

EU Tools for the Protection of Victims of Serious and Organized Crime

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Abstract Traditionally the European Union has been somewhat reticent in proposing specific rights for crime victims. That position changed significantly with the adoption in 2001 of the Framework Decision on the Standing of Victims in Criminal Proceedings which set down legally binding rights for victims and corresponding obligations on Member States to protect victims from primary and secondary victimisation. Whilst representing an important step forward in securing protection for victims, the Framework Decision has also been seen to fall short of its objectives in various respects. This has resulted in proposals for legislative reform including the introduction of the European Protection Order and the adoption of the draft Directive establishing minimum standards on the rights, support and protection of victims of crime. This chapter outlines the key rights and obligations set down in the Framework Decision and also considers the likely impact on the protection afforded to victims of the introduction of the proposed reforms.

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Abbreviations

ECHR European Convention on Human Rights

ECJ European Court of Justice

1 Introduction

The ascent of the crime victim in international law and policy has been nothing short of remarkable over the course of the last two decades. However, until recently, the European Union was notably more reticent than many other international organisations—including the UN and Council of Europe—to propose specific rights for crime victims. Traditionally, the task of prescribing structures and procedures that Member States ought to adopt in their criminal justice systems was seen as something that fell beyond the competency of the EU. This position shifted somewhat in 1999, when the Commission issued a communication to the European Parliament entitled “Crime Victims in the European Union: Reflections on Standards and Action,”¹ which contained 17 proposals grouped under five main headings: prevention of victimization; assistance to victims; standing of victims in the criminal procedure; compensation issues; and general issues (information, language, training), and called on all Member States to implement fair and effective legislation in these areas. Following its ratification by the Parliament, in March 2001 the Justice and Home Affairs Council adopted the Framework Decision on the Standing of Victims in Criminal Proceedings.² Member States were given just one year—until March 2002—to ensure that their criminal justice systems complied with its provisions.³

Although some of the provisions of the Framework Decision were drafted in a vague or imprecise manner, its significance should not be underestimated. In contrast to the various declarations, recommendations, bodies of principles, and other soft law pronouncements of international bodies which had been gradually emerging since the 1980s, the Framework Decision was legally binding and, as such, was directly applicable in all Member States of the European Union. Among the most important key rights conferred to victims are:

- a) A right to respect and recognition at all stages of the criminal proceedings; victims should have “a real and appropriate role in its criminal legal system’ and

¹ European Commission (1999) *Crime Victims in the European Union: Reflections on Standards and Action* (COM/1999/359), Brussels.

² Justice and Home Affairs Council (2001) *Framework Decision on the Standing of Victims in Criminal Proceedings* (2001/220/JHA), Brussels.

³ Exceptions were provided for Articles 5 and 6, which were to be implemented by 2004, and Article 10, which was to be implemented by 2006.

that ‘victims who are particularly vulnerable can benefit from specific treatment best suited to their circumstances.’ (Art. 2);

- b) A right to be heard during proceedings and to be asked only such questions that “are necessary for the purpose of criminal proceedings” (Art. 3);
- c) A right to receive information and be kept informed about the progress of the case throughout the criminal process (Art. 4);
- d) A right to protection—in terms of both safety and privacy—throughout the criminal process (Art. 8);
- e) A right to compensation from the offender and/or the State (Art. 9).

In addition, the Framework Decision conferred a number of corresponding duties on Member States which included:

- a) The promotion of mediation in criminal cases for offences which it considers appropriate for this sort of measure (Art. 10);
- b) Developing co-operation with other Member States “to facilitate the more effective protection of victims’ interests in criminal proceedings” (Art. 12);
- c) Access to specialist services and training of personnel to ensure better levels of support and assistance to victims (Arts. 13 and 14);
- d) Taking steps to ensure that the criminal process did not result in secondary victimisation (Art. 15).

These were ambitious plans indeed, particularly given the far-reaching changes that had to be introduced within such a short period of time. Two years after the implementation date had passed, the European Commission issued a report in which serious misgivings were expressed about the extent to which Member States were implementing its provisions.⁴ A more recent study,⁵ commissioned by Victim Support Europe in 2010, found that while significant progress had been made in certain areas (particularly regarding the provision of information and general support), the Member States surveyed were still falling short of many of the standards imposed by the Framework Decision. Most significantly, it was underlined that changes in law and policy did not always impact on practice in the criminal justice system.

1.1 *The Right to Protection*

The “right to protection” arises within two main contexts. First, there is a need for the State to put in place measures to prevent people from *becoming* victims of crime in the first place. In a strict sense, this is not a right that is limited to victims

⁴ European Commission (2004) Report from the Commission on the basis of Article 18 of the Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings (COM/2004/54), Brussels.

⁵ Victim Support Europe (2010) Project: Victims in Europe, Lisbon.

of crime; rather, it is a right to which all citizens should be entitled, since all are potentially victims of crime. Secondly, international standards also increasingly contain provisions concerning “secondary victimisation,” which is a label commonly applied to describe the additional suffering of victims that has been incurred as a result of the institutional response to an offence.

As regards the first form of protection, Article 8 of the Framework Decision obliges Member States to ensure

a suitable level of protection for victims and, where appropriate, their families or persons in a similar position, particularly as regards their safety and protection of their privacy, where the competent authorities consider that there is a serious risk of reprisals or firm evidence of serious intent to intrude upon their privacy.

What constitutes “a suitable level of protection” is open to argument, but we can assume that, in the most serious cases at least, this would reflect the obligation on states under Article 2 ECHR to put in place measures to protect life against threats from third parties.⁶ Similarly, it should be borne in mind that the state owes a similar positive obligation to protect the privacy of individuals under Article 8 ECHR.⁷ While the specific circumstances whereby a positive obligation will arise “do not lend themselves to precise definition,”⁸ the degree of long-term trauma and emotional distress commonly associated with certain types of serious victimisation such as rape and child abuse would seem to suggest that there is clear potential for the Article to apply where vulnerable victims are subject to intrusive cross-examination at court.

While Member States have considerable leeway as to the form that protection should take, recent proposals for a European Protection Order should ensure that protections afforded to intimidated witnesses and other vulnerable victims under the laws of one Member State should be replicated within another where the subject of the order exercises their rights to free movement within the European Union.⁹ These proposals have now been given effect through Directive 2011/99/EU which took effect on 10 January 2012. Under the new Directive, the Member State to which the victim or witness moves should provide such an order as an “immediate response”. The Member State may then impose a number of restrictions upon the

⁶ This should involve putting in place effective criminal law measures aimed at deterring and preventing crime that may pose a threat to life. See ECtHR, 28 October 1998, *Osman v. UK*, Application No. 23452/94. Note also Council Framework Decision of 19 July 2002 on combating trafficking in human beings [Justice and Home Affairs Council (2002)] which stipulates that states must punish any form of recruitment, transportation, transfer or harbouring of a person who has been deprived of his/her fundamental rights. National legislation must be “effective, proportionate and dissuasive.”

⁷ See ECtHR, 26 March 1985, *X and Y v. Netherlands*, Application No. 8978/80.

⁸ See ECtHR, 25 November 1994, *Stjerna v. Finland* Application No. 18131/91, § 38.

⁹ European Commission, Initiative of the Kingdom of Belgium, the Republic of Bulgaria, the Republic of Estonia, the Kingdom of Spain, the French Republic, the Italian Republic, the Republic of Hungary, the Republic of Poland, the Portuguese Republic, Romania, the Republic of Finland and the Kingdom of Sweden with a view to the adoption of a Directive of the European Parliament and of the Council on the European Protection Order (O.J. 2010/C 69/02).

“person causing danger,” which may consist of one or more of the following under Article 5:

- a) An obligation not to enter certain localities, places or defined areas where the protected person resides or that he visits;
- b) An obligation to remain in a specified place, where applicable during specified times;
- c) An obligation containing limitations on leaving the territory of the issuing State;
- d) An obligation to avoid contact with the protected person; or
- e) A prohibition on approaching the protected person closer than a prescribed distance.

Such an order should be issued by a judicial authority only after having verified that the relevant measure(s) meets all the requirements of the national legislation of the issuing or the requesting State. It should also contain information on the length of any obligations or restrictions imposed in addition to an express statement that their infringement would constitute a criminal offence under the law of the issuing State.

In an attempt to balance the need for protection alongside the individual’s right to liberty, a court may refuse to recognise a European protection order under Article 10 in the following circumstances:

- (a) The European protection order is not complete or has not been completed within the time-limit set by the competent authority of the executing State;
- (b) The requirements set out in Article 2(2) have not been met;
- (c) The protection derives from the execution of a penalty or measure that is covered by amnesty according to the law of the executing State and relates to an act which falls within its competence according to that law;
- (d) There is immunity conferred under the law of the executing State on the person causing danger, which makes it impossible to adopt the protection measures.

Yet there is also the prospect of a more wide-ranging directive in the not too distant future which—if it enters into force—will replace the 2001 Framework Decision. The proposed Directive establishing minimum standards on the rights, support and protection of victims of crime¹⁰ replicates much of the original wording of the Framework Decision. Given that the objectives of the Framework Decision were not wholly realised,¹¹ concerns have been expressed that the new Directive will similarly fail to meet its own objectives and will not really add anything new in terms of concrete measures to protect victims.¹² However, by the same token, it is

¹⁰ European Commission (2011) Draft Directive establishing minimum standards on the rights, support and protection of victims of crime (COM/2011/275), Brussels.

¹¹ As acknowledged at page 2 of the Explanatory Memorandum to the draft Directive itself.

¹² Article 1 of the draft Directive states that ‘the purpose of this Directive is to ensure that all victims of crime receive appropriate protection and support and are able to participate in criminal proceedings and are recognised and treated in a respectful, sensitive and professional manner, without discrimination of any kind, in all contacts with any public authority, victim support or restorative justice service.’

suggested that through framing the issues within a directive it is hoped that Member States will feel greater pressure to ensure compliance with its terms which clearly go beyond the parameters of its predecessor in several respects. The main advances made to the protection from primary victimisation under the proposals are as follows:

- a) Article 2 affords an extended definition to the term “victim” to include family members of victims whose death was caused by a criminal offence. “Family members” is also interpreted widely to include cohabitantes and those in registered partnerships;
- b) Article 11 sets down minimum standards of protection to safeguard victims from intimidation or further victimisation when participating in mediation or restorative justice services;
- c) Article 17 avoids the threshold tests that feature in Article 8 of the Framework Decision. Under the new provision Member States will be instructed to ‘ensure that measures are available to protect the safety of victims and their family members from retaliation, intimidation, repeat or further victimisation’ with no mention of the risk having to be of any particular seriousness. However, the draft Directive does go on to focus on victims that are regarded as “vulnerable” and outlines how an assessment of vulnerability is to be achieved. Once identified as vulnerable, victims will then have a right to special measures of protection during criminal proceedings under Articles 21 and 22. The most relevant in the context of protection from primary victimisation are those measures which allow victims to give evidence in court without having to have visual contact with the defendant,¹³ measures which allow victims to give evidence without having to be present in the courtroom at all,¹⁴ and measures that allow the case to be conducted without the presence of the public¹⁵;
- d) Article 22 focuses on the particular vulnerabilities and protection requirements of children; and
- e) Article 23 adds to the existing protection of the privacy of victims and their families by requiring Member States to encourage self-regulation by the media.

As regards secondary victimisation, the key provision is Article 3 of the Framework Decision which grants victims a “right to be heard and supply evidence.” It also stipulates that any questioning of victims should be “necessary for the purpose of criminal proceedings.” Adversarial jurisdictions—particularly England, Scotland, Northern Ireland and the Republic of Ireland—bear a poor record as regards the way in which witnesses are routinely denigrated and humiliated about events when questioned in court by the opposing party.¹⁶ Judges have traditionally allowed a wide range of questions to be put to complainants concerning their

¹³ Article 21(3)(a).

¹⁴ *Ibid.*, at (b).

¹⁵ *Ibid.*, at (d).

¹⁶ See generally Ellison (2001).

previous behaviour and intimate details of their private lives which go far beyond a “need to know” basis.¹⁷ It is not inconceivable that domestic cross-examination practice could be subject to a future challenge on this point, particularly in a case involving a child or a complainant in a case of rape.

Although robust questioning is often viewed as a *sine qua non* of the adversarial process, it is clear that the era when the ECJ granted Member States a considerable amount of elbow room in relation to their domestic criminal justice processes may well have passed. This is evidenced by the case of *Pupino*,¹⁸ which underlines the fact that the provisions of the Framework Decision should be regarded as justiciable by victims within domestic courts.

The case concerned criminal proceedings in Italy against a nursery school teacher for offences relating to cruelty of children in her care. As with the legal systems of the UK and Ireland, Italian law stipulates that evidence should be heard in an oral form at trial. There was a procedure (*incidente probatorio*) through which the court did have the power to order pre-trial witness examination in exceptional circumstances. The prosecution sought to have a number of the child witnesses examined in this way, but the court refused on the grounds that under the Criminal Code, none of the exceptional circumstances applied in the instant case. The case thus concerned the compatibility of the relevant provisions of the Italian Code of Criminal Procedure with the Framework Decision.

The ECJ held that the Framework Decision

must be interpreted as meaning that the national court must be able to authorise young children, who, as in this case, claim to have been victims of maltreatment, to give their testimony in accordance with arrangements allowing those children to be guaranteed an appropriate level of protection, for example outside the trial and before it takes place.¹⁹

The Italian court was therefore under an obligation to interpret the terms of the Criminal Code in the light of the wording and purpose of the Framework Decision. On account of the former reluctance of the ECJ to be too prescriptive in relation to domestic criminal procedure, the decision in *Pupino* is particularly welcome, and underlines the fact that the right of victims to be protected from secondary victimisation is now a standard that is directly applicable in the domestic legal order.

Article 3 of the Framework Decision is paralleled in Article 20 of the draft Directive establishing minimum standards on the rights, support and protection of victims of crime²⁰ with the additional requirements that Member States ensure that interviews with victims are carried out “without unjustified delay,” that “the

¹⁷ Notwithstanding, there have been efforts to regulate this type of questioning in recent years. Section 41 of the Youth Justice and Criminal Evidence Act 1999 (England) places stringent conditions on the types of questions that can be put to complainants in rape cases. Section 100 of the Criminal Justice Act 2003 restricts questions that can be asked of witnesses concerning their character.

¹⁸ ECJ, 16 June 2005, *Pupino*, in Case C-105/03.

¹⁹ *Ibid.*, § 61.

²⁰ See above, footnote 11.

number of interviews with victims is kept to a minimum,” and that these are only carried out “where strictly necessary for the purposes of criminal proceedings.” While the inclusion of the word “strictly” within the Article may appear to add little to the protection that is currently afforded, this does at least indicate a heightened awareness to the potential for secondary victimisation where victims are interviewed unnecessarily.

It is also clear from the terms of Article 24 of the draft Directive that increased pressure will be applied to Member States to ensure the appropriate training of practitioners who have victim contact. Under Article 14 of the Framework Decision Member States are currently only required to encourage initiatives which allow personnel to receive suitable training. Whereas under Article 24 this obligation will be bolstered to require Member States to

ensure that police, prosecutors and court staff receive both general and specialist training to sensitise them to the needs of victims and to deal with them in an impartial, respectful and professional manner.

The second and third paragraphs of the Article go on to extend this obligation to include the provision of appropriate training to the judiciary and those working within victim support and restorative justice services. Article 24 concludes with a description of the minimum standards of training that will be expected and states that the content of such training should include:

matters relating to the impact that crime has on victims, the risks of intimidation, repeat and secondary victimisation and how these can be avoided and the availability and relevance of support to victims.

It is clear that by couching Article 20 in stronger terms than its predecessor and by ensuring the appropriate training of personnel under Article 24 the intention is to entrench best practice within the agencies working with victims and positively impact upon the victim experience as a result. However, only in time can an assessment be made on the success of such measures and whether they have any tangible effect on the incidence of secondary victimisation.

At the time of writing, the proposed Directive is still subject to the consultation process, but it would appear to be widely supported, not least by the Commission itself as part of the “comprehensive package of measures to protect victims’ rights” which was originally promised by the Justice and Home Affairs Council in 2010.²¹

1.2 Future Issues: Challenges

With the recent integration of the Third Pillar of the European Union, Police and Judicial Co-operation in Criminal Matters, into its mainstream legal framework, harmonisation in the field of criminal justice is likely to accelerate significantly in

²¹ Justice and Home Affairs Council (2010) Press release [8920/10 (Presse 88)], Brussels.

the near future. The right to protection is one area where significant progress has been made in the past ten years, but there are many other victims' rights issues falling outside the scope of this paper which are also likely to be developed on the European platform in forthcoming years. These include the participatory rights within the criminal process, the right to justice, and the expansion of mediation and restorative justice programmes. These developments underline the need for policymakers and courts alike to consider carefully the significant challenges that lie before us in determining how different legal cultures and traditions can find common ground in giving effect to the emergent rights of victims whilst simultaneously upholding the rights of the accused to a fair hearing.

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