a Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union. Although this proposal came shortly after the Green Paper, it already excluded a category-based approach to vulnerable people.¹⁷ Article 10 of this proposal states that “a suspected person who cannot understand or follow the content or the meaning of the proceedings owing to his age, mental, physical, or emotional condition is given specific attention to safeguard the fairness of the proceeding.”. Although the adoption of this Framework Decision was planned in 2005, Member States did not reach the consensus, and the proposal was abandoned in 2007.

The period leading up to the Treaty of Lisbon – considered a turning point when the EU acquired competence in criminal law – concluded with a resolution from the European Council that approved an action plan in 2009. This plan emphasized (in the context of a fair trial) that special attention should be given to suspects or accused persons who cannot understand or follow the content or the meaning of the proceedings, owing to factors such as age, or mental or physical condition.¹⁸ *Fitness to stand trial* is a fundamental concept in many legal systems, so this position of the EU was not surprising. It is generally recognised that for a trial to be fair, the accused must be able to participate in the legal proceedings.¹⁹ The idea of this principle is established in the European Convention on Human Rights (further ECHR) as well. It could be agreed with P.H.P.H.M.C. van Kempen particularly in article 6, that the right to a fair process implies the right for the defendant to effectively participate in the criminal proceedings.²⁰

¹⁷ Proposal for a Council Framework Decision on certain rights in criminal proceedings throughout the European Union, Brussels, COM(2004) 328 final.

¹⁸ Resolution of the Council of 30 November 2009 on a Roadmap for Strengthening Procedural Rights of Suspected or Accused Persons in Criminal proceedings, OJ C 295, 4.12.2009.

¹⁹ L. van den Anker et al., *Fitness To Stand Trial: A General Principle of European Criminal Law?*, “Utrecht Law Review”, Vol 7(3), 2011.

²⁰ P. H. P. H. M. C. van Kempen, The Right to Fair Preliminary Investigation and Trial for Vulnerable Defendants. The law of the European Convention on Human Rights, European Union Law and the Case of the Netherlands, [in:] R. Mackay, W. Brookbanks

Therefore the European Council, in its Roadmap, identified six priority areas: (A) Translation and interpretation; (B) Information on rights and information about the charges; (C) Legal advice and legal aid; (D) Communication with relatives, employers, and consular authorities; (E) Special safeguards for suspected or accused persons who are vulnerable; and (F) A green paper on pre-trial detention.²¹ This roadmap also became part of the Stockholm programme.²² After the EU acquired the right to adopt Directives in the criminal law, this Roadmap plan was implemented with Directive 2010/64/EU as the right to interpretation and translation,²³ Directive 2012/13/EU as the right to information,²⁴ Directive 2013/48/EU as the right to have a lawyer,²⁵ Directive (EU) 2016/343 as the right to be presumed innocent and to be present at trial,²⁶ Directive (EU) 2016/800 as special safeguards for children suspected and accused in criminal proceedings,²⁷ and Directive (EU) 2016/1919 as the right to legal aid.²⁸

(eds), *Fitness to Plead: International and Comparative Perspectives*, Oxford: Oxford University Press, 2018, pp. 231–253.

²¹ Resolution of the Council of 30 November 2009 on a Roadmap for Strengthening Procedural Rights of Suspected or Accused Persons in Criminal proceedings, OJ C 295, 4.12.2009.

²² The Stockholm Programme – An open and secure Europe serving and protecting citizens, OJ C 115, 4.5.2010.

²³ Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings, OJ L 280, 26.10.2010.

²⁴ Directive 2012/13/EU of the European Parliament and the Council of 22 May 2012 on the right to information in criminal proceedings, OJ L 142, 1.6.2012.

²⁵ Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while-deprived of liberty, OJ L 294, 6.11.2013.

²⁶ Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal procedure, OJ L 65, 11.3.2016.

²⁷ Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on the procedural safeguards for children who are suspects or accused persons in criminal procedure, OJ L 132, 21.5.2016.

²⁸ Directive (EU) 2016/1919 of the European Parliament and of the Council of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings

In the preamble to all these Directives, there is a reference to the Council resolution on a Roadmap for strengthening the procedural rights of suspects or accused persons in criminal proceedings, as well as to Measure (E), which concerns special safeguards for suspects or accused persons who are vulnerable. Specifically, Directive 2010/64/EU, clause 10, acknowledges the Roadmap's step-by-step approach for adopting measures related to special safeguards for vulnerable suspected or accused persons (Measure E).²⁹

This would be logical and clear if measure E of the Resolution provided a detailed explanation regarding vulnerable persons. However, when we examine section E of the Roadmap, it is limited to a formal reference, labelled "Short explanation", with just one sentence "In order to safeguard the fairness of the proceedings, special attention must be shown to suspected or accused persons who cannot understand or follow the content or the meaning of the proceedings, owing, for example, to their age, mental or physical condition."³⁰ The right to a fair trial in the context of vulnerable suspects and accused persons is echoed in clause 27, which mentions duty of care towards such individuals, though vulnerability is only referred to in terms of physical impairments. This raises an open question: What exactly constitutes vulnerability, and how should it be taken into an account?

Directive 2012/13/EU is even more cautious on this issue, with only clause 11 briefly acknowledging the Roadmap and Measure E.³¹ This leads to a logical question: if Directives are implemented in terms of the result, is it possible to ensure the rights of vulnerable persons in a general and efficient manner without more specific references to the definition of a vulnerable suspect or accused person, or to the procedures for identifying this group?

and for requested persons in European arrest warrant proceedings, OJ L 297, 4.11.2016, para 10.

²⁹ Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings, OJ L 280, 26.10.2010.

³⁰ Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings, OJ C 295, 4.12.2009.

³¹ Directive 2012/13/EU of the European Parliament and the Council of 22 May 2012 on the right to information in criminal proceedings, OJ L 142, 1.6.2012, para 11.

Directive 2013/48/EU on the right of access to a lawyer, clause 9, repeats the same position and formal reference to the Roadmap and Measure E, but clause 51 is more interesting in its wording: “The duty of care towards suspects and accused persons who are in a potentially weak position... taking into account any potential vulnerability...”.³² This raises a key issue: the Directive provides no criteria to determine whether a “potentially weak position” equates to vulnerability. For example, this raises a question, in the context of such clause 51’s wording – could a complete lack of income to hire a lawyer be considered a form of vulnerability? On the one hand, the competent authorities need to take into account all the factors that may jeopardize the ability to exercise the right of access to a lawyer or to have a third party informed upon deprivation of liberty. On the other hand, they have to provide suitable measures to ensure the exercise of these rights.³³

Directive, 2016/343, clause 6, also references the Roadmap and Measure E, but clauses 42 and 43 take a slightly different approach,³⁴ and this has a reason, because the European Commission issued recommendations on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings³⁵ in 2013. Since the purpose of these Recommendations was to strengthen the procedural rights of vulnerable suspects and accused persons, it adopted a more comprehensive approach, identifying vulnerable persons as those who, owing to their age,

³² Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while-deprived of liberty, OJ L 294, 6.11.2013, para 9, para 51.

³³ P. H. van Kempen, G. Vervaeke, L. Mergaerts, D. Van Daele, Challenges in defining and identifying a suspect’s vulnerability in criminal proceedings: What’s in a name and who’s to blame?, [in:] P. Cooper, L. Hunting (eds), *Access to justice for vulnerable people*, Wildy, Simmonds & Hill Publishing, 2018, pp. 48–71.

³⁴ Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal procedure, OJ L 65, 11.3.2016, para 6, para 42, para 43.

³⁵ Commission Recommendations of 27 November 2013 on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings, OJ C 378, 24.12.2013.

mental, or physical condition, or disabilities, are unable to understand and participate in criminal proceedings.

Possibly owing to the fact that the three previous directives, adopted under the influence of the Roadmap, paid insufficient attention to this vulnerable group, these Recommendations emphasize that vulnerable persons should be promptly identified, and that law enforcement and judicial authorities must receive specific training to assess vulnerability. As a consequence, clause 42 of Directive 2016/343 references these Recommendations and defines vulnerability similarly as “age, their mental or physical condition or any disabilities they may have”. Clause 43 distinguishes children, stating that they should be given a specific degree of protection. It should be noted that no other article in this Directive provides any specific references for determining vulnerability, leaving Member States free to choose the measures and procedural rules for identifying vulnerability.³⁶

Directive 2016/1919 aims to ensure the effectiveness of the right to access a lawyer as provided for under Directive 2013/48/EU.³⁷ Although it came into force after the Commission Recommendations, it adopted the same formal approach in clauses 4, 5, and 18 as Directive 2013/48/EU,³⁸ leaving unclear who, and under what conditions, needs to be considered as being vulnerable.

Directive 2016/800 pays more detailed attention to vulnerability, which is logically explained – this legal act is intended for the group of vulnerable persons that raises the least definitional questions: minors. Clause 45 introduces the term “particularly vulnerable”, indicating that children deprived of their liberty are particularly vulnerable. It is noteworthy that this Directive introduces individual evaluation assessment

³⁶ Directive 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal procedure, OJ L 65, 11.3.2016, para 42, para 43.

³⁷ Directive 2016/1919 of the European Parliament and of the Council of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings, OJ L 297, 4.11.2016.

³⁸ Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while-deprived of liberty, OJ L 294, 6.11.2013, para 51.

(clauses 35 and 36) to identify vulnerability, even though the assessment methodology itself is not provided in this legal act.³⁹ However, this reference obliges Member States to implement such an assessment procedure in their national legal acts, allowing them the flexibility to do so in their own way. This national implementation will be examined further in the relevant section. On the other hand, one cannot disagree with R. Vaičiūnienė, who argues that such wide discretion left to the Member States opens up the possibility for the formal and/or improper implementation of certain provisions of the Directive,⁴⁰ even though some mental health conditions and learning disabilities would not be easily identified.⁴¹ The authors agree with L. Waddington that in general, “there are two dominant ways in which vulnerability and the associated risks can be understood.”⁴² One group can be regarded as vulnerable *per se* (children, people with disabilities) whilst other groups have to be assessed to evaluate vulnerability.”⁴³

Considering all the aforementioned Directives, it can be concluded that these legal acts primarily focus on ensuring the rights of suspects and accused persons in the context of a fair trial, aligning with the purpose of the criminal process itself and the synergy between the purpose of the criminal process and the right to a fair trial. From the analysis of these acts, it is evident that previous directives took a formal approach, simplifying vulnerability concerning suspects and accused persons by associating it with age and mental and physical disability and presenting the need for vulnerability assessment procedure.

There are two dominant ways in which vulnerability and the associated risks can be understood.

³⁹ Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on the procedural safeguards for children who are suspects or accused persons in criminal procedure, OJ L 132, 21.5.2016, para 35, para 36, para 45.

⁴⁰ R. Vaičiūnienė (ed), *Įtariamųjų ir kaltinamųjų vaikų individualus vertinimas: išvalgos formuojant gerąją praktiką Direktyvos (ES) 2016/800 kontekste*, Vilnius: Žara, 2020.

⁴¹ D. Markov et al., *Suspects and Accused Persons with Intellectual and Psychosocial Disabilities: Identification and Communication*, Sofia: CSD, 2020, p. 23.

⁴² L. Waddington, *Exploring vulnerability in EU Law: An analysis of ‘vulnerability’ in EU criminal law and consumer protection law*, “European Law Review”, Vol. 45(6), 2020, pp. 779–801.

⁴³ J. Herring, *Vulnerable Adults and the Law*, Oxford: Oxford University Press, 2016.

Within a few years, the European Council itself recognised that the attention and rights afforded to vulnerable suspects and accused persons were still not sufficiently ensured. Conclusions on the protection of vulnerable adults across the European Union were published in 2021.⁴⁴ Although the Council emphasized in these conclusions that various directives have been implemented, it also acknowledged that the rights of vulnerable persons are still not sufficiently ensured. The Council invited the Commission “to examine whether there is a need to strengthen, in a comprehensive manner, the procedural safeguards for vulnerable adults who are suspects or accused persons in criminal proceedings and carefully to reflect on the need to identify uniform and common criteria for identifying vulnerable adults in criminal proceedings, taking into account the fact that vulnerability may be attributable to a wide range of circumstances and not necessarily have a single common cause.”⁴⁵

The Commission’s Recommendations 2023/681, regarding the procedural rights of suspects and accused persons subject to pre-trial detention and material detention conditions, continue with the same general provision: authorities must take special measures to ensure the protection of detained persons with special needs or vulnerabilities. From this, it can be concluded that, at least for the time being, the EU’s position has not changed. Legal acts continue to provide general provisions for vulnerable persons without establishing common criteria for identifying such persons or algorithm detection, which remains insufficient,⁴⁶ wherein similar yet neither identical nor exhaustive descriptions of vulnerability are used.⁴⁷ This conclusion is supported by the research of A. Limaitė and D. Pūraitė-Andrikienė, which states that “the concepts of ‘vulnerability’ and ‘vulnerable groups’ do not have clear and uniform definitions fitting all the areas in which they appear.”⁴⁸ Michael Mey-

⁴⁴ Council Conclusions on the Protection of Vulnerable Adults across the European Union, OJ C 330I, 17.8.2021.

⁴⁵ Ibid.

⁴⁶ Commission Recommendation (EU) 2023/681 of 8 December 2022 on procedural rights of suspects and accused persons subject to pre-trial detention and on material detention conditions, C/2022/8987, OJ L 86, 24.3.2023.

⁴⁷ P. H. van Kempen, G. Vervaeke, L. Mergaerts, D. Van Daele, Challenges in defining and identifying a suspect’s vulnerability in criminal proceedings..., pp. 48–71.

⁴⁸ A. Limaitė, D. Pūraitė-Andrikienė, *Legal Protection of Vulnerable Groups in Lithuania, Latvia, Estonia and Poland. Trends and Perspectives*, Springer, 2022.

sman emphasizes in a more strict manner that the biggest obstacle to achieving effective results and unified improvements remains, however, the non-binding by nature EU instrument's form.⁴⁹

1.1. PROTECTION OF VULNERABLE VICTIMS

It should be noted that while EU criminal law seems to focus more on the first group (suspects/accused persons), the first legally binding documents prior to the Lisbon Treaty were actually adopted for the second group – victims. Four framework decisions (further FD) were intended to protect victims' rights:

- (1) Council Framework Decision 2001/220/JHA on the Standing of Victims in Criminal Proceedings, describes the victim "as a natural person who has suffered harm, including physical or mental injury, emotional suffering, or economic loss, directly caused by acts or omissions that are in violation of the criminal law of a Member State". This document mainly focuses on the victim's procedural rights; however, Article 8 mentions category of so-called "most vulnerable" victims without providing any criteria for determining who qualifies as "most vulnerable" compared to the other victims.⁵⁰
- (2) Council Framework Decision 2002/475/JHA on combating terrorism in clause 8 states that "victims of terroristic offences are vulnerable, and therefore specific measures are necessary with regard to them", which *a priori* could be interpreted that vulnerability is based on the nature of the crime.⁵¹
- (3) Council Framework Decision 2002/629/JHA on Combating trafficking in human beings goes further, and Article 3, section b, defines a particularly vulnerable victim as "at least when the victim

⁴⁹ P. Verbeke et al., *Protecting the fair trial rights of mentally disordered defendants in criminal proceedings: exploring the need for further EU action*, "International Journal of Law and Psychiatry", Vol. 4, 2015.

⁵⁰ Council Framework Decision 2001/220/JHA on the standing of victims in criminal proceedings, OJ L 82, 22.3.2001, para 8.

⁵¹ Council Framework Decision 2002/475/JHA on combating terrorism, OJ L 165, 22.6.2002, para 8.

was under the age of sexual majority under national law and the offence has been committed for the purpose of the exploitation of the prostitution of others or other forms of sexual exploitation, including pornography.”. In other words, it could be stated that minors are considered more vulnerable compared to others.⁵²

- (4) This rule is reiterated in Council Framework decision 2004/68/JHA on combating the sexual exploitation of Children and Child pornography, specifically in article 9.⁵³

After the Lisbon Treaty was adopted, the European Council in the Stockholm programme of 2010 emphasized the need for an integrated and coordinated approach to victims, in line with the Council conclusions on a strategy to ensure fulfilment of the rights of, and improve support for, persons who fall victims to crime.⁵⁴ A year later, the Council adopted a resolution on a Roadmap for strengthening the rights and protection of victims, particularly in criminal proceedings.⁵⁵ The European Council stressed the importance of providing “special support and legal protection to those who are most vulnerable (children) or find themselves in particularly exposed situations, such as persons subjected to repeated violence in close relationships, victims of gender-based violence, or persons who fall victim to other types of crimes in a Member State of which they are not nationals or residents.”.⁵⁶

This Roadmap (in contrast to the Roadmap for suspects and accused persons⁵⁷) provides criteria for identifying vulnerable victims. The annex with Measure E (specific needs of victims) highlights vulnerable victims and defines that some victims have specific needs based on the type or on the circumstances of the crime they have been subjected

⁵² Council Framework Decision 2002/629/JHA on combating trafficking in human beings, OJ L 203, 1.8.2002, para 3.

⁵³ Council Framework decision 2004/68/JHA on combating the sexual exploitation of children and child pornography, OJ L 13, 20.1.2004, para 9.

⁵⁴ The Stockholm Programme – An open and secure Europe serving and protecting citizens, OJ C 115, 4.5.2010.

⁵⁵ Resolution of the Council of 10 June 2011 on a Roadmap for strengthening the rights and protection of victims, in particular in criminal proceedings OJ C 187, 28.6.2011.

⁵⁶ Ibid.

⁵⁷ Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings OJ C 295, 4.12.2009.

to, considering the social, physical, and psychological repercussions of these crimes, such as victims of trafficking in human beings, child victims of sexual exploitation, victims of terrorism and victims of organized crime. Their special needs could be addressed in specific legislation dealing with the fight against these types of crime. On the other hand, some crime victims require special support and assistance owing to their personal characteristics, which should be evaluated on a case by case basis. In this respect, children should always be considered particularly vulnerable.

The same year the Roadmap was published, three Directives came into force, replacing the earlier framework decisions. Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims defines vulnerability through the prism of human trafficking – *a position of vulnerability means a situation in which the person concerned has no real or acceptable alternative but to submit to the abuse involved*.⁵⁸ Rather than limiting vulnerability to person's inherent characteristics, this definition also considers the circumstantial and structural factors that make them vulnerable to abuse and exploitation and leave them without an alternative.⁵⁹ However, it must be recognised that this definition may not be universally applicable in other contexts outside human trafficking. Clause 8 echoes the framework decision by stating that that children are particularly vulnerable, but it extends the particularly vulnerable persons definition with other factors such as gender, pregnancy, state of health, and disability. However, no explanation is provided to clarify when, for example, a state of health and disability would cause vulnerability and when it would lead to particular vulnerability.

Directive 2011/93/EU on combating the sexual abuse and sexual exploitation of children and child pornography maintains the same stance – identifying children as vulnerable victims is focusing mainly

⁵⁸ Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, OJ L101, 15.4.2011, para 2.

⁵⁹ S. Marchetti, L. Paumbo, *10 Years After the Directive 2011/36/EU*, Brief No. 33, 2022, available at: https://population-europe.eu/files/documents/pb33_vulner_human-trafficking_final.pdf [last accessed: 11.11.2024].

on sanctions for crimes against them.⁶⁰ This would be straightforward if it were not for Article 9, which distinguishes the concept of a “particularly vulnerable situation” when a crime is committed, “such as a child with a mental or physical disability, in a situation of dependence or in a state of physical or mental incapacity.”⁶¹ This raises uncertainty about whether that maybe child victims are not always *a priori* particularly vulnerable group? In September 2021, The Commission launched an initiative to assess the implementation of this Directive in order to revise it, but no attention was paid to the definitions of vulnerability.⁶²

The third Directive 2011/99/EU on the European protection order, is part of a coherent and comprehensive set of measures on victims’ rights. It focuses on the procedure for issuing a European protection order and only formally references, in Clause 15 of the preamble, that “in the procedures for the issuing and recognition of a European protection order, competent authorities should give appropriate consideration to the needs of victims, including particularly vulnerable persons, such as minors or persons with disabilities.”⁶³ This raises the question: What kind of disability qualifies a person as particularly vulnerable?

Lisa Waddington observes that “the key legal instrument protecting the rights of victims under EU law”⁶⁴ is the Directive 2012/29/EU, which is considered the most important legal act to ensure victims’ rights of victims, establishing minimum standards for the support and protection of victims of crime.⁶⁵ The directive does not define vulnerability directly, but it does consider individual evaluation assessment

⁶⁰ Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA, OJ L 335, 17.12.2011.

⁶¹ *Ibid.*, art. 9.

⁶² Revision of Directive 2011/93/EU on combating the sexual abuse and sexual exploitation of children and child pornography, 2024, available at: [https://www.europarl.europa.eu/RegData/etudes/BRIE/2024/757790/EPRS_BRI\(2024\)757790_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2024/757790/EPRS_BRI(2024)757790_EN.pdf) [last accessed: 8.11.2024].

⁶³ Directive 2011/99/EU of the European Parliament and the Council of 13 December 2011 on the European protection order, OJ L 338, 21.12.2011, clause 15.

⁶⁴ L. Waddington, *EU Criminal Law and Persons with Disabilities: Reflections on Vulnerability and the Influence of the CRPD*, “American Society of International Law”, Vol. 116, 2022, pp. 84–89.

⁶⁵ Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of vic-

when discussing the specific protection of victims. Whether a victim is considered vulnerable under this Directive depends on the outcome of an individual assessment, which takes into account (a) the victim's personal characteristics (it could be age, disabilities); (b) the type and nature of the crime (e.g. domestic crimes, sexual offences, human trafficking, etc.); and (c) the circumstances of the crime (e.g. threats).⁶⁶

This Directive provides criteria for presuming vulnerability: "victims who have suffered considerable harm owing to the severity of the crime; victims who have suffered a crime committed with a bias or discriminatory motive which could, in particular, be related to their personal characteristics; victims whose relationship to and dependence on the offender make them particularly vulnerable, victims of terrorism, organized crime, human trafficking, gender-based violence, violence in a close relationship, sexual violence, exploitation or hate crime, and victims with disabilities. Child victims shall be presumed to have specific protection needs."⁶⁷ It should be noted that this definition of vulnerability is quite general, leaving the possibility for Member States to extend these criteria, which could be seen as a strong side of the Directive. However, transferring the assessment responsibility to law enforcement and judicial institutions without any mandatory implementation rules raises concerns about the efficiency and uniformity of the procedure for identifying vulnerable victims. Moreover, Clause 58 suggests a general conclusion by stating "Victims who have been identified as vulnerable..."⁶⁸ which clearly indicates that not all victims are considered vulnerable. Yet, Richard Lang points out, that setting out special measures for vulnerable victims, but then leaving the assessment as to who is vulnerable to Member States, resembles minimum harmonization, raising his next question: can minimum harmonization work for a concept like vulnerability?⁶⁹

tims of crime, and replacing Council Framework Decision 2001/220/JHA, OJ L 315, 14.11.2012.

⁶⁶ Ibid., para 22(2).

⁶⁷ Ibid., para 22 (3).

⁶⁸ Ibid., clause 58.

⁶⁹ R. Lang, *The EU's new victim's rights directive: can minimum harmonization work for a concept like vulnerability?*, "Nottingham Law Journal", vol 22, 2013.

One of the final legal acts that form a coherent and comprehensive set of measures on victims' rights is Directive 2017/541 on combating terrorism.⁷⁰ This Directive brings a formal approach in the preamble, stating that "Member States should ensure that support services address in the first place at least the emotional and psychological needs of the most vulnerable victims of terrorism, and inform all victims of terrorism about the availability of further emotional and psychological support including trauma support and counselling."⁷¹ It also references Directive 2012/29/EU, which was discussed earlier.

From these Directives, the following conclusions can be drawn:

- not all victims are vulnerable
- there is no precise definition for vulnerable and particularly vulnerable victims.
- criteria for assessment vulnerability are very general
- this implies that the assessment procedure is crucial for identifying vulnerable victims in the national criminal laws of Member States.

It must be acknowledged that these legal acts confirm the absence of a common definition or evaluation procedure for vulnerable victims. This concern is echoed by/in the EU's 2020-2025 strategy on victims' rights.⁷² The Commission has noted that while the EU has already adopted a solid set of victims' rights⁷³, despite this progress, recent reports and the analysis show that victims of crime still cannot fully rely

⁷⁰ Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA, OJ L 88, 31.3.2017.

⁷¹ Ibid.

⁷² Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, EU Strategy on Victims' Rights (2020-2025), COM/2020/258.

⁷³ Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, OJ L 315, 14.11.2012; Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims, OJ L 261, 6.8.2004; Directive 2011/99/EU of the European Parliament and of the Council of 13 December 2011 on the European protection order, OJ L 338, 21.12.2011; Regulation (EU) No 606/2013 of the European Parliament and of the Council of 12 June 2013 on mutual recognition of protection measures in civil matters, OJ L 181, 29.6.2013; Directive 2011/93/EU of the European Parliament and of the Council of 13 December

on their rights across the EU. Although this strategy document only provides general guidelines and outlines the EU's position, it is not specifically focused on vulnerable victims. However, the document does recognise that the regulation of victims' rights, including those of vulnerable victims, is insufficient. The strategy acknowledges that for the most vulnerable victims, such as those with disabilities and elderly victims, it is particularly challenging to navigate criminal proceedings and cope with the aftermath of crime.

In 2021, Conclusions on the protection of vulnerable adults across the European Union⁷⁴ were also published. Reflecting on the Stockholm programme and the 2013 Commission's recommendations on guarantees for vulnerable persons, the Council noted that only one Member State had notified the necessary measures to give effect to the Recommendation. Furthermore, most Member States had not fully transposed the minimum standards agreed upon in the EU rules on victims' rights. The Commission has ongoing infringement proceedings against Lithuania for the incomplete transposition of the Victims' Rights Directive (2012/29/EU).⁷⁵

The characterization of crime victims as the 'forgotten party' in criminal proceedings⁷⁶ is no longer correct, however, and despite various Directives being implemented, the Commission admitted in these conclusions that the rights of vulnerable persons are not sufficiently ensured. Additionally, the European Council invited the Commission "to examine whether there is a need to strengthen, in a comprehensive manner, the procedural safeguards for vulnerable adults who are sus-

2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA, OJ L 335, 17.12.2011.

⁷⁴ Council Conclusions on the Protection of Vulnerable Adults across the European Union, OJ C 330I, 17.8.2021.

⁷⁵ Report from the Commission to the European Parliament and the Council on the implementation of Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, COM/2020/188 final.

⁷⁶ M. S. Groenhuijsen, R. M. Letschert, *Legal Reform on Behalf of Victims of Crime: The Primacy of the Dutch Legislature in a Changing International Environment? Intervict Working Paper Series on Victimology and Human Security*, 2010, available at: <http://www.ssrn.com> [last accessed: 10.11.2024].

pects or accused persons in criminal proceedings and carefully to reflect on the need to identify uniform and common criteria for identifying vulnerable adults in criminal proceedings, taking into account the fact that vulnerability may be attributable to a wide range of circumstances and not necessarily have a single common cause.”⁷⁷ This clearly confirms that, at this stage, EU regulation does not provide adequate protection, a common definition (except general criteria), or an evaluation procedure for vulnerable victims in criminal proceedings, nor for suspects and accused persons.

II. PROTECTION OF VULNERABLE PERSONS IN LITHUANIA

The aim of this section is to analyse how EU legal acts are implemented in Lithuanian criminal procedure law from the perspectives of suspect, accused (with a specific focus on minors), and victim, both from theoretical and practical angles. One of the main legal acts, the Lithuanian Code of Criminal Procedure, does not provide a definition of a vulnerable person⁷⁸ and does not regulate the categories of procedural legal capacity, which would facilitate the identification of vulnerable persons,⁷⁹ although certain definitions can be found in other laws. In the Law on the Legal Status of Foreigners, a *vulnerable person* is defined as someone with special needs (for example, a minor, a disabled person, a person over 75 years old, a pregnant woman, a single father or mother raising minor children, a person with mental and behavioural disorders, a victim of human trafficking, or a person who has been tortured, raped, or has suffered other serious psychological, physical, or sexual violence).⁸⁰ In the Law on the Ethics of Biomedical Research *vulnerable persons* are

⁷⁷ Council Conclusions on the Protection of Vulnerable Adults across the European Union, OJ C 330I, 17.8.2021.

⁷⁸ D. Juodkaitė, *Asmenų, turinčių proto ir/ar psichologinę negalią procedūrinių teisių stiprinimas baudžiamojoje teisėje, Psichikos sveikatos perspektyvos*, 2017; R. Žibaitė, *Neliubšienė in the article Asmenų parodymų patikimumo probleminiai klausimai*, “Jurisprudencija”, Vol. 23(2), 2016, pp. 310–332.

⁷⁹ J. Kanapeckaitė, *Itariamųjų psichikos trūkumų (sutrikimų) atskleidimas ir nustatymas*, “Jurisprudencija”, Vol. 75(67), 2005, pp. 43–49.

⁸⁰ Lietuvos Respublikos įstatymas dėl užsieniečių teisinės padėties (Official Gazette, 2004, No. 73-2539), art. 18–2.

defined as those whose consent to participate in biomedical research may be affected by external circumstances or who are partially or completely unable to defend their interests.⁸¹ This legal act provides the list of categories of persons who may be treated as vulnerable if the aforementioned conditions of vulnerability are established. These categories include persons who, owing to their health condition, cannot be considered capable of intelligently evaluating their interests; children; students, if their participation in biomedical research is related to studies; persons living in social care institutions; soldiers during their actual military service; employees of health care institutions where biomedical research is conducted, subordinate to the researcher; persons in prisons and places of temporary detention.⁸² The list is not complete, as other groups of persons may be recognised as vulnerable persons by the reasonable decision of the Lithuanian Bioethics Committee or the regional biomedical research ethics committee.⁸³

It is obvious that these definitions are not universal, as the analysed legal acts have different goals and tasks that are not related to the purposes of criminal procedure law. The main aim of Biomedical research ethics is to protect human health, while the Law on the Legal Status of Foreigners aims to protect a wide range of human rights. However, in both cases, the laws aim to protect certain interests of vulnerable persons.

The question then arises: who should be treated as vulnerable in criminal procedure law, given that the mentioned definitions are goal-specific and cannot be used for our purposes? The purpose of the criminal process is broad and multilayered, requiring a balance of interests as it aims to protect the rights and freedoms of individuals and citizens, the interests of society and the state, to quickly and thoroughly reveal criminal acts, and to apply the law properly so that the person who committed the criminal act is justly punished, and no one innocent is convicted.⁸⁴ Thus, the main goal of criminal procedure law is related to

⁸¹ Lietuvos Respublikos biomedicininių tyrimų etikos įstatymas (Official Gazette, 2000, No. 44-1247; TAR, 25-09-2015, No. 2015-14272), art.6.

⁸² Ibid.

⁸³ Ibid., art.6 (2).

⁸⁴ Lietuvos Respublikos baudžiamojo proceso kodeksas (Official Gazette, 2002, No. 37-1341), art.1.

the assurance of a fair trial for suspects, accused persons, and the victims of criminal acts. Perhaps the group that raises the least questions and the least need for a definition is children, as “a child is inherently vulnerable by virtue of their age.”⁸⁵

There are two legal acts directly related to criminal procedure law that also provide definitions of vulnerable persons. The first one, the Recommendations, has a narrow subject as it is aimed at identification of victims of human trafficking, pre-trial investigation, and inter-institutional cooperation. It was enacted by three institutions (the Prosecutor General, the Minister of Interior affairs, and the Minister of Social affairs) to establish uniform criteria for identifying victims of human trafficking, improve the quality of pre-trial investigation, ensure that pre-trial investigation is carried out, and criminal acts are revealed in the shortest possible time, form a uniform advanced practice of pre-trial investigation, and coordinate inter-institutional cooperation in providing assistance to victims of criminal acts of human trafficking. This legal act defines vulnerability as a situation in which a person has no other acceptable option and therefore accepts the terms of the trafficker. A non-exhaustive list provides possible characteristics which could indicate the vulnerability of the person: difficult material situation; childhood or minor status; youth (a person under the age of 29); various mental and behavioural disorders; low education (undereducated); lack of social skills; various addictions (e.g. drugs, alcohol); staying in the country illegally, etc.⁸⁶ Thus, the definition of a vulnerable person is not universal and cannot be used for any vulnerable person in criminal procedure law, as it relates only to specific crimes.

The second legislative act, the Order of the Minister of Interior affairs (one of the goals of data collected in the register is to ensure the necessary protection of vulnerable persons against specific and obvious risks) provides the most universal, but also very brief, definition of a vulnerable person - as a person with special needs - and offers sample categories such as a minor, a disabled person, a person over the age of

⁸⁵ A. Gutauskas, *Diagnozė – šiuolaikinė vergovė: ar įmanoma ją sustabdyti? Vyraujančios teismų praktikos tendencijos*, “Jurisprudencija”, Vol. 23(2), 2016, pp. 193–209.

⁸⁶ Kolegialių institucijų 2015 m. gruodžio 17 d. įsakymas Nr. I-327/IV-1015/A1-758 „Dėl Prekybos žmonėmis aukų nustatymo, ikiteisminio tyrimo ir tarpinstitucinio bendradarbiavimo rekomendacijų patvirtinimo“ (TAR, 2015-12-28, Nr. 2015-20631), art. 4.8.

75, a pregnant woman, a single father or mother raising minor children, a person with a mental disorder, a victim of human trafficking or a person who has been tortured, raped, or has experienced other serious psychological, physical, or sexual violence.⁸⁷ The last definition is the most universal one, as it could be used for any person in criminal procedure law, regardless of their legal status (whether they are a suspect, accused, or victim of crime, and whether they are a minor or an adult) and distinguishes both physical and psychological categories as possible features of vulnerability.

On the basis of an analysis of the presented legal acts, it can be concluded that, in criminal procedure law, a person may be identified as vulnerable if it is established that he/she has special needs or characteristics, but the list of these needs or characteristics is not exhaustive. In other words, Lithuania, similarly to the EU, grants much discretion to the authorities in this regard. To determine whether this is indeed the case, it is essential to examine whether the Criminal procedure code (further CPC)⁸⁸ provides specific legal regulations on who decides and when it is decided if a person is vulnerable – that is, whether there is a clear and precise procedure for recognising a person as vulnerable.

The CPC recognises two categories of vulnerable persons: victims of crime and suspects/accused minors.

1. VULNERABLE VICTIMS' RIGHTS

In national criminal procedure law, the vulnerability of the victim is referred to as “special protection needs” and was introduced into the CPC (Article 186-1) on March 1, 2016. Special protection needs are defined as the needs of the victim, determined by personal characteristics, the nature of the crime, or the circumstances of its commission, to utilize the

⁸⁷ Lietuvos Respublikos vidaus reikalų ministro 2017 m. kovo 3 d. įsakymas Nr. 1V-174 “Dėl Ieškomų asmenų, neatpažintų lavonų ir nežinomų bejėgių asmenų žinybinio registro reorganizavimo ir Ieškomų asmenų, neatpažintų lavonų ir nežinomų bejėgių asmenų žinybinio registro nuostatų patvirtinimo” (TAR, 2017-03-03, Nr. 2017-03645), art. 6.4.

⁸⁸ Lietuvos Respublikos baudžiamojo proceso kodeksas (Official Gazette, 2002, No. 37-1341).

guarantees established by the CPC. These guarantees aim to protect the victim from mental trauma, criminal influence, or other negative consequences. A detailed, clear, and mandatory assessment procedure is outlined in the recommendations of the Prosecutors General.⁸⁹ It should be noted that the emergence of this assessment in the Lithuanian CPC is linked to Directive 2012/29/EU, as prior to the transposition of the provisions of the Directive in Lithuania, the procedure of assessment of individual victims' claims was not carried out at any stage of the criminal proceedings.⁹⁰

The initial assessment of special protection needs is carried out as soon as possible after receiving a report of a criminal act, but no later than during the first interview of the victim. To assess special protection needs, the victim's special protection needs assessment certificate is filled out, which differs for adult and minor victims. Separate categories of criteria (three for adults and two for minors) should be evaluated: 1) data on the criminal act; 2) information about the victim; and 3) information about the perpetrator. Depending on the total number of points collected, the vulnerability of the victim is determined as follows: low risk – up to 10 points; average risk – 11-20 points; high risk – 21 points and above.⁹¹ The recommendations establish up to eighteen special protection measures. Some of these measures are specific to minors (e.g. interviews conducted in premises adapted for interviewing children), while others are universal (e.g. closed court proceedings; the presence of an accompanying person, interviews conducted by an officer of the same sex); notification of possible protective measures estab-

⁸⁹ Lietuvos Respublikos Generalinio prokuroro 2016 m. vasario 29 d. įsakymas Nr. I-63 "Dėl rekomendacijų dėl nukentėjusiųjų specialių apsaugos poreikių vertinimo patvirtinimo", art. 2.2. available at: <https://www.prokuraturos.lt/data/public/uploads/2020/11/rekomendacijos-del-nukentejusiųjų-specialių-apsaugos-poreikių-vertinimo.pdf> [last accessed: 10.05.2024].

⁹⁰ R. Jakštienė, Nukentėjusiųjų nuo smurto artimoje aplinkoje specialiųjų apsaugos poreikių vertinimo procedūra [Procedure for assessing the special protection needs of victims of domestic violence], *Jurisprudencija*, 2017, 24(2), p. 359–386.

⁹¹ Lietuvos Respublikos Generalinio prokuroro 2016 m. vasario 29 d. įsakymas Nr. I-63 "Dėl rekomendacijų dėl nukentėjusiųjų specialių apsaugos poreikių vertinimo patvirtinimo", art. 2.2, available at: <https://www.prokuraturos.lt/data/public/uploads/2020/11/rekomendacijos-del-nukentejusiųjų-specialių-apsaugos-poreikių-vertinimo.pdf> [last accessed: 10.05.2024].

lished in legal acts and the procedure for their use; the presence of a legal representative; interrogation by means of remote audio and video transmission etc).⁹² These measures should be selected based on the assessed vulnerability of the victim.

It is a good practice that data obtained during the assessment of the victim's special protection needs are kept separately from the case file. The suspect, the accused, the convicted person, and his or her lawyer are permitted to access this data.⁹³

The established evaluation procedure is clear, objective, and allows for differentiation in the application of special protection measures depending on the level of risk identified. Thus, the existing national regulation, which implements the requirements of the EU directive 2012/29/EU,⁹⁴ enables a clear and precise assessment of each victim's vulnerability and permits the selection of appropriate protection measures.

1.1. VULNERABLE SUSPECTS AND ACCUSED SUSPECTS RIGHTS

Since the Lithuanian national regulations on the assessment of minors and adults differ, and the EU regulations distinguish between these two groups through separate legal acts, this chapter will discuss these two categories separately.

Special protection grounds for minor suspects and accused persons have been in force since January 1, 2020 (Articles 27-2 and 189-1 of the CPC). The data from the individual assessment are considered when selecting pre-trial and other coercive procedural measures for a minor, making decisions on termination the pre-trial investigation or transferring the case to court, organizing procedural actions with a minor suspect or minor accused, and making decisions on the imposition of punishment or educational measures on the minor (Article 189-1 (2), CPC).

⁹² Ibid.

⁹³ Lietuvos Respublikos baudžiamojo proceso kodeksas (Official Gazette, 2002, No. 37-1341), art. 186-1 (4).

⁹⁴ Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, OJ L 315, 14.11.2012.

The individual assessment includes information about the personality of the minor suspect or accused, his/her environment, and needs in the areas of protection, education, and social integration. This assessment may include details about the child's physical/psychiatric health (e.g. established physical and/or mental disability; behavioural and/or emotional disorders), living conditions, home environment, household conditions, economic, social, and family circumstances, and relationships with parents, other relatives, friends, classmates, and teachers. Information obtained during family visits by a representative of a territorial unit authorized by the Office is also included (the information provided by the child and the parents must be individually marked⁹⁵). The list is not exhaustive and can be supplemented with other important information obtained during visits to the child's actual place of residence or contained in the child's file, as well as additional documents. Individual assessments are carried out by the State Child Rights Protection and Adoption Service with assistance from the territorial Municipal Pedagogical Psychological Services, involving professionals in the process. The involvement of the holder of parental responsibility is also required. The evaluation is performed by the state child rights protection institution or the prison where the minor is held. National legislation provides that this assessment must be completed no later than within twenty-five working days from the date of receipt of the request. According to national legislation, after questioning a minor suspect for the first time, the pre-trial investigation officer or prosecutor conducting the pre-trial investigation immediately requests an individual assessment from the state child rights protection institution, following the procedures established by the Minister of Social Security and Labour of the Republic of Lithuania. The State Child Rights Protection institution is empowered to receive data on the minor's special educational needs, personality, and maturity assessment from the municipality's pedagogical psychological service (Article 189-1, CPC). The law (Article 189-1 (2-3) CPC) also allows for the adaptation of the individual assessment

⁹⁵ Lietuvos Respublikos socialinės apsaugos ir darbo ministro 2019 m. rugsėjo 9 d. įsakymas Nr. A1-509 "Dėl Nepilnamečio individualaus vertinimo tvarkos aprašo patvirtinimo", TAR, No. 2019-14331, A1-509, available at: <https://e-seimasx.lrs.lt/portal/legalAct/lt/TAD/a8dc9b12d33811e9978e9d8965748b45?jfwid=-vpmrv8wth> [last accessed: 10.05.2024].

to the circumstances of the case (the evaluation template permitting the recording of a wide variety of information, as relevant). Thus, Lithuania has properly implemented the requirements of EU Directive 2016/800 on procedural safeguards for children who are suspects or accused persons in criminal proceedings.⁹⁶

In Lithuanian criminal procedure law, there is no specific norm defining vulnerability of suspects or accused persons, nor are there criteria for identifying them as such. This raises the question of whether such provisions are necessary in practice, given the goal of criminal procedure law and the assurance of a wide catalogue of procedural rights for these individuals during the criminal process. Various scientific research indicates that suspect and accused persons may have some intellectual and psychosocial disabilities or impairments arising from complex reasons such as "...co-occurring substance use problems and treatment non-compliance, as well as social and systemic factors, such as improperly implemented deinstitutionalization policies, homelessness and poverty, community disorganization, poorly funded and fragmented community-based mental health and social services, hospital emergency room bed pressures, overly restrictive civil commitment criteria, intolerance of social disorder, and criminal law reforms."⁹⁷ These factors indicate that this category of people may also be vulnerable and in need of special protective measures during the criminal procedure. Traditionally, when a person has problems with sanity issues there is a clear and detailed procedure for determining their state of mind. With the enactment of the new Criminal Code in Lithuania in 2000 (in force from May 1, 2003) a person may be recognised as having either legal incapacity or diminished capacity. In both cases, the CPC ensures the obligatory participation of a defence attorney in certain cases (situations) that indicate potential vulnerability of the suspect or accused person. These situations include cases of the blind, deaf, mute, and other persons who cannot use their right to defence owing to physical or men-

⁹⁶ R.Vaičiūnienė (ed), *Itariamųjų ir kaltinamųjų vaikų individualus vertinimas: įžvalgos formuojant gerąją praktiką Direktyvos (ES) 2016/800 kontekste...*

⁹⁷ D. Delyana, *Vulnerable Offenders, The Rights of Suspects and Accused with Psychosocial and Intellectual Disabilities*, Center for the Study of Democracy, 2019, available at: <https://csd.bg/publications/publication/vulnerable-offenders-the-rights-of-suspects-and-accused-with-psychosocial-and-intellectual-disabili/> [last accessed: 20.06.2024].

tal disabilities; cases involving individuals who do not understand the language of the process; cases where there are conflicts between the defence interests of suspects or accused persons if at least one of them has a defence attorney; cases involving crimes punishable by life imprisonment etc. (Article 51 CPC). The list of cases is not exhaustive. The law allows a pre-trial investigation officer, the prosecutor, or the court to decide, by a reasoned decision, that the participation of a defence attorney is necessary in other cases as well, if, in their opinion, the rights and legitimate interests of the suspect or the accused would not be adequately protected without the assistance of a defence lawyer, and this could cover any possible case of vulnerability. (art. 51(2) CPC).

However, a concern arises regarding the effectiveness of this provision, if and when this discretion is actually used, as there is no clear procedure established to determine when this discretion should be exercised. Additionally, legal professionals, such as pre-trial investigators, prosecutors, and even judges may not be adequately trained in how to distinguish whether a person has certain social or psychological impairments making him/her vulnerable. Diagnosing such conditions typically requires the participation of specialists, but there is no clear procedure in place to ensure that this is done.

2. UNDERSTANDING VULNERABILITY

The analysis of legal acts both in relation to the European Union and the Lithuanian state's regulation allows the authors to present several generalized insights. The term "vulnerability" itself is a rather broad concept and "indeed, vulnerability cannot be defined unless we know the purpose the definition is to be used for and the context of its use."⁹⁸ On the one hand, vulnerability can be congenital and permanent (congenital vulnerabilities include disabilities, mental disorders), and on the other hand, it can be temporary (in other words, triggered by certain factors, such as the loss of a baby or a loved one, leading to a temporary mental condition). However, narrowing the field of inquiry to crimi-

⁹⁸ J. Herring, *Defining Vulnerability in Vulnerable Adults and the Law*, Oxford: Oxford University Press, 2016.

nal proceedings, there is no single unified definition of vulnerability as well. Finally, it must be accepted that the vulnerability of victims and suspects or accused is not equal. One of the important differences in today's legal framework is that the protection for victims regarded as "vulnerable" is set out in a legally binding instrument (Directive), "whilst the key instrument addressing suspects regarded as "vulnerable" is a non-binding recommendation."⁹⁹

The authors agree that there is no unified and universal definition of vulnerability in criminal proceedings and that it is apparently impossible to define it, as it is not possible to provide an exhaustive list of conditions for its occurrence, but there is a lack of a clearer regulation in assessing vulnerability. Looking at the case of Lithuania, the implementation of Directives 2012/29/EU and 2016/800 has been supplemented by the aforementioned articles (27-2 and 189-1) in the CPC on the necessity to carry out an individual assessment. However, if minors can be considered vulnerable per se, if an individual assessment is required to assess the vulnerability of victims, for which there is also a procedure, then the question arises as to what measures should be taken with regard to vulnerable adult suspects and accused persons. On the one hand, some of the aspects of vulnerability that are permanent, such as innate vulnerabilities, and which were identified in the first part of the article in the analysis of EU legislation, may not be an issue, but what about when we are not talking about such obvious vulnerabilities as require special knowledge to identify or recognise them? For example, Article 1 of the Order on the Approval of the Regulations on Forensic Psychological Examinations at the State Forensic Psychiatric Service under the Ministry of Health states that forensic psychological examinations are to be given to persons whose mental health is not in doubt.¹⁰⁰ However, it is not clear how (especially) at the pre-trial stage of the investigation, law enforcement authorities without specialized knowl-

⁹⁹ S. van der Aa, *Variable vulnerabilities? Comparing the rights of adult vulnerable suspects and vulnerable victims under EU law*, "New Journal of European Criminal Law", Vol. 7(1), 2016, pp. 41-42.

¹⁰⁰ LR SAM Įsakymas dėl teismo psichologijos ekspertizių darymo valstybinėje teismo psichiatrijos tarnyboje prie Sveikatos apsaugos ministerijos nuostatų patvirtinimo, 2003 m. rugpjūčio 18 d. Nr. V-499, available at: <https://e-seimas.lrs.lt/portal/legislAct/lt/TAD/TAIS.216746/asr> [last accessed: 9.06.2024].

edge in psychiatry, psychology, and other sciences¹⁰¹ can determine this without specialized knowledge. Similar indirect references to the possibility of ensuring the rights of vulnerable suspects are also provided for in the CPC. For example, Article 53(4) of the CPC provides the guarantee for a family member or a close relative of a person, who has not been recognised as incapable, but who, owing to old age, disability, illness, or other important reasons, is unable to exercise his/her rights under the law in a satisfactory manner, to participate in the proceedings upon a written or verbal request.¹⁰² However, there is no formalized procedure, nor are there precise guidelines as to how such an initial assessment of a person's vulnerability should be carried out by the pre-trial investigation officer, the public prosecutor, and the court,¹⁰³ nor is there any guidance on the criteria that would determine the need for such an assessment. The previous procedure in force in Lithuania provided for the collection of characteristic data on the suspect, i.e. data on the person's state of health from health care institutions, but by the instruction of the Prosecutor General issued in 2016, it is no longer necessary to examine every suspect. And so the vulnerability of a person is assessed in the light of the act committed or the suspicion that has been raised.¹⁰⁴ In this context, it should be recalled that the EU has chosen to regulate the rights of vulnerable suspects and the need to assess them by means of the Commission Recommendations on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings, adopted in 2013,¹⁰⁵ the non-binding nature of which has not led to any major changes.

Therefore, the authors of this article believe that, if it is concluded that it is not possible to define a single definition or an exhaustive list of criteria for vulnerability, a possible positive initiative for EU legislation would be to provide guidance on the criteria that could be considered

¹⁰¹ J. Kanapeckaitė, *Įtariamųjų psichikos trūkumų...*, pp. 43–49.

¹⁰² Lietuvos Respublikos baudžiamojo proceso kodeksas (Official Gazette, 2002, No. 37–1341).

¹⁰³ D. Juodkaitė, *Asmenų, turinčių proto ir/ar psichologinę negalią procedūrinių teisių stiprinimas baudžiamojoje teisėje...*, pp. 310–332.

¹⁰⁴ Ibid.

¹⁰⁵ Commission Recommendations of 27 November 2013 on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings, OJ C 378, 24/12/2013.

as an indication of vulnerability. The authors of this article also consider that an algorithm for assessing vulnerability in relation to suspects and accused persons is the second change needed in EU regulation. This leads to the need to initiate EU legislative initiatives for the adoption of a Directive on the *assessment of suspects and accused persons for the purpose of vulnerability assessment* as one of the possible solutions, possibly by defining a non-exhaustive, but more detailed (using a category-based approach) guideline on possible criteria for determining vulnerability. Also defining the duty of officials or the court (possibly including the competent authorities) to carry out the assessment, and the procedure for the assessment itself (for example by completing a questionnaire on the suspect's character during the first questioning of a suspect). This proposal could be analogous to the system of individual assessment that is already in place in Lithuania for minors and victims of domestic violence.

CONCLUSIONS

Although the analysis of EU legal acts clearly proves that there is an increase in legislative measures aimed at protecting vulnerable persons (including suspects, defendants, and victims) in criminal proceedings, there is still no clear and unified position throughout the EU regarding vulnerable persons. The right to a fair trial is fundamentally aligned with the rights of vulnerable persons, whether viewed from the perspective of suspects or victims. However to date, there are neither common criteria nor a clear assessment procedure defined in EU legislation for determining a person's vulnerability, which would be crucial for fostering mutual trust in legal systems and promoting closer cooperation among Member States. While it is universally acknowledged in all relevant legal acts that children and persons with mental and physical disabilities are vulnerable, there is no uniformly defined set of criteria for other factors, such as whether age should always be considered a factor of vulnerability or whether age can be consistently used to identify vulnerability across different contexts.

In Lithuania the clearest evaluation of vulnerability and the means of protection are established for the victims of crime, as existing nation-

al regulations allow for a precise assessment of each victim's vulnerability based on clear criteria, with appropriate protection measures selected accordingly. Additionally, minor suspects and accused persons are treated as vulnerable and provided with special protections. However, the protection for adult suspects and accused persons is less clear, except in cases involving mental health issues, which are regulated by detailed procedures. Other vulnerability factors, such as physical and social disabilities, are subject to discretion by pre-trial officers. There is no clear procedure for when such discretion should be applied, and pre-trial authorities lack specialized training to identify whether a person is vulnerable.

The analysis of legislation and scientific sources suggests that, even if the definition of vulnerability in criminal law is narrowed down, there is no single and unified definition. The reasons for this are both in terms of the fundamentally different participants in the proceedings (victims and suspects and accused persons) and the different criteria for vulnerability, of which there is no exhaustive list.

However, in order to strengthen the rights of vulnerable suspects or accused persons, it is suggested that those rights should be regulated by a binding implementing act, possibly by defining a non-exhaustive, but more detailed (category-based approach) set of possible criteria for determining vulnerability, as well as by establishing a clear methodology for assessing the vulnerability of suspects or accused persons.