

Statement on the Draft Directive establishing minimum standards on the rights, support and protection of victims of crime.

1. The European Criminal Bar Association

The European Criminal Bar Association (ECBA) is an association of independent specialist defence lawyers. The association was founded in 1997 and has become the pre-eminent independent organisation of specialist defence practitioners in all Council of Europe countries. We represent over 35 different European countries including all EU Member States. The ECBA's aim is to promote the fundamental rights of persons under investigation, suspects, accused and convicted persons, not only in theory, but also in the daily practice in criminal proceedings throughout Europe.

Through its conferences, website and newsletter the ECBA provides a suitable forum to access up-to-date information on legal developments. Through the work of its legal development sub-committee the Association actively seeks to shape future legislation with a view to ensuring that the rights of European citizens in criminal proceedings are enhanced in practise. Through the networking opportunities available with membership, members establish one to one contact with other practitioners in other member states both with a view to the exchange of information and to practical cooperation in specific cases. This experience from comparative jurisdictions shapes and informs the submissions which are made by the Association to the law makers, and ensures that those submissions are given due weight.

We are member of the European Commission's Justice Forum and we are actively involved in several EU-related projects e.g. training events for defence lawyers jointly with ERA, legal aid in criminal matters (including research on best practice in European Arrest Warrant cases); pre trial defence rights (including access to a lawyer; letter of rights; pre-trial emergency defence; pre-trial detention) and evidence in criminal cases (including the European Investigation Order)) and we are regularly invited to many EU experts' meetings concerning criminal law issues.

Further information on the ECBA can be found at our website: www.ecba.org.

2. International Law and the rights of victims

The rights of victims of crime are increasingly recognised by international human rights law. The case law of the European Convention on Human Rights (ECHR) establishes that the effective protection of a number of Convention rights, including the right to life, the right not to be subjected to inhuman or degrading treatment, and the right to physical integrity, require States to provide the protection of the criminal law against violation of those rights by other private parties. In addition, case law also establishes that victims or their families are entitled to participate in the investigations required by Articles 2 and 3 ECHR *to the extent necessary to protect their interests*.

In addition, there now exist certain "soft law" standards concerning the rights of victims of crime, such as:

- UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (1985), which sets out a number of basic principles to guide States when deciding how to protect the rights of victims of crime, e.g. ensuring that

victims are treated with compassion and respect for their dignity, have access to judicial and administrative mechanisms, are informed of the progress and disposition of their cases, can present their views *at appropriate stages of the proceedings* where their personal interests are affected, have their privacy and safety adequately protected, and receive proper assistance and where appropriate restitution or compensation.

- Commonwealth *Guidelines for the Treatment of Victims of Crime* (2002) provide similar best practice guidance.

It is important to note that the relevant international standards all contain the important qualification that the rights of victims shall not be secured at the expense of the well established rights of suspects or offenders such as the right to a fair trial and the presumption of innocence.

3. The draft Directive

The objective of the Directive is to establish minimum standards for the rights, support and protection of victims of crime. To that end, the Directive defines “victims” and “vulnerable victims” (Art. 2 and 18 respectively). All victims are granted minimum rights such as the right to receive information (Art. 3 and 4), the right to interpretation and translation (Art. 6), access to legal aid (Art. 12) and the right to a decision on compensation from the offender in the course of criminal procedures (Art. 15). The ECBA supports these efforts to strengthen the position of victims of crime, and to empower victims to participate in criminal proceedings that directly relate to them.

However, it cannot be overlooked that criminal proceedings may *regard*, but cannot *focus* on victims. The one central issue that has to be decided in any criminal case is the question of guilt or innocence of the defendant(s). In that respect each defendant, and his guilt or innocence, must take centre stage, which by necessity means that the victim can only play a secondary role in any criminal trial.

That secondary role is in many cases is not just that of a victim of the crime, but also that of a witness against the defendant. This is most easily understood in cases regarding sexual abuse: in the classic case, the victim of rape or a serious sexual assault is often the only witness against the accused.

It is a fact that not all complaints of crime are true. So, not all persons claiming to be victims are indeed victims. A further fact is that not all victims can correctly and unerringly identify their assailants. So however true or abhorrent the victimisation, the rights of victims shall not be secured at the expense of the well established rights of suspects or offenders such as the right to a fair trial and the presumption of innocence. This means that, in the interest of justice and in the interest of deciding the central question that is at stake in all criminal proceedings, victims, and even “vulnerable victims”, cannot cede their role as witnesses in a criminal case.

Article 6, par. 3 (d) of the ECHR states that that everyone charged with a criminal offence has the right to examine or have examined witnesses against him. It is established case law of the ECtHR that the rights of the defence “require that the defendant be given an adequate and proper opportunity to challenge and question a witness against him either when he was making his statement or at a later stage in the proceedings” (e.g. Saïdi v. France, 20 September 1993). The competing rights of

the victim and the rights of the defendant is considered in *S.N. v. Sweden* (judgement of 2 July 2002) where the ECtHR stated: “The court accepts that in criminal proceedings concerning sexual abuse certain measures may be taken for the purpose of protecting the victim, provided that such measures can be reconciled with an adequate and effective exercise of the rights of the defence.”

For the draft Directive, this case law means that all rights granted to “victims” and “vulnerable victims” should not unfairly interfere with the right of the defendant to exercise his right to challenge and question these same “victims” and “vulnerable victims” as *witnesses* against him. In individual cases, the specific circumstances of that case can lead to a different outcome when deciding how such competing interests can be respected..

The ECBA finds that the proposed wording of the Directive does not sufficiently reflect this need to consider these potentially conflicting rights on a case to case basis. This is most obvious in Articles 20(c) and 21(3).

Article 20(c) states that, as a rule, in all cases in which a “victim” is questioned in the course of a criminal investigation, the “victim” may be accompanied by a person of their choice. However, particularly in the early stages of an investigation, victims are not questioned as “victims”; they are questioned as *witnesses*. Having a third party from the social environment of the witness present risks undermining the quality of the testimony; this in turn can lead to the veracity of the case being damaged so that justice cannot be achieved either for the victim or any defendant. The risk is easily understood and well recorded in – again – cases of alleged sexual abuse: if for some reason – guilt, shame, embarrassment – someone justifies a voluntary sexual encounter by claiming abuse, that person may feel forced to follow through on that claim in a police interview, when giving an account in the presence of someone from their social group. The right of the “victim” to have someone present at all instances of questioning could have the unintended consequence of being highly detrimental to the establishment of the truth or falsehood of that “witness’s” testimony.

By its wording, Article 21(3) appears to force judges to supply *all* vulnerable victims with *all* the protective measures mentioned in that Section. That is incompatible with the necessity to consider the rights of witnesses and the rights of the defendant on a case to case basis. The wording of Article 21 should be changed to better reflect the apparent purpose of the Article: to ensure that Member States have in place the measures mentioned in Article 21(3), so that national courts may provide them to the witness, should it be determined in the circumstances of the individual case that it would be fair and just to grant them.

For further questions and comments please contact:

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