



## *EU's 'Victims' Directive' – a legal act for a cultural change?*

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### Abstract

The article looks at safeguarding points in 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 if and how some European countries have implemented the Directive. The article discusses what might be success factors to fulfil the Directive's safeguarding intentions in the light of securing access to justice. We observe that focus on and measures for the victim often lead to a new conscience about the needs of all witnesses. The article addresses the need for cultural changes in the judicial system in order to fulfil the Directive's intentions, and what might be a drive to such changes.

**Key words:** EU Victims' Directive, safeguarding, witnesses, access to justice, cultural changes in the judicial system

### 1. The EU's 'Victims' Directive'

Many EU member countries have made amendments to or established new measures and services for victims as a result of EU Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012. The Directive established minimum standards on the rights, support and protection of victims of crime.

In this article we look at safeguarding points in the Directive, and how some European countries have implemented the Directive. We discuss what might be success factors to fulfil the Directive's safeguarding intentions.

In 2012, the EU established the 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.<sup>2</sup> This Directive replaced the EU's Council Framework Decision 2001/220/JHA.

The purpose of the Directive is to ensure that victims of crime:

1. Are recognised and treated in a respectful, sensitive and professional manner in the judicial system and the society;
2. Are protected from secondary and repeat victimisation, from intimidation and from retaliation within the context of criminal proceedings;
3. Receive appropriate support to facilitate their recovery and are provided with sufficient access to justice;
4. Have appropriate access to financial compensation and damages for non-economic losses from the State or the offender.

The deadline for incorporating the Directive into national law was set at 15 November 2015. The Directive imposes the member states to report data showing how and to what extent the victims have exercised the rights provided for in this Directive no later than 16 November 2017, and then every 3 years.

Special attention is given to support and protection of victims of certain crimes, including victims of gender-based violence, mainly women. This is due to the risk of secondary and repeat victimisation, from intimidation and from retaliation. The Directive also focuses on a child-friendly approach, where the main focus is on what will best serve children who have become victims.

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<sup>2</sup> <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1421925131614&uri=CELEX:32012L0029> (Obtained: 15 November 2017)

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The essence of the Directive is that the needs of victims must be addressed in an individual manner, based on an individual assessment, and using a dedicated and participatory approach regarding provision of information, support, protection and procedural rights.

The Directive is furthermore based on the key principle of the role assigned to the victim in the judicial system. The formal role of the victim in the various national systems will determine the appropriate approach for implementation of some of the most important rights addressed in the Directive. Since the formal role of a victim in a criminal case varies considerably among the member states, the realisation of these provisions will vary to some extent; cf. *DG JUSTICE GUIDANCE DOCUMENT*, European Commission, DG Justice, December 2013, p. 4.<sup>3</sup> Services for victims have been established without being matched with procedural rights (Doak, 2011).

Incorporation of an EU directive into national law does not necessarily require transposition of the exact wording of the provisions of said directive into explicit and specific legal provisions. The key is that the national law must provide for a legal framework that will make it possible to ensure that the Directive will apply in full.

The Directive assumes investments in new or further development of existing services, and this entails that financial issues are of prime importance for the implementation of the Directive.

## **2. Safeguarding measures. The victim: a new actor**

A comparative study among the EU member countries from 2009 (the study was partly to serve as a zero-point survey to determine the subsequent effects of the Directive) showed that the victim is considered a new actor in the judicial system of most countries.<sup>4</sup> The judicial systems are mainly structured around the defendant and his/her rights.

It is still a considerable challenge in many countries to clarify the procedural role of the victims of crime, cf. *The "Victims" Directive*, Centre for European Constitutional Law and Institute for Advanced Legal Studies of the University of London, undated, pg. 3.<sup>5</sup>

A challenge associated with the Directive is that there is to be an individual evaluation of the needs, as well as provision of individually appropriate, and at the same time unified, safeguarding services throughout the criminal proceedings. An approach adapted to each individual in combination with unified safeguarding measures does not appear to be linked to the status as a victim of crime. The Centre for European Constitutional Law and Institute for Advanced Legal Studies of the University of London maintains that such a link must be established in order to facilitate efficient implementation of the Directive.

As the victim is still seen as a new actor in the judicial systems in many countries and the victim's procedural role differs and is sometimes unclear, means that the Directive will work differently in different countries. The considerable differences between the countries make it seem nearly impossible to establish a common European standard. Thus, the Directive must be regarded as a starting point and a signal to the member countries that they will have to work with a long-term perspective on the safeguarding of victims.

In our opinion psychological and physical measures will together contribute to good safeguarding of victims. The Directive stipulates that the EU's member countries must ensure appropriate training regarding the needs of victims for officials who are likely to come into personal contact with victims, e.g. in the police services, prosecuting authorities or the courts.

The Directive addresses shielding of witnesses from the defendant or other parties in recital 53. It is emphasised that the practitioners must co-operate in order to avoid contact between victims and defendants at the court premises. The Directive points to alternative solutions such as video-recording the taking of evidence with playback in court. Recital 53 states furthermore that the member countries should facilitate victims having no direct contact with the defendant and/or his/her family, acquaintances and the audience by using appropriate facilities for courts and the police, with separate entrances and waiting areas for victims.

Some countries, like Denmark and England and Wales, allow new court buildings to have special entrances and waiting areas for victims and witnesses. In Norway actors in court, such as the prosecuting authority, judges and Witness Support Service, confirm that there is an increasing need and demand for shielding measures. In the 2012 Witness Survey in Norway, the witnesses stated that they did not want to see the defendant or anybody else from the other party in the waiting area in the court house, and many did not want to testify with the defendant present.<sup>6</sup>

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3 [http://ec.europa.eu/justice/criminal/files/victims/guidance\\_victims\\_rights\\_directive\\_en.pdf](http://ec.europa.eu/justice/criminal/files/victims/guidance_victims_rights_directive_en.pdf) page 4 (Obtained 15 November)

4 [http://ec.europa.eu/justice/news/consulting\\_public/0053/bg\\_study\\_on\\_victims\\_07\\_2009\\_final\\_en.pdf](http://ec.europa.eu/justice/news/consulting_public/0053/bg_study_on_victims_07_2009_final_en.pdf) (obtained 15 November 2017)

5 Centre for European Constitutional Law, Newsletter undated "Offer" direktivet (The Victims' Directive")

6 [https://www.domstol.no/globalassets/upload/internett\\_fillister/da/publikasjoner/rapporter/rapport-vitneundersokelse-2012.pdf](https://www.domstol.no/globalassets/upload/internett_fillister/da/publikasjoner/rapporter/rapport-vitneundersokelse-2012.pdf) p. 32 (Obtained 15 November 2017)

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We are of the opinion that it is important in terms of due process of law that most cases are handled in accordance with the basic assumption behind the law; that the evidence is presented directly to the court passing judgement. The courts must facilitate this taking place. On the other hand, in Norway we have traditionally focused on having the victim testify with the defendant present in the courtroom. It is a key principle that the defendant must be able to hear the witnesses, and that he/she is entitled to comment on the evidence presented. Perhaps our focus on this one element has been too strong? The courts in some European countries we have visited are more open to having the victim testify in another room with video transmission to the courtroom. This will safeguard the right of contradiction.

### 3. Formal implementation of the Directive

'The Victims' Directive' has been adopted by the EU, and it applies to the member countries. It is our understanding that the implementation of the Directive varies, however. We have looked at how the Directive has been implemented in some countries.

In Germany and Austria, the Directive has resulted in changes in legislation and increased funding to private organisations that give support to victims. Danish authorities are of the opinion that victims of crime are already safeguarded in practice in accordance with the EU's 'Victims' Directive', and it is our understanding that the Directive has therefore not been incorporated into Danish law.

March 2017, the Directive was implemented by law in the Netherlands. Since the rights of victims were strengthened by law in 2011, implementation of the Directive did not require any amendments. A national project leader has been appointed to organise the implementation in the Netherlands. One of the objectives is to use appropriate language for informing witnesses under the age of 18 of their rights. Victims will be informed when defendants are released from custody or have completed their sentence of imprisonment if found guilty. Vulnerable witnesses will be contacted by the police at an early stage to determine any special needs, for example whether they would like to testify anonymously.

In Sweden, the authorities have assumed that Swedish law is in conformity with the Directive.<sup>7</sup>

English authorities report that they have updated their standards in accordance with the 'Victims' Directive'. «The Victims Code» describes the victims' right to information in the judicial system, and the various institutions in the criminal justice system are obliged to apply certain minimum standards for witnesses based on the so-called «Witness Charter».<sup>8,9</sup>

Lithuania has prepared a training programme (80 academic hours) for judges, employees of the courts and NGOs. The purpose of the training is to provide the participants with knowledge regarding how crime affects the victim and witnesses, to introduce measures that are required to provide psychological and physical protection of victims and witnesses in court, and training in appropriate communication with these vulnerable groups in court. One of two main topics of the training is a new approach to law enforcement where the EU Directive and what this approach entails for the courts and NGOs are covered, while the second one is the psychological effects of crime on the victim and any witnesses. Lithuanian authorities have established witness support schemes at the courts and prepared various types of information for witnesses.

In 2015, Polish authorities adopted a law that will provide protection for and support of victims of crime, both before, during and after the trial process. To start off, the victims will have access to police protection during the court case. In certain cases, victims and witnesses may be provided with personal police protection, including at home. In addition, victims, witnesses and their families will have access to psychological support. The police decide who will receive such support.

### 4. What will make the Directive work as intended - in practice? Success factors for safeguarding measures

As we have seen several countries have established new measures or services or made amendments to existing ones because of the 'Victims' Directive'.

In our opinion safeguarding of victims and witnesses contributes to due process of law, and ensures access to justice. Thus safeguarding must be addressed. It represents the judicial system's social responsibility.

The greatest challenge associated with the Directive's safeguarding issues is, in our opinion, probably making safeguarding of victims function *in practice*; to have the practitioners within the system of criminal justice make safeguarding of victims a part of their everyday practice. Provision of cost effective and satisfactory services will require a *common culture* as regards providing such services on the part of all public and private actors and practitioners, and a culture to coordinate the services. It is no secret that services for victims traditionally have not been considered as part of the core tasks for police, prosecution or courts. More

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<sup>7</sup> At the same time as certain changes were proposed as regards the right of the victim to an interpreter and information on the time and location of the court hearing, cf. Ds 2014:14 Genomförande av brottsofferdirektivet (Implementation of the Victims' Directive). In Proposition 2014/24:57 (with proposed entry into force on 1 November 2015), it is proposed that the statutory rules regarding the right of the victim to an interpreter and translations be amended. It was proposed in the proposition that the right to information should be strengthened by granting the victim the right to be informed of the time and location of the main proceedings.

<sup>8</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/265341/witness-charter-easyread.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/265341/witness-charter-easyread.pdf)

<sup>9</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/476900/code-of-practice-for-victims-of-crime.PDF](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/476900/code-of-practice-for-victims-of-crime.PDF)

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services for victims and better coordination of services will require a cultural change and a new mind-set. The question is what may promote such changes?

Measurement of safeguarding services and their effectiveness may be required to provide motivation. User surveys are good indicators. A driving force to ensure focus on safeguarding of victims is to credit the actors' achievements. This means that police and prosecution authorities, judges and courts should also be measured by other quality indicators than number of cases completed or hours in court. Quality measured by spent time is the most used measure for most actors in European courts. A recent survey amongst judges and administrative employees in Norwegian courts shows that there are great awareness of treating the users of the court with respect and dignity. This might indicate that courts see safeguarding as part of the court's work. Quality may be measured by how the actors safeguard victims and witnesses and their ability to coordinate their services.

A cultural change will probably require having to change procedures, preferably by establishing standards, to ensure that the actors and practitioners prioritise safeguarding services in their daily work. The making of such standards itself will draw safeguarding to the actors' attention.

Another driver for this cultural change is training. The Directive stipulates that the EU's member countries must ensure appropriate training regarding the needs of victims for officials who are likely to come into personal contact with victims, e.g. in the police services, prosecuting authorities or the courts. Several of the countries we have mentioned here are improving their trainings for actors in court on how to safeguard victims and witnesses.

Even though Norwegian witness support volunteers in court have received training on victims' and witnesses' needs for years, communication with victims and witnesses have just recently been put on the agenda in trainings for Norwegian judges. In previous years there have been courses for new judges in 'witness psychology', focusing on knowledge about witnesses' memory and on how to evaluate a witness statement. This approach focuses at the witness as evidence – and not so much at making the best out of a witness statement through good communication. Psychologists and victim support organisations have advocated the importance of good and proper communication with victims and witnesses for decades, without the craftsmen of law enforcement have been able to receive these advice. This seems to be changing for the better.

Another intention is that the Directive shall contribute to coordination of the services provided. Coordinated services are essential for the victim, and this is in our opinion a challenging issue that might require a coordinating initiative from each country's government. Using strategic interaction <sup>10</sup>as a tool in coordinating services, focusing on benefits for all stakeholders, might be a useful approach.

Our experience is that England and Wales are particularly good at coordinating their services to victims and witnesses, and have written standards to offer victims and witness a holistic treatment.

Witness Support Service in Norwegian courts makes efforts to coordinate their services with police, prosecution service and the courts. One good example of a coordinating initiative in Norway is a pilot project established in 2015 in Oslo, 'Project November'<sup>11</sup>, that offers coordinated services through interdisciplinary collaboration, at one location. The project delivers services to victims of domestic violence, their families and abusers. The project might be compared to 'Children's House'<sup>12</sup> and is collaboration between several ministries. This project may be a model fit for the purpose in the Directive; an individual evaluation of the needs, as well as provision of individually appropriate, and at the same time unified, safeguarding services – that are coordinated. The project is a pilot during the period 2016-2018.

## 5. Conclusion

In our opinion the establishment of the 'Victims' Directive' is itself an important driver for change. As we have seen here several European countries have established new services or measures or made amendments to existing ones. We have observed that focus on and measures for the victim often lead to a new conscience about the needs of all witnesses as some countries have even established services for witnesses at the same time as they established measures for victims. This means increased access to justice.

It is our opinion that the success factor for the 'Victims' Directive's' safeguarding effects is to promote a cultural change. The Advocacy Training Council, *Raising the Bar*, 2011, calls for a cultural change where advocates must both learn to recognize and address vulnerabilities in an individual manner. Acknowledging safeguarding measures and services as quality indicators might be a valuable driver to contribute to this cultural change. Trainings, establishment of standards, implementing user surveys and coordination services will be crucial factors.

It is all about having a user perspective.

10 Strategic interaction as the process of several parties reaching a common goal, with emphasis on communication.

11 For more information on this project: <https://blogg.hioa.no/voldsprogrammet/om-prosjektet/prosjekt-november/>

12 For information about Childrens' House (i.e. 'Barnehus'): <https://www.statensbarnehus.no/>

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