

Andrea Kenéz¹: European Union framework for victims' protection in the criminal proceedings. What the judicial practitioner should know?²

I.) Strengthening victims' rights in the European Union

As it is stated in the Resolution of the Council on a roadmap for strengthening the rights and protection of victims, in particular in criminal proceedings the removal of internal borders and the increasing exercise of the rights to freedom of movement and residence have led as an inevitable consequence to an increase number of people who become victims of a criminal offence and become involved in criminal proceedings in a Member State other than that of their residence.

The conclusions of the European Council meeting in Tampere in 1999 stipulate that minimum standards should be drawn up on the protection of the victims of crimes.

These days in the light of the Stockholm Programme to consolidate the area of freedom, security and justice, to strengthen the rights of victims of crime and to ensure their need for protection, support and access to justice have identified as a strategic priority.

Is this a claim or a fact?

The *active protection* of victims of crime is a high priority for the European Union and its Member States. Although several legal instruments and non-legislative actions have been adopted both at EU and national levels, more over Article 82(2)(c) TFEU is a legal base for the EU to establish minimum rules on the rights of victims of crime to facilitate mutual recognition of judgements and judicial decisions, these are still not effective and the national laws and policies on victims' rights and the role of victims in criminal proceedings differ considerably from one Member State to another.

II.) Definition of victim

- a natural person who suffered harm, including physical or emotional harm or economic loss which was directly caused by a criminal offence
- family members of a person whose death was directly caused by a criminal offence and who have suffered harm as a result of that person's death

„family members” means the spouse, the person who is living with the victim in a committed intimate relationship, in a joint household and on a stable and continuous basis, the relatives in direct line, the siblings and the dependants of the victim

„people close to victim” means relatives and other persons in a close relationship to them, such as partner, (grand)children, parents and siblings

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- „child” means any person below 18 years of age (where the age of a victim is uncertain and there are reasons to believe that the victim is a child, the victim shall, for the purposes of the Directive 2012/29/EU, be presumed to be a child)

III.) (Cross-border) offences raise the question of victim protection

- (transnational) organised crimes
- terrorism
- trafficking in human beings
- sexual abuse, sexual exploitation of children and child pornography
- road accidents
- fraud
- cybercrimes violating property rights

IV.) The victims' needs

- recognition and respectful treatment
- protection
- support
- access to justice
- compensation and restoration

V.) Framework for victims' rights and protection

Non-legislative actions

Mainly training programmes for professionals, such as

- Justice Programme (2014-2020)

This programme shall contribute to the further development of a European area of justice based on mutual recognition and mutual trust by promoting – inter alia - judicial cooperation in criminal matters, judicial training (including language training on legal terminology, with a view to fostering a common legal and judicial culture), effective access to justice in Europe (including rights of victims of crime and procedural rights in criminal proceedings).

- Daphne III.

It aims to contribute to the protection of children, young people and women against all forms of violence and attain a high level of health protection, well-being and social cohesion, to contribute to the prevention of, and the fight against all forms of violence occurring in the public or the private domain, including sexual exploitation and trafficking of human beings, to take preventive measures and provide support and protection for victims and groups at risk.

It builds on the achievements of the previous Daphne (2000-2003) and Daphne II (2004-2008) programmes.

- Rights, Equality and Citizenship Programme (REC) (2014-2020)

This programme shall contribute to the further development of an area where equality and the rights of persons, as enshrined in the Treaty, the Charter and international human rights conventions, are promoted and protected, specifically: promote non-discrimination, combat racism, xenophobia, homophobia and other forms of intolerance, promote rights of persons with disabilities, promote equality between women and men and gender mainstreaming, prevent violence against children, young people, women and other groups at risk, promote the rights of the child, ensure the highest level of data protection, promote the rights deriving from Union citizenship and enforce consumer rights.

Legislative instruments

International legal instruments defining EU legislation

UN

- Convention on the Rights of the Child (1989)
- Convention against Transnational Organised Crimes (2000)
- Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) (1979)
- Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (2000)

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- Convention on Action against Trafficking in Human Beings (2005)
- Convention on Preventing and Combating Violence against Women and Domestic Violence (2011)
- Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (2007)
- Recommendation Rec (2006)8 on assistance to crime victims

EU framework

- **Charter of Fundamental Rights of the European Union**

Human dignity (Article 1), Right to life (Article 2), Right to the integrity of the person (Article 3), Right to liberty and security (Article 6), Respect for private and family life (Article 7), Protection of personal data (Article 8), Freedom of expression and information (Article 11), Right to property (Article 17), Equality before the law (Article 20), Non-discrimination (Article 21), Cultural, religious and linguistic diversity (Article 22), Equality between men and women (Article 23), The rights of the child (Article 24), The rights of the elderly (Article 25), Integration of persons with disabilities (Article 26), Freedom of movement and residence (Article 45), Diplomatic and consular protection (Article 46), Right to an effective remedy and to a fair trial (Article 47).

- **Minimum standards of victims' rights and protection**

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 (Transposition by 16 November 2015) (*see details in lecture of Mr Kuba Sękowski*)

Directive 2011/99/EU of the European Parliament and of the Council of 13 December 2011 on the European protection order (Transposition by 11 January 2015)

According to the Stockholm Programme mutual recognition should extend to all types of judgements and decisions of a judicial nature, being either criminal or administrative one. The Stockholm Programme also points out that victims of crime can be offered special protection measures which should be effective within the European Union.

In a common area of justice without internal borders, it is necessary to ensure that the protection provided to a natural person in one Member State is maintained and continued in any other Member State to which the person moves or has moved. It should also be ensured that the legitimate exercise by citizens of the European Union of their right to move and reside freely within the territory of Member States does not result in loss of their protection.

The Directive applies to protection measures which aim specifically to protect a person against a criminal act of another person, which may, in any way, endanger that person's life or physical, psychological and sexual integrity, dignity or personal liberty and which aim to prevent new criminal acts or to reduce the consequences of previous criminal acts.

The recognition of the European protection order by the Executing State implies – inter alia – that the competent authority of that State, subject to the limitations set out in the Directive, accepts the existence and validity of the protection measure adopted in the Issuing State, acknowledges the factual situation described in the European protection order, and agrees that protection should be provided and should continue to be provided in accordance with its national law.

The Directive applies to protection measures adopted in favour of victims or possible victims of crimes (and a relative of the main protected person), in *criminal* matters, taking into appropriate consideration to the needs of victims, including particularly vulnerable persons (e.g. minors, person with disabilities). However, it should not apply to measures adopted with a view to witness protection.

Any request for the issuing of a European protection order should be treated with appropriate speed, taking into account the specific circumstances (e.g. urgency, the date of the arrival of the protected person, degree of risk).

The Directive contains an exhaustive list of prohibitions and restrictions which, when imposed in the Issuing State and included in the European protection order, should be recognised and enforced in the Executing State:

- a) a prohibition from entering certain localities, places or defined areas where the protected person resides or visits,
- b) a prohibition or regulation of contact, in any form, with the protected person (by phone, electronic or ordinary mail, fax etc.)
- c) a prohibition or regulation on approaching the protected person closer than a prescribed distance.

The Directive provides a high degree of flexibility in the cooperation mechanism between Issuing and Executing States.

When the competent authority in the Issuing State withdraws the European protection order, the competent authority in the Executing State should discontinue the measures which was adopted in order to enforce the European protection order. However, the competent authority in the Executing State may – autonomously and in accordance with its national law – adopt any protection measure under its national law in order to protect the person concerned.

As a kind of balance between victims' and defendants' rights, in accordance with Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and Article 47(2) of the Charter of Fundamental Rights of the European Union, the person causing danger should be provided with the possibility of being heard and challenging the protection measure.

Denmark and Ireland are not taking part in the adoption of this Directive.

There has not been any practical experience in Visegrad countries yet.

{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 (It is applicable from 11 January 2015 to protection measures ordered on or after 11 January 2015, irrespective of when proceedings have been instituted).

This Regulation establishes rules for a simple and rapid mechanism for the recognition of protection measures in *civil* matters ordered in Member States. The scope of the Regulation is within the field of judicial cooperation in *civil* matters within the meaning of Article 81 TFEU.

The Regulation should apply to protection measures ordered with a view to protecting a person where there exist serious grounds for considering that that person's life, physical or psychological integrity, personal liberty, security or sexual integrity is at risk (e.g. in order to prevent any form of gender-based violence or violence in close relationships such as physical violence, harassment, sexual aggression, stalking, intimidation or other forms of indirect coercion).

This Regulation complements Directive 2012/29/EU. The fact that a person is the object of a protection measure ordered in civil matters does not necessarily preclude that person from being defined as a 'victim' under that Directive.

This Regulation applies only to protection measures ordered *in civil matters*. Protection measures adopted in criminal matters are covered by Directive 2011/99/EU of the European Parliament and of the Council of 13 December 2011 on the European Protection Order. }

- **Minimum rules concerning specific criminal offences**

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 (Transposition by 6 April 2013)

Preventing and combating trafficking in human beings is a priority for the European Union and the Member States being is a serious (often organised) crime, and explicitly prohibited by the Charter of Fundamental Rights of the European Union.

The Directive adopts an integrated, holistic and human rights approach and establishes minimum rules concerning the definition of criminal offences concerning trafficking in human beings and sanctions.

The Directive also introduces common provisions, taking into account the gender perspective, to strengthen the prevention of this crime and the protection of the victims thereof, by:

- non-prosecution or non-application of penalties to the victim,
- investigations into or the prosecution of the offence are not dependent on a report or accusation being made by the victim or by his/her representative, and that criminal proceedings may continue even if that person has withdrawn his/her statement,

- prosecution for a sufficient period of time after the victim has reached the age of majority,
- rules of jurisdiction and coordination of prosecution,
- without delay and free of charge access to legal counselling and legal representation,
- individual risk assessment,
- preventing secondary victimisation by receive specific treatment (to avoid unnecessary repetition of interviews during investigation, prosecution or trial, use of appropriate communication technologies, avoid giving of evidence in open court, unnecessary questioning concerning the victim's private life),
- provisions on assistance, support and protection measures for child victims of trafficking in human beings,
- right to compensation to victims.

The United Kingdom and Denmark are not taking part in the adoption of this Directive.

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 (Transposition by 18 December 2013)

Sexual abuse and sexual exploitation of children (including child pornography) constitute serious violation of fundamental rights (the rights of children to the protection and care necessary for their well-being) as provided for by the 1989 United Nations Convention on the Rights of the Child and by the Charter of Fundamental Rights of the European Union.

The Directive complements the Directive 2011/36/EU.

It establishes minimum rules concerning the definition of criminal offences and sanctions in the area of sexual abuse and sexual exploitation of children, child pornography and solicitation of children for sexual purposes.

The Directive also introduces provisions to strengthen the prevention and protection of the victims thereof, by:

- non-prosecution or non-application of penalties to the victim,
- investigations into or the prosecution of the offence are not dependent on a report or accusation being made by the victim or by his/her representative, and that criminal proceedings may continue even if that person has withdrawn his/her statement,
- prosecution for a sufficient period of time after the victim has reached the age of majority,

- rules of jurisdiction and coordination of prosecution,
- special representative,
- without delay and free of charge access to legal counselling and legal representation,
- the accompanied child victim interviewed without unjustified delay and as limited as possible in premises designed or adapted for this purpose, carried out by or through the same professionals trained for this purpose,
- audio-visually recorded interviews, may be used as evidence in criminal court proceedings
- hearing without the presence of the public, through the use of appropriate communication technologies
- protection of the privacy, identity and image of child victims and prevention the public dissemination of any information that could lead their identification

Denmark is not taking part in the adoption of this Directive.

**Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism,
Council Framework Decision 2008/919/JHA of 28 November 2008 amending FD
2002/475/JHA on combating terrorism**

Terrorism constitutes one of the most serious violations of the universal values of human dignity, liberty, equality and solidarity, human rights and fundamental freedoms. It also represents one of the most serious attacks on democracy and the rule of law. The terrorist threat has grown and rapidly evolved in recent years (see 9/11, London, Madrid, Paris, Copenhagen).

This Framework Decision and amending decision require Member States to align their legislation and introduce minimum penalties regarding terrorist offences and to establish jurisdictional rules to ensure that the terrorist offence may be effectively prosecuted. The decisions define terrorist offences, as well as offences related to terrorist groups or offences linked to terrorist activities.

Regarding victims' rights and protection: According to the Article 10 Member States shall ensure that investigations into, or prosecution of, offences covered by the Framework Decision are not dependent on a report or accusation made by a person subjected to the offence, at least if the acts were committed on the territory of the Member State. In addition to the measures laid down in the Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings, each Member State shall, if necessary, take all measures possible to ensure appropriate assistance for victims' families.

- **Rules relating to compensation to victims of crime**

Council Directive 2004/80/EC of 29 April relating to compensation to crime victims

Victims of crime should be entitled to fair and appropriate compensation for the injuries they have suffered, regardless of where in the European Union the crime was committed. It is often difficult to obtain compensation for victims either because the offender does not have the necessary financial resources or because it has not been possible to identify or prosecute the offender. Most Member States are aware of this fact and have already introduced state-funded compensation schemes. However, these schemes differ greatly.

This Directive requires Member States to provide in their national legislation for a compensation scheme for victims of violent intentional crime committed in their territories and sets up a system facilitating access to compensation for victims of crimes in cross-border situations (possibility of making an application in the Member State of residence, designation of central contact points in Member States, etc.), irrespective of the victim's country of residence or the Member State in which the crime was committed.

The amount of compensation to be paid to individual victims is left to the discretion of the Member State in which the crime was committed, but it must be fair and appropriate.

The Commission has established standard forms for the transmission of applications and decisions relating to compensation to victims.

With a view to implementation, the Directive made provision for the drawing up and publishing of a manual for the assisting authorities on the internet. The Directive also provides for the setting up of a system of central contact points in each Member State to facilitate cooperation in cross-border situations. Additional information is available on the website of the European Judicial Atlas in Civil Matters.

There has not been any experience in Visegrad countries yet, at least practitioners (judges, prosecutors) dealing with criminal cases.