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## European and International Law



### Supporting and Protecting the Victims of Crime in the European Union. Some General Considerations

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**Abstract:** In the present paper there were examined, the general provisions of Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing the minimum standards on the rights, support and protection of victims of crime and replacing the Framework Decision 2001/220/JHA. The paper continues other studies relating to international judicial cooperation in criminal matters, published in national or international journals or conference proceedings. Developed in a modern way that allows understanding the terms used by the European legislator and the described objectives, the paper can be useful to academics, practitioners or European legislator in terms of changing and supplementing this legislative act. The innovations consist in the brief examination, in the critical opinions and in formulating *de lege ferenda*, by which we propose a single act regulating the rights, supporting and protecting victims of crime by amending and completion of the examined document.

**Keywords:** Offense; purpose; child; cooperation

### 1. Introduction

The permanent expansion of cross-border crime in Europe has led the Member States to adopt new decisions, the ultimate goal being to continuously improve the complex work of international judicial cooperation in criminal matters and therefore reducing this type of crime.

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At the level of the European Union in the recent years they were promoted more legal instruments meant to help improving cooperation between judicial authorities of Member States and ensuring an appropriate climate of public safety.

Incidentally, one of the objectives set by the EU is to maintain and develop an area of freedom, security and justice, having as the cornerstone principle the mutual recognition to judgments in criminal and civil matters.

In the context of the increase of the cross-border crime, increased cooperation activities between Member States and the recognition and enforcement of judgments in another Member State was another problem, namely the problem of protecting the victims of this kind of crime.

The first legal instrument adopted at European Union level designed to protect victims of crime has been the Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings<sup>1</sup>.

Later, amid the significant changes that have occurred in this area, it was adopted Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing the minimum standards on the rights, support and protection of the victims of crime and replacement of the framework Decision 2001/220/JHA of the Council<sup>2</sup>, an European legal instrument which we shall examine below.

Thus, based on the Stockholm Programme - an open and secure Europe serving and protecting citizens<sup>3</sup>, adopted by the European Council in its meeting of 10-11 December 2009, the Commission and the Member States have been asked to examine the ways for improving the legislation and the practical support measures for the protection of victims, focusing, primarily, on the support and recognition to all victims, including victims of terrorism.

Moreover, art. 82 para. (2) of the Treaty on the Functioning of the European Union (TFEU) provides the establishment of minimum rules applicable in the Member States in order to facilitate mutual recognition of judgments and judicial decisions, as well as police and judicial cooperation in criminal matters having a cross-border dimension especially on the rights of victims of crime (Directive 2012/29/EU, preamble, para. 2).

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<sup>1</sup> Published in the Official Journal L 82 of the 22.03.2001, p. 1.

<sup>2</sup> Published in the Official Journal of the European Union L 315/57 of the 14.11.2012.

<sup>3</sup> Published in the Official Journal C 115 of 04.05.2010, p. 1.

## **2. Some General Considerations**

The need to take the most effective measures to protect victims of crime has been an ongoing concern of the European Parliament and the Council in the recent years.

Thus, by the resolution of 26 November 2009 on the elimination of violence against women<sup>1</sup>, the Member States were invited to improve laws and the national policies to combat all forms of violence against women and take measures to address the causes of violence against women, and not least by employing the preventive measures; also it has called upon the Union to guarantee the right to assistance and support for all victims of violence (Directive 2012/29/EU, Preamble, para. 5).

Also, by this resolution of 5<sup>th</sup> April 2011 on the priorities and the structure of a new EU policy framework to fight against violence against women<sup>2</sup>, the European Parliament proposed a strategy to combat violence against women, domestic violence and female genital mutilation of women to underpin future legal instruments in the criminal law in order to combat gender-based violence, including a framework to fight against violence against women (policy, prevention, protection, prosecution, concrete measures and partnership), followed by a Union action plan.

In this area there were previously adopted the following international legal instruments: the United Nations Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), adopted on 18 December 1979, the recommendations and decisions of the CEDAW Committee and Council of Europe Convention on preventing and combating violence against women and domestic violence adopted on 7 April 2011 (Directive 2012/29/EU, preamble, para. 6).

The European Council in its resolution of 10 June 2011 on a roadmap for strengthening the rights and protection of victims, in particular in criminal proceedings<sup>3</sup> (called “roadmap from Budapest”), has stipulated that at the level of the Union there should be carried out actions to strengthen the rights, support and protection of victims of crime. To this end, in accordance with this resolution, the adoption of this legislative act (the examined legislation) is intended to revise and supplement the principles laid down in the Framework Decision 2001/220/JHA and therefore determine some significant progress in terms of the level of protection of

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<sup>1</sup> Published in the Official Journal C 285 E of 21.10.2010, p. 53.

<sup>2</sup> Published in the Official Journal C 296 E of 02.10.2010, p. 26.

<sup>3</sup> Published in the Official Journal C 187 of 28.06.2011, p. 1.

the victims throughout the Union, especially in criminal proceedings (Directive 2012/29/EU, preamble, par. 4).

At the same time at the level of the European Union there have been adopted also other legal instruments regulating the mechanisms of protection of individuals in the crime domain, such as the Directive 2011/99/EU of the European Parliament and of the Council of 13 December 2011 on the European protection order<sup>1</sup> that establishes a mechanism for mutual recognition by Member States of the protective measures in the crime domain; The Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating human trafficking and protecting its victims<sup>2</sup>; Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse, sexual exploitation of children and child pornography<sup>3</sup> which addresses inter alia the specific needs of special categories of victims of trafficking, of sexual abuse and sexual exploitation of children and child pornography, and the framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism<sup>4</sup>, which recognizes that terrorism represents one of the most serious violations of the principles on which the Union is based, including the principles of democracy, and it confirms that it is, among other things, a threat to the free exercise of human rights.

Given the fact that crime is a harm to society and, it equally constitutes a violation of human rights victims of crime it should be recognized and treated with respect, attention and professionalism, without discrimination of any kind on any grounds such as race, color, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property in its possession, birth, disability, age, gender, identity gender and the wording of gender, sexual orientation, their status in terms of residence or health. Thus, in all contacts with the competent authorities in criminal proceedings and any service coming into contact with the victims, how can the service on victim's support or restorative justice should take into account the personal situation and immediate needs, age, gender, disability and maturity possible victims of crime, while fully respecting their physical, mental and moral integrity. Meanwhile, the victims of crime should be protected against victimization and repeated and intimidation and

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<sup>1</sup> Published in the Official Journal L 338 of 21.12.2011, p. 2.

<sup>2</sup> Published in the Official Journal L 101 of 15.04.2011, p. 1.

<sup>3</sup> Published in the Official Journal L 335 of 17.12.2011, p. 1.

<sup>4</sup> Published in the Official Journal L 164 of 22.6.2002, p. 3.

retaliation, it should receive the appropriate support to facilitate their recovery and to benefit of sufficient access to justice (Directive 2012/29/EU, preamble, para. 9).

Another issue that should be considered a priority is linked to the superior interest of the child should be a primary consideration, in accordance with the Charter of Fundamental Rights of the European Union and the United Nations Convention on the Rights of the Child adopted on November 20, 1989 (Directive 2012/29/EU, preamble, para. 14).

The victims of terrorism may require special attention, support and protection, taking into account the specific nature of the crimes committed against them.

The violence directed against people because of their gender, gender identity or gender expression thereof or disproportionately affecting persons of a particular gender is understood as gender-based violence. Gender-based violence is considered a form of discrimination and a violation of fundamental freedoms of the victim and it includes violence in close relationships, sexual violence (including rape, sexual assault and harassment), trafficking, slavery and different forms of harmful practices, such as forced marriages, female genital mutilation and so-called “crimes of honor”. The women victims of gender-based violence and their children often require support and special protection because of the high risk of secondary and repeated victimization, the risk of intimidation or revenge associated with such violence (Directive 2012/29/EU, Preamble par. 16 and 17).

Another type of violence involves violence in close relationships which represent a serious social problem and often hidden that could cause systematic psychological and physical trauma, with severe consequences because the offender is someone in whom the victim trusts (Directive 2012/29/EU, preamble, par. 18).

Particular importance should be given to the onset of judicial procedures that must identify the moment of filing the complaint. Therefore, at the time of denouncing the crime, victims should receive a written confirmation of their complaint by the police, stating the basic elements of the offense, such as the type of offense, time and place and any physical injury, mental or emotional or economic harm caused by the offense. This acknowledgment should include a file number and date and place of the denunciation of the offense (Directive 2012/29/EU, Preamble, par. 24).

At the same time, because of the particularities of this type of crime, without bringing prejudice to the rules on the periods of limitation, the delayed denunciation of a crime, due to fears of retaliation, humiliation or stigmatization, should not result in

the refusal of recording the victim's complaint (Directive 2012/29/EU, preamble, par. 25). No doubt that in such a case, the victim must prove that the passing of the deadline is determined by one of the causes expressly provided in the text of the European legal instrument, namely, fear of retaliation, humiliation or stigmatization.

Another right of the victim regards the right to information regarding:

- Date and place of the trial taking place following a complaint about a criminal offense suffered by the victim;
- Date and place of a hearing within an appeal;
- Data relating to the release or escape of the offender (which should be communicated to the request of the victim);
- Any entitlement on an appeal against a decision to release the offender, if such a right exists under the national law;
- Effective opportunity to explain the circumstances of the infringement against them before the judicial authorities, as well as providing evidence for the prosecution (Directive 2012/29/EU, preamble, par. 31-34).

Regarding the solutions to not prosecute, they should be given by prosecutors, investigating magistrates or police, not by the courts. The role of the courts is to review any such decision (Directive 2012/29/EU, Preamble, par. 43).

Restorative justice services, including for example, mediation between victim and offender, family conferencing and sentencing circles, can be of great benefit to the victim, but it requires protection barriers in order to prevent any secondary and repeated victimization, as well as intimidation and revenge. Such services should therefore have as a primary consideration the interests and needs of the victim, repairing the harm suffered by the victim and avoiding further damage. The factors such as the nature and gravity of the crime and the followed suffered trauma, the repeated aggression to the physical, sexual or psychological victim's integrity, imbalances between the ratio of forces, age, maturity or intellectual capacity of the victim, which could limit or reduce its ability to make an informed choice or it could prejudice a positive outcome for the victim, it should be taken into consideration in referring restorative justice service and the restorative justice process. Restorative justice processes should be, in principle, confidential, unless the parties decide otherwise, or as required by the law, given the prevailing public interest. The factors such as threats or other forms of violence committed during the process may be

considered as requiring disclosure in the public interest (Directive 2012/29/EU, Preamble, para. 46).

In order to assist victims, the recovered goods that are seized during criminal proceedings should be returned to it as soon as possible (Directive 2012/29/EU, Preamble, para. 48).

As the victims of human trafficking, terrorism, organized crime, violence in close relationships, sexual violence or exploitation of gender-based violence, of hate crime, the victims with disabilities and child victims tend to be subject to high rate of secondary and repeated victimization or intimidation and revenge, it is necessary to pay special attention to assessing the risk of further victimization to which are subject or not the victims and there should be a strong presumption that those victims will benefit from special protection measures (Directive 2012/29/EU, preamble, para. 57).

Another issue is the qualifications of the personnel involved in criminal proceedings, which are in direct contact with the victims of crime.

Thus, the persons likely to be involved in the individual assessment of the identification of the needs for the protection of victims and in order to determine the need for them to benefit from special protection measures it should receive a specific training on the ways of achieving such assessments. The Member States should ensure such training for police personnel and court staff. Also, training should be promoted for lawyers, prosecutors and judges and for practitioners who provide victims' support or restorative justice services. That obligation should include training on the specific services to support victims to which it should be directed the victim or specialized training in the case where their work regards particularly the victims with special needs, and also psychological training, when appropriate (Directive 2012/29/EU, preamble, par. 61).

Finally one last issue that the European legislative act insists upon is linked to creating the appropriate framework for cooperation with the recognized and active non-governmental organizations in contact with the victims of crime, especially with regard to policy development, the information campaigns and awareness research and training programs, training, and also monitoring and evaluation of the impact of measures to support and protect victims of crime (Directive 2012/29/EU, preamble, par. 62).

We note that within the preamble, the European legislator stresses on the need and importance of adopting a European legal instrument that would ensure to a greater extent, and especially qualified the protection of victims of crime.

Although it is generally targeted crime of all kinds, yet it insists upon the transnational organized crime, terrorism, human trafficking, violence in close relationships, sexual violence or exploitation, gender-based violence, hate crime. It also insists upon the crimes where the victims are people with disabilities or children, categories that tend to be subject to high rates of secondary and repeated victimization or intimidation and revenge. In this context, it is necessary to pay special attention to further victimization risk assessment that are subject to these special categories of victims. Special protection is required to be given to children (as expressed by the European legislator) or minors (under Romanian law), given of course their special situation, when they have the quality of victim.

### **3. The Objectives of the European Legal Instrument**

Under the European legislative act contained in art. 1, para. (1), its purpose is to ensure that victims of crime receive information, support and appropriate protection and that they are able to participate in criminal proceedings. Also, the member states ensure that victims are recognized and treated in a respectful, sensitive and professional manner and in a manner individualized and nondiscriminatory, in all contacts with support services to victims and restorative justice or a competent authority intervening in criminal proceedings. A special procedure will apply whenever the victim is a child, in that it will have regard primarily its best interest; the higher interest will be assessed each time in relation to the particularities of each case. In this context, it will be considered the age, maturity level, the views, needs and concerns of the child. In all circumstances, the child or if any, the holder of parental responsibility or legal guardian of the child will be informed of any measures or its rights (Directive 2012/29/EU, art. 1).

### **4. Definitions**

In order to avoid other interpretations than those which were the focus of the European legislator, in its enactment the following terms are defined as follows:

a) “*victim*” means:



(i) *a physical entity* who has suffered a prejudice, including harming its physical, mental or emotional integrity or economic prejudice caused directly by a criminal offense;

(ii) *the family members* of a person whose death was directly caused by the offense and who have suffered prejudices following the death of that person.

b) *family members* means husband/wife, the person living with the victim, being engaged in an intimate relationship and managing the house in a stable and continuous manner, relatives in direct line, brothers and sisters, and the people within the care of the victim;

c) *child* means any person below the age of 18.

d) *Restorative justice* means any process whereby the victim and the offender may, if they freely consent, participate actively in solving the crime generated by a third impartial party.

If we refer to the provisions of Romanian law regarding the interpretation of the terms mentioned above, we see some elements of perfect identity with the interpretation given by the European legislator. Thus, the terms of *child* and *victim* and the European legislator have the same meaning as under the Romanian law, while the term family members in the European legislative act has a narrower meaning than in the Romanian law. At the same time, the term restorative justice is used only in the recent doctrine of the Romanian law, having the same meaning as the one provided in the European law.

## **5. Conclusions. Some Critical Opinions**

Amid the increase of the cross-border crime, crime in which there has been a sharp increase in terrorist offenses, human trafficking and in particular women and children, drug trafficking, trafficking in arms and ammunition etc., in the European Union there have been adopted series of measures, focusing on the prevention and combating more effectively this kind of crime.

Among the measures we include the adoption of a legislative system which aimed at reducing crime of this kind, while increasing the security of EU citizens.

Although primarily the European Union has endorsed the adoption of a legal system designed to help identify and prove the activity of criminal groups, subsequently,

amid its own findings, there have been adopted also legislative acts aimed at ensuring the rights, support and protection of victims of crime.

Among these European legal instruments adopted in the recent years we include the legislative act briefly examined, by which it was desired to establish the minimum standards on the rights, support and protection of victims of crime.

The phrase “minimum standards” used by the European legislator in the title of the normative act, expresses the possibility for Member States to extend the rights and protection of victims of crime, those mentioned by the European legislator is the basis from which it can start.

Although the intervention of the European legislator in adopting those provisions can be interpreted as being positive and unavoidable, however, we highlight some critical opinions concerning this legislative act.

The problem that we can bring into your attention, concerns the fact that since the beginning of this century, the European Union, in the judicial cooperation domain in criminal matters between the Member States in order to prevent and combat more effectively the cross-border crime of all kinds, there were adopted several laws, an aspect, otherwise positive and absolutely necessary.

In their contents, in addition to rules regulating the mode of action against organized crime groups, the recognition and the enforcement of judgments, legal assistance, etc., there are provided also some legal rules relating to the protection of victims of crime.

In this context, it has reached to the situation where many European laws governing the issue of protection of victims of crime, each coming with a certain view on the matters covered by the framework legislative act.

With the adoption of the European legal instrument under consideration, its provisions were superimposed to the provisions of those laws to which we referred.

We believe that currently it should adopt a single act providing some minimum standards on the rights, support and protection of victims of crime; this can be possible by amending the existing European legal instrument such provisions examined specific activities carried out by organized crime groups; the legislative act in question should contain chapters that ensure the protection of victims, depending on: the kind of crime whose victim was (human trafficking, drug trafficking, terrorism, etc.), categories of people: children, the elderly, women, etc., issues raised, related to race, color, sex, religion, etc. and other such items.

Starting from the provisions of such legislation, each Member State is to perfect its legal system to protect victims of crime on its territory.

We consider that such an approach would ensure respect for the rights and protection of victims of crime to a great extent in all Member States.

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