

Guidelines for transposition

**The EU Directive on
Victims' Rights (2012/29/EU)**

**And homophobic and
transphobic crime victims**

ILGA
EUROPE 

December 2013

Professor Steve Peers
Human Rights Centre, University of Essex

Table of Contents

1. Introduction and background	3
2. Principles for Interpretation of the Directive	5
3. Summary of the key definitions used in the Directive	10
4. Incident reporting, support services and awareness-raising	12
5. Specific protection needs and protection measures for victims	16
6. Training measures	18
7. Translation tables	19
8. Conclusions	21

1 Introduction and background

In 2012, the EU adopted a Directive on the position of crime victims in criminal proceedings (Directive 2012/29, OJ 2012 L 315/57; the '2012 Directive'), replacing a 'Framework Decision' on the same subject, which had been adopted back in 2001 (OJ 2001 L 82/1). The Directive will apply to every EU Member State except Denmark (which remains bound by the Framework Decision); Member States are obliged to apply it by 16 November 2015 (see Article 27(1) of the Directive). All references in these guidelines concern this Directive, unless otherwise indicated.

The previous Framework Decision was subject to a number of constraints. First of all, it had to be agreed unanimously by the Council (ie, Member States' justice ministers) and so was not very ambitious. Similarly, the European Parliament was only consulted on its adoption. However, the 2012 Directive was adopted in accordance with the EU's 'ordinary legislative procedure', which means that the Council voted by a qualified majority and the European Parliament had joint decision-making powers with the Council. As a result, the Directive is more detailed and ambitious than the Framework Decision. Secondly, the powers of the Commission and of the Court of Justice were limited as regards the Framework Decision. It was not possible for the Commission to bring 'infringement procedures' against Member States which had not applied the measure at all on time, or which had applied it incorrectly. Also, Member States had an option as to whether to allow national courts to send questions to the EU's Court of Justice as regards this measure (and other 'third pillar' measures adopted before the entry into force of the Treaty of Lisbon on 1 December 2009). About two-thirds of Member States took up this option, and so a number of questions concerning the Framework Decision were sent to, and decided by, the Court of Justice (for the text, see www.curia.europa.eu):

- Case C-105/03 *Pupino* [2005] ECR I-5285
- Case C-467/05 *Dell'Orto* [2007] ECR I-5557
- Case C-404/07 *Katz* [2008] ECR I-7607
- Case C-205/09 *Eredics* [2010] ECR I-10231
- Joined Cases C-483/09 *Gueye* and C-1/10 *Salmeron Sanchez* [2011] ECR I-8263
- Case C-507/10 *X*, judgment of 21 Dec. 2011
- Case C-79/11 *Giovanardi*, judgment of 12 July 2012

These restrictions on the Court's jurisdiction will cease to apply, as from 1 December 2014, and they will never apply to the 2012 Directive.

Finally, the legal effect of the Framework Decision is limited, in that (unlike EU Directives), it does not have 'direct effect', meaning that it cannot be relied upon directly to assert rights in national courts. However, according to the *Pupino* judgment, it does have 'indirect effect', meaning that national courts must interpret their national legislation consistently with the Framework Decision as far as possible. Furthermore, by analogy with a judgment concerning the Framework Decision establishing the European Arrest Warrant (Case C-399/11 *Melloni*, judgment of 26 Feb. 2013), the Framework Decision has primacy over conflicting national law. By contrast, the 2012 Directive has 'direct effect' (as well as indirect

effect and primacy over conflicting national law), so that victims of crime can invoke its provisions in national courts. This is consistent with the frequent references to the 'rights' of victims in the Directive.

It follows that not only is the substance of the Directive more ambitious and far-reaching than that of the Framework Decision, but also that there are more mechanisms to ensure the effective and timely enforcement of the former as compared to the latter: Commission infringement proceedings, more possibilities for references to the Court of Justice from national courts, and the 'direct effect' of the Directive's obligations in the national courts. Non-governmental organisations with an interest in ensuring the effective implementation of the Directive can therefore make complaints to the Commission, and there is also greater facility for them to bring proceedings in national courts or to give advice and support to test cases to the same end.

Ahead of the publication of the Commission's proposition for a Directive (May 2011) and until the end of the negotiation process (October 2012), ILGA-Europe and its national LGBTI organisations have advocated for the inclusion of several important provisions in EU legislation. These advocacy objectives included the clarification of the concept of 'vulnerable victims' (now 'victims with specific protection needs') to include victims of bias crimes, in conformity with different international commitments made by EU Member States. Our objectives also included the development of higher EU policy standards in relation to data collection, support to victims and training of law enforcement officers, prosecutors and judges, with a special attention for the contribution of civil society organisations. The Commission's proposal included some of these points, which were later reinforced by the European Parliament's negotiation position. The following sections provide explanations on the different areas where the Directive brings useful legal change.

2 Principles for Interpretation of the Directive

2.1 Preamble to the Directive

The preamble to EU legislation often sets out both general principles and detailed definitions which are very useful for the interpretation of the measure concerned, and which are very frequently taken into account by the EU's Court of Justice. In the case of the 2012 Directive, the preamble is particularly lengthy, consisting of no fewer than 72 recitals.

The most important recitals in the preamble are:

- (a)** Recital 4, which states that the EU intended to 'strengthen the rights of, support for, and protection of' crime victims, and that the Directive 'aims...to take significant steps forward in the level of protection of victims throughout the Union';
- (b)** Recital 9, which states that victims of crime must be treated 'without discrimination of any kind based on any ground such as...gender, gender expression, gender identity, sexual orientation...' and that authorities must take account of the 'personal situation and immediate needs' of victims, 'fully respecting their physical, social and moral integrity';
- (c)** Recital 11 confirms (as set out in the Treaty) that the Directive sets out only minimum standards, which Member States can exceed;
- (d)** Recital 12 observes that the Directive is without prejudice to the rights of offenders;
- (e)** Recital 17 defines 'gender-based violence' (see section 3 below);
- (f)** Recital 25 specifies that delayed reporting of a crime due to 'fear of retaliation, humiliation or stigmatisation' should not lead to a refusal to acknowledge the complaint;
- (g)** Recital 38 States that (inter alia) victims of gender-based violence should be provided with 'specialist support and legal protection', including providing shelter and safe accommodation, medical examinations and other forms of support and care;
- (h)** Recital 56 States that individual assessments of support needs should take into account the 'personal characteristics of the victim', inter alia his or her 'gender and gender identity or expression, [...] sexual orientation', as well as the characteristics of the crime, inter alia 'whether it is a hate crime, a bias crime or a crime committed with a discriminatory motive';
- (i)** Recital 57 notes that victims of gender-based violence (inter alia) 'tend to experience a high rate of secondary and repeat victimisation, of intimidation and of retaliation', and so 'there should be a strong presumption that these victims will benefit from special protection measures'; and
- (j)** Recital 61 States that there should be 'specific training' for professionals on how to identify special protection needs.

It can be seen from this summary that the Directive: aims to increase the rights enjoyed by crime victims, not to limit them; respects both aspects of the principle of non-discrimination (banning unequal treatment on grounds including 'gender expression, gender identity [and] sexual orientation', but also requiring people to be treated *differently* if their circumstances require it; requires special treatment for persons subjected to 'gender-based violence'; and specifies that account must be taken both of the nature of the crime and the characteristics of the victim, when it comes to bias crime.

2.2 Member States' human rights obligations

While there are no international human rights treaties solely concerning the rights of crime victims, such treaties nevertheless entail obligations relevant to victim protection. Most recently, the 2011 Council of Europe Convention on preventing and combating violence against women and domestic violence (CETS 210, known as the Istanbul Convention), which is likely to enter into force in the near future (having obtained eight of the ten minimum ratifications necessary to enter into force at the time of writing) includes a Chapter (Chapter IV, Articles 18-28) on 'protection and support' of victims of domestic violence. The non-discrimination clause in this Convention (Article 4) also refers expressly to 'sexual orientation' and 'gender identity' as prohibited grounds of discrimination.

Similar provisions on victim protection also appear in the Council of Europe Convention on Action against Trafficking in Human Beings (CETS 197), which has been widely ratified. The case law of the European Court of Human Rights regarding the European Convention of Human Rights has also developed a number of key rules (see the 2009 Council of Europe report on 'Non-criminal remedies for crime victims', online at: http://www.coe.int/t/dghl/standardsetting/victims/victims%20final_en%20with%20cover.pdf). On this point, it is clear that the 2012 Directive is based on concern for the human rights of victims, as set out in the Commission's communication on the rights of victims which accompanied the proposal for the Directive (COM (2012) 274, 18 May 2012, pages 3-4).

There are also non-binding political commitments in this area. As regards crime victims in general, on 14 June 2006 the Council of Europe's Committee of Ministers adopted Recommendation Rec(2006)8 to member states on assistance to crime victims. This Recommendation includes a proviso that States should 'respect the security, dignity, private and family life of victims and recognise the negative effects of crime on victims' (point 2.1), and ensure that the measures set forth in this recommendation are made available to victims without discrimination' (point 2.2). States should also protect the private and family life of victims (point 10.8), a concept which includes same-sex relationships (see the case law discussed in section 3 below), and encourage the media to self-regulate to the same end (point 10.9). There should be specialised training for those working with victims of 'special categories of crime', which include 'crimes motivated by racial, religious or other prejudice' (point 12.3).

More generally, this Recommendation includes provisions on: assistance to victims; the role of the public services; victim support services; information to victims; the right of access to remedies; State compensation; insurance; protection (as regards physical and psychological integrity, repeat victimisation and privacy); selection and training of personnel; mediation; public awareness; international cooperation; and research. A significant proportion of the issue addressed in this Recommendation were also subsequently addressed by the 2012 Directive.

More specifically, there are provisions in hate crimes in the Council of Europe Committee of Ministers Recommendation Rec(2010)5 to Member States on measures to combat discrimination on grounds of sexual orientation or gender identity. First of all, 'Member States should ensure effective, prompt and impartial investigations into alleged cases of crimes and other incidents, where the sexual orientation or gender identity of the victim is reasonably suspected to have constituted a motive for the perpetrator', including particularly cases where the crime was allegedly committed by a law enforcement official or another person acting in an official capacity. Those responsible for such acts should be 'brought to justice' and punished for them (point 1.A(1)).

Next, States 'should ensure that when determining sanctions, a bias motive related to sexual orientation or gender identity may be taken into account as an aggravating circumstance' (point 1.A(2)). States should also act to encourage victims and witnesses to report such crimes, and should take steps to ensure that law enforcement officials and the judiciary 'have the necessary knowledge and skills to identify such crimes and incidents and provide adequate assistance and support to victims' (point 1.A(3)).

States must also protect against hate crime against prisoners on grounds of their sexual orientation or gender identity. In particular, they should ensure 'the safety and dignity' of all prisoners, 'including lesbian, gay, bisexual and transgender persons', and 'take protective measures against physical assault, rape and other forms of sexual abuse, whether committed by other inmates or staff'. They should also take measures 'to adequately protect and respect the gender identity of transgender persons' (point 1.A (4)).

Finally on this point, States should take steps to gather and analyse data 'on the prevalence and nature of discrimination and intolerance on grounds of sexual orientation or gender identity, and in particular on "hate crimes" and hate-motivated incidents related to sexual orientation or gender identity' (point 1.A(5)).

There are similar provisions in the OSCE Ministerial Council Decision 9/09 of December 2009, which concerns bias crimes in general, without mentioning specific grounds for bias.

2.3 Comparison with the 2001 Framework Decision

Comparing the 2012 Directive with the prior Framework Decision sheds light on the intention of the EU legislators. The main differences between the two measures are as follows:

- (a)** the Directive contains a new provision on its objectives (Article 1);
- (b)** there is a wider definition of 'victim', including now also family members in the event of a victim's death (Article 2(1)(a)); 'family members' are therefore now also defined (Article 2(1)(b));
- (c)** there are wholly new rules on the victim's 'right to understand and to be understood' (Article 3);
- (d)** the rules on the victim's right to receive information have been greatly expanded (Articles 4 to 6; compare to Article 4, Framework Decision);
- (e)** victims have a 'right to interpretation and translation' (Article 7), which is much stronger than the rules on 'communication safeguards' in the Framework Decision (Article 5, Framework Decision);
- (f)** victims have the 'right to access victim support services' (Articles 8 and 9), which is much stronger than the rules on 'specialist services and victim support organisations' in the Framework Decision (Article 13, Framework Decision);
- (g)** there are wholly new rules in the event of a decision not to prosecute (Article 11);
- (h)** the rules on 'penal mediation' (Article 10, Framework Decision) have been fundamentally altered by new rules on safeguards in restorative justice services (Article 12);
- (i)** the rules on protection of victims during criminal investigations (interviews, legal assistance, medical examinations) have been expanded (Article 20; compare to Article 3, second paragraph, Framework Decision);

- (j)** the right to privacy of victims has been elaborated further (Article 21; compare to Article 8(2), Framework Decision);
- (k)** the provisions on victims with 'specific protection needs' have been hugely expanded (Articles 22 to 24; compare to Article 2(2), Framework Decision);
- (l)** there are expanded provisions on the training of practitioners (Article 25; compare to Article 14, Framework Decision);
- (m)** the rules on cooperation between Member States' authorities have been expanded (Article 26(1); compare to Article 12, Framework Decision); and
- (n)** there are new provisions requiring Member States to make victims more aware of their rights (Article 26(2)).

While point (k) above is the most directly significant change as far as bias crimes are concerned, and will be discussed in particular detail further below, the other amendments may improve the position of victims of bias crimes more indirectly. For instance, a victim of a bias crime who is visiting another Member State might benefit from the stronger 'right to interpretation and translation', and any victim of bias crime might benefit from the new rules on the 'right to understand and to be understood'.

The Directive has made more limited changes (if any) to the rules in the Framework Decision on:

- (a)** the right to be heard (Article 10; compare to Article 3, first paragraph, Framework Decision);
- (b)** the right to legal aid (Article 13; compare to Article 6, Framework Decision);
- (c)** the right to reimbursement of expenses (Article 14; compare to Article 7, Framework Decision);
- (d)** the right to the return of property (Article 15; compare to Article 9(3), Framework Decision);
- (e)** the right to a decision on compensation from the offender (Article 16; compare to Article 9(1), Framework Decision);
- (f)** the rights of victims resident in another Member State (Article 17; compare to Article 11, Framework Decision);
- (g)** the general right to protection (Article 18; compare to Articles 2, 8(1) and 15, Framework Decision); and
- (h)** the right to avoid contact with the offender (Article 19; compare to Article 8(3), Framework Decision).

Again, these provisions may be relevant to victims of bias crimes indirectly. The comparison of the Directive to the Framework Decision also needs to take into account the case law of the EU's Court of Justice on the interpretation of the Framework Decision. The main points of each of the relevant cases decided by the Court of Justice are as follows:

- (a)** in *Pupino* the Court decided that young children allegedly mistreated by their teacher were 'vulnerable' victims within the meaning of the Framework Decision, and so could benefit from the special rules on giving evidence; in assessing the vulnerability of victims, it was necessary to take account of their age, and the nature, seriousness and consequences of the alleged crime;
- (b)** in *Dell'Orto* the Court ruled that the Framework Decision did not apply to legal persons who were victims;
- (c)** in *Katz* the Court ruled that the Framework Decision applied to private prosecutions, but it did not require Member States to permit persons bringing a private prosecution to give evidence as a witness, although there had to be some means by which that victim could submit testimony which would be taken into account as evidence;
- (d)** in *Eredics* the Court ruled again that the Framework Decision did not apply to legal persons who were victims, and also ruled that Member States had discretion over whether to provide for mediation in cases of fraud;
- (e)** in *Gueye and Salmeron Sanchez* the Court ruled that the Framework Decision did not regulate the question of the penalties to be applied to persons who were convicted of crime (in this case, crimes of domestic violence), and also ruled (similarly to the *Eredics* case) that Member States had discretion over whether to provide for mediation in cases of domestic violence;
- (f)** in *X*, the Court ruled that the Framework Decision could not be interpreted to mean that victims could require a prosecution to be brought, in Member States where the public prosecutor had discretion over whether or not to bring a criminal prosecution; also, child victims of sexual offences by their parents must be regarded as vulnerable victims; and
- (g)** in *Giovanardi*, the Court ruled that the Framework Decision did not have the effect of requiring Member States to impose criminal liability on legal persons, in order so that the Framework Decision would give the victims of crime the right to seek compensation against such legal persons.

The 2012 Directive does not overturn any of these rulings as such. Rather, it confirms that all child victims of crime have specific protection needs (Articles 22(4) and 24; a 'child' is defined in Article 2(1)(c) as any person younger than 18 years old), and sets out a different test for assessing whether adult victims have such needs: 'particular vulnerability to secondary and repeat victimisation, to intimidation and to retaliation' (Article 22; see also Recital 38 in the preamble, referred to above, which states expressly that (inter alia) victims of gender-based violence must be considered to be particularly vulnerable). Also, the question of when mediation might be required in criminal cases is now irrelevant, since the Directive, unlike the Framework Decision, does not require in principle that such mediation must be available, but rather sets out safeguards which apply if a Member State applies a system of restorative justice (as defined in Article 2(1)(d); see Article 12).

Finally, while the Directive does not require Member States to establish a system requiring prosecutors to bring proceedings following the victim's complaint, it does require Member States to provide for reviews of any decision not to prosecute (Article 11). This provision might be useful (inter alia) where a victim believes that a decision not to prosecute is based on bias on the part of the prosecution, for instance due to the sexual orientation or gender identity of the victim. According to the Directive, the 'procedural rules' for such reviews are determined by national law (Article 11(1)), but this rule does not give Member States any discretion as regards their substantive obligations to provide for such reviews, or to limit the grounds which might be pleaded in such challenges. In particular, it should always be possible to argue that a decision not to prosecute was discriminatory, in light of the obligation to deal with victims and respond to victims' complaints in a non-discriminatory manner (Article 1(1), and recitals 61 and 63 in the preamble) and the general respect for the principle of non-discrimination in EU law (recital 66 in the preamble). Recital 44 in the preamble clarifies that a 'decision ending criminal proceedings', which presumably includes a decision not to prosecute, 'should include situations where a prosecutor decides to withdraw charges or discontinue proceedings'.

However, it should be noted that the Directive provides for some special rules in this respect. Where (under national law) the role of the victim is established only after a decision not to prosecute has been taken, Member States 'shall ensure that at least the victims of serious crime' have such a right of review (Article 11(2)). While 'serious crime' is not defined, recital 8 in the preamble states that terrorism is a 'serious' violation of EU principles, and recital 18 in the preamble states that violence in close relationships is a 'serious' social problem. Therefore, it should also be arguable that bias crimes and hate crimes are 'serious' for the purposes of a right to review, inter alia in light of the obligation to give particular attention to victims who have suffered from such crimes when determining special protection needs (Article 22(3)). Recital 43 in the preamble also specifies that the right of review applies to 'decisions taken by prosecutors and investigative judges or law enforcement authorities such as police officers, but not to the decisions taken by courts', and that it 'does not concern special procedures, such as proceedings against members of parliament or government, in relation to the exercise of their official position'.

Victims must be notified of their right to receive information about their right to review a decision not to prosecute, 'without unnecessary delay'. They must receive this information if they request it (Article 11(3)). Normally the review must be carried out by a body independent of the body which decided not to prosecute (recital 43 in the preamble), but where the decision not to prosecute was taken by the highest prosecution authority and no review of that decision is possible under national law, the decision must be reviewed by the same authority (Article 11(4)). But the right to review does not apply if national law excludes it in cases where a prosecutor decides not to prosecute following an out-of-court settlement (Article 11(5); according to recital 45 in the preamble, this applies only where the settlement 'imposes a warning or an obligation').

3 Summary of the key definitions used in the Directive

As noted already, there are four express definitions in the Directive. The concept of a 'victim' includes anyone who has 'suffered harm...which was directly caused by a criminal offence'; such 'harm' includes 'physical, mental or emotional harm or economic loss', but this list of types of 'harm' is clearly non-exhaustive, as indicated by the word 'including' (Article 2(1)(a)(i)). Family members need only be covered by the concept of 'victim' when a person has died as a direct result of a criminal offence and family members of that person 'have suffered harm as a result of that death' (Article 2(1)(a)(ii)). Presumably 'harm' has the same broad meaning as it does in Article 2(1)(a)(i), and the existence of such harm can be presumed in the event of a family member's death – unless perhaps in highly exceptional cases where the family members are very deeply estranged, or were responsible for the death. The Directive therefore rules out the classic scenario where (for instance) a child kills his or her parents, and then expects sympathy as an orphan. Within the context of bias crimes, this might be relevant (for example) where a person discovers his or her family member's sexual orientation, and kills that person as a consequence.

The definition of 'family member' (in Article 2(1)(b)) first of all means a 'spouse'. This term is not further defined, but would obviously apply to anyone who was married under the law of a State (including a non-Member State, or a Member State other than that in which the crime was committed), whether the couple concerned were of opposite sexes or the same sex – although this would not entail an obligation to recognise a same-sex marriage celebrated in another State for any other purpose. This definition also includes 'the person who is living with the victim in a committed intimate relationship, in a joint household and on a stable continuous basis'; the relationships concerned could obviously be either between persons of the same sex or of opposite sexes. This interpretation is confirmed by analogy in a recent judgment of the Court of Justice in relation to discrimination on the basis of sexual orientation in employment, when the Court ruled that it was discriminatory to treat a person in a same-sex civil partnership differently from a person married to an opposite-sex spouse (Case C-267/12 *Hay*, judgment of 12 December 2013). Finally, the definition of 'family members' includes 'the relatives in direct line, the siblings and the dependants of the victim'. There is no requirement that a 'dependant' must be a blood relative or a relative by marriage, and so the concept could include (for instance) the children of a deceased partner, even in the absence of a marriage or civil partnership between the persons concerned (whether this absence is because the law does not provide for these possibilities, or due to the choice of the persons concerned not to avail of them), whether the partners are persons of the same sex or of opposite sexes.

While Member States can limit the number of family members who claim rights under the Directive, 'taking into account the individual circumstances of each case', or set priority as between family members (Article 2(2)), it would be incompatible with the principle of non-discrimination to exclude same-sex partners (regardless of the legal status of their relationship) entirely from the concept, purely on the grounds of their sexual orientation. This interpretation takes account of the recent case law of the European Court of Human Rights relating to family life and same-sex couples (see *Schalk v Austria* and *Kozak v Poland*). This case law will become even more relevant to the EU once the Union's planned accession to

the ECHR is completed, and in any event Member States are bound by it when transposing the EU legislation into national law.

Another key term is 'gender-based violence', which is defined (oddly) not in Article 2 of the Directive, but in its preamble (recital 17). According to this definition, 'gender-based violence' is violence which is 'directed against a person because of that person's gender, gender identity or gender expression or that affects persons of a particular gender disproportionately'; this form of violence 'may result in physical, sexual, emotional or psychological harm, or economic loss' for the victim; it is 'a form of discrimination' and 'includes violence in close relationships, sexual violence (including rape, sexual assault and harassment)...'.

The concepts of 'gender identity' and 'gender expression' are discussed further below. It should be noted that while this form of violence 'includes violence in close relationships', this is not the only form of violence which is covered by the concept, as indicated by the non-exhaustive word 'includes'. The possible forms of harm or economic loss referred to in this recital are not as such part of the definition of the concept of 'gender-based violence', as indicated by the words 'may result'; presumably the drafters of the Directive simply wanted to explain why this form of violence merited particular attention. It should be noted that the preamble expressly states that such violence is 'a form of discrimination'; indeed, the definition in effect encompasses both forms of discrimination: direct discrimination (violence directed against a person because of gender identity or gender expression (inter alia)) and indirect discrimination (affecting persons of a different gender disproportionately, although there is no express reference here to gender identity or gender expression).

4 Incident reporting, support services and awareness-raising

4.1 Incident reporting

The Directive obliges Member States to give victims written acknowledgement of their formal complaint to a competent authority of a Member State. In practice, this will normally mean that after a victim reports a crime to the police, they will have to acknowledge that report formally. This acknowledgement must state ‘the basic elements of the criminal offence concerned’ (Article 5(1)). According to recital 24 in the preamble, these ‘basic elements’ include issues ‘such as the type of crime, the time and place, and any damage or harm caused by the crime’. Logically, this would entail acknowledgement of hate crime, as a particular type of crime. Also, according to the same recital, the acknowledgement ‘should include a file number and the time and place for reporting of the crime in order to serve as evidence that the crime has been reported’. Victims must, if necessary, be given ‘linguistic assistance’ to make this complaint, or ‘be enabled to make the complaint in a language they understand’ (Article 5(2)). In that case, the victims must receive translation, free of charge, of the acknowledgment of their complaint in a language they understand (Article 5(3)).

There are also implicit obligations for Member States as regards the reporting of crimes in general. Article 28 requires Member States to provide to the Commission, by November 2017 and every three years afterward, ‘available data showing how victims have accessed their rights set out in this Directive’. Recital 64 in the preamble states further that Member States ‘should communicate to the Commission relevant statistical data related to the application of national procedures on victims of crime, including *at least the number and type of the reported crimes* and, as far as such data are known and are available, the number and age and gender of the victims’ (emphasis added). In light of (inter alia) the rules in the Directive on special protection needs, this must necessarily include information on hate or bias crimes, including homophobic and transphobic incidents. This would entail compiling disaggregated data (while ensuring victims’ anonymity) on the number of recorded bias crimes, including those based on gender identity and gender expression.

It is possible, as noted already, to have higher standards in national law. In this case, this could entail, for Member States which do not provide for bias or hate crime as a category of crime (or at least do not categorise crimes committed on the basis of sexual orientation, gender identity or gender expression as hate or bias crimes), compiling disaggregated data on the number of recorded crimes with a discriminatory motive.

4.2 Access to support services

Article 8(1) specifies that victims must have access to confidential victim support services, in accordance with their needs. The services must be offered free of charge, in the interests of victims, and before, during and for an appropriate time after criminal proceedings. Recital 37 in the preamble further specifies that support ‘should be available from the moment the competent authorities are aware of the victim’, and that support ‘should be provided through a variety of means, without excessive formalities and through a sufficient geographical distribution across the Member State to allow all victims the opportunity to access such services’. Furthermore, Article 8(1) states that family members (see the discussion of the definition of this term above) must also have access to such services based on the degree of harm they suffered due to the criminal offence against the victim.

According to Article 8(2), Member States must facilitate referral of victims to such services, from the competent authority which received the complaint and from ‘other relevant entities’. However, access to these services cannot be dependent upon the victim making a formal complaint to those authorities (Article 8(5)).

Next, Article 8(3) requires that Member States must establish free confidential specialist support services, either as part of or in addition to general victim support services, or to enable victim support bodies to call upon specialist support bodies. According to recital 38 in the preamble, specialist support services should be available to (inter alia) victims of gender-based violence.

The general and specialist support services may be either professional or voluntary, and may be public or non-governmental organisations (Article 8(4)). But Member States do not have any discretion as regards their very existence; there is a clear obligation to ensure that such services exist.

As to the content of victim support services, Article 9(1) states that they must, ‘as a minimum’ provide:

- (a) ‘information, advice and support’ on victims’ rights, ‘including on accessing national compensation schemes for criminal injuries’, and on the victims’ ‘role in criminal proceedings, including preparation for attendance at the trial’; it should be noted that a separate EU measure requires Member States to establish compensation schemes for victims of serious violent crime, and details the coordination of such schemes in cross-border situations (Directive 2004/80, OJ 2004 L 261/15); for the reasons set out above, it must be concluded that any violent crime committed with a bias motive is ‘serious’ for the purpose of that Directive also;
- (b) ‘information about or direct referral to any relevant specialist support services in place’;
- (c) ‘emotional and, where available, psychological support’;
- (d) ‘advice relating to financial and practical issues arising from the crime’; and
- (e) ‘advice relating to the risk and prevention of secondary and repeat victimisation, of intimidation and of retaliation’, unless this advice is ‘otherwise provided by other public or private services’.

Member States must encourage these support services to ‘pay particular attention’ to the specific needs of those victims who have ‘suffered considerable harm due to the severity of the crime’ (Article 9(2)). As for specialist services, unless this is provided by other public or private bodies, they must at least provide shelters for victims who need a safe place to stay, and targeted support for victims with specific needs, including victims of gender-based violence as defined in the preamble (Article 9(3)), including trauma support and counselling. Recital 38 in the preamble refers more specifically, as regards specialist support for victims of gender-based violence, to ‘immediate medical support, referral to medical and

forensic examination for evidence in cases of rape or sexual assault, short and long-term psychological counselling, trauma care, legal advice, [and] advocacy’.

It should again be recalled that Member States can set higher standards in their national law on these issues.

It is self-evident that the requirement to offer all of these services free of charge entails a requirement of public funding, at least to the extent that charitable donations do not fully fund and/or volunteer support cannot fully supply any or all of the services which must be available. While Article 8(4) provides that the support services can form part of a public organisation (presumably in whole or in part), Member States’ underlying obligation to ensure the availability of such services necessarily means that if some or all of the minimum requirements for victim support services set out in the Directive are not provided for by public organisations, Member States must support non-governmental organisations which are able to provide such services.

4.3 Awareness-raising

According to Article 26(2), Member States ‘shall take appropriate action, including through the Internet’, to raise awareness of the rights set out in the Directive. These measures must also aim to reduce ‘the risk of victimisation’ and minimise ‘the negative impact of crime and the risks of secondary and repeat victimisation, of intimidation and of retaliation’. They must ‘in particular’ target groups at risk, such as victims of gender-based violence.

The measures ‘may include’, in cooperation with ‘relevant civil society organisations and other stakeholders’ where appropriate, ‘information and awareness-raising campaigns and research and education programmes’. While these specific forms of campaigns and programmes are not obligatory as such (as indicated by the word ‘may’, which also indicates that the two measures referred to are not the only measures which could be applied), there is an underlying obligation to take *some* appropriate awareness-raising actions (as indicated by the word ‘shall’).

This provision is explained further by recital 62 in the preamble to the Directive, which specifies that ‘Member States should encourage and work closely with civil society organisations’, including NGOs working with crime victims, ‘in particular in policy-making initiatives’ as well as research and awareness-raising and ‘monitoring and evaluating the impact of measures to support and protect victims of crime’.

In order to comply with their obligations, Member States have to make victims aware of the rights in the Directive. Logically, this includes all measures referred to as ‘rights’, which encompasses most of the specific provisions of the Directive. Member States cannot ‘skip’ the awareness-raising as regards rights which might be particularly expensive to provide, or inconvenient for law enforcement authorities if exercised (cf the right to challenge the decision not to prosecute). Arguably a ‘letter of rights’ (as expressly provided for criminal suspects, in separate EU legislation), handed to the victim upon making a crime report and/or contact with other relevant authorities or NGOs, would be a good way of raising awareness of crime victims’ rights.

The messages must also target groups at risk, with victims of gender-based violence referred to specifically. Logically, such groups must be made aware in particular of the specific rights available for persons with ‘specific protection needs’. It will often be the case that targeting specific groups will only be possible or fully effective in collaboration with specialist NGOs.

Although the wording of the Directive points towards raising the awareness of *victims* about their rights, it could be argued that the other objectives such as reducing the impact of crime could be accomplished by discouraging potential *offenders* from committing the offences in question in the first place. Equally, informing victims about their rights necessarily entails informing them about the relevant criminal law, if there is any possibility that they might be unaware that the actions which they suffered from are a crime. This would mean that the awareness messages have to be tailored to take account of specific national criminal laws, including (where relevant) laws on hate crimes, such as the possibility for a bias motive to be reported and considered as an aggravating circumstance.

In any event, an awareness-raising campaign aimed at would-be offenders would constitute a higher standard in national law, which Member States are permitted to apply. Such an awareness campaign would to some extent logically have to focus on specific forms of crime, as a campaign solely discouraging people from committing *any* forms of crime would likely have too diffuse an impact. It could focus on the existence of the criminal law obligation, and the consequences of the offence for both the offender and the victim. On the other hand, a broader campaign making would-be offenders aware of specific victims' rights such as the right to compensation from the offender might possibly have a deterrent effect as regards crime in general.

As regards the other aspects of this provision, Article 26(2) refers specifically to research and education, while the preamble refers to policy-making initiatives and monitoring and evaluating the impact of measures to support crime victims. Such types of measures would include examining the effectiveness of measures which implement the Directive and recommending whether they should be retained or strengthened, as well as assessing whether the Directive has been implemented correctly. A possible higher standard in national law would be supporting civil society to challenge government action for non-implementation or incorrect implementation of the Directive, and/or to support individual victims who wish to make such challenges.

5 Specific protection needs and protection measures for victims

There are two provisions in the Directive devoted to crime victims with specific protection needs (Articles 22 and 23), and also a special provision devoted to children (Article 24), which will not be further discussed here, although it could be relevant, for example, to teenage victims of homophobic attacks. Articles 22 and 23 address in turn the identification of the crime victims with specific protection needs, and the right to protection of such victims once they have been identified.

As regards the assessment, first of all, according to Article 22(1), it must be ‘timely’ and ‘individual’, but ‘in accordance with national procedures’. However, the reference to national procedure does not mean that Member States have an option of not providing for such a procedure at all – only that they have a degree of discretion over the details of providing for it. Recital 55 in the preamble clarifies further that this assessment ‘should be carried out at the earliest possible opportunity’ and states that it ‘should be carried out for all victims’. It is therefore not possible for Member States to carry out such assessments for certain groups of victims only, or to make those assessments available only upon the request of the victims, or otherwise to deny an individual assessment to any crime victim for any reason whatsoever. While Article 22(6) refers to (in effect) the possible waiver of a right to benefit from special measures, there is no reference in the Directive to any possible waiver of the individual assessment for possible specific protection needs.

The purpose of the assessment is to determine whether the person concerned would benefit from ‘special measures in the course of criminal proceedings, due to their particular vulnerability to secondary and repeat victimisation, to intimidation and retaliation’. Furthermore, Member States must update individual assessments ‘throughout the criminal proceedings’, if the elements which the original assessment was based on ‘have changed significantly’ (Article 22(7)).

According to Article 22(2), the individual assessment must ‘take into account’ the personal characteristics of the victim, the type or nature of the crime and the circumstances of the crime. The criterion relating to the ‘type or nature’ of the crime would obviously be relevant to hate or bias crime, but the personal characteristics of the victims and the circumstances of the crime would obviously also be relevant to such cases. In any event, this is a non-exhaustive list, as indicated by the words ‘in particular’.

This interpretation is confirmed by Article 22(3), which expressly states that ‘particular attention’ must be paid to (inter alia) crime victims ‘who have suffered a crime committed with a bias or discriminatory motive which could, in particular, be related to their personal characteristics’ and that victims of ‘hate crime’ must be ‘duly considered’. Recital 57 in the preamble states that there must be a ‘strong presumption’ that such victims have specific protection needs. As noted above, recital 56 in the preamble states that individual assessments must consider the ‘personal characteristics of the victim’, inter alia his or her ‘gender and gender identity or expression, [...] sexual orientation’, as well as the characteristics of the crime, inter alia ‘whether it is a hate crime, a bias crime or a crime committed with a discriminatory motive’.

As for general rules on assessment of such needs, the individual assessment ‘may be adapted according to the severity of the crime and the degree of apparent harm suffered by the victim’ (Article 22(5)). Victims must be ‘closely involved’ with

individual assessments, and Member States must 'take into account their wishes', including where they do not wish to benefit from special measures (Article 22(6)). This provision does not require Member States to comply with victims' wishes in all cases, but it does perhaps create a rebuttable presumption that those wishes must be complied with, and a procedural obligation to explain why the Member State did not comply. As a higher standard in national law, it would be possible to require the authorities to comply with those wishes in some or all cases.

This brings us to the question of legal challenges to individual assessments. The directive makes no express reference to the possibility of such legal challenges, but the right to an effective remedy set out in Article 47 of the EU Charter of Fundamental Rights, along with the principle of effectiveness forming part of EU law, must mean that Member States are nonetheless obliged to provide for one, in particular where no such assessment was carried out, or the assessment did not comply with the minimum rules in the Directive, or the assessment reached the wrong result (either by failing to identify any specific protection needs or by not determining that the 'correct' special measures were required).

Once a crime victim is determined to have specific protection needs, what special measures can he or she benefit from? Article 23(1) states that Member States must ensure that those crime victims 'may benefit from' the measures listed in Article 23(2) and (3). The first list applies 'during criminal investigations', while the second list applies 'during court proceedings'. In particular, the first list regulates interviews with crime victims. Interviews must be 'carried out in premises designed or adapted for that purpose'; 'by or through professionals trained for that purpose'; 'conducted by the same person unless this is contrary to the good administration of justice'; and 'conducted by a person of the same sex as the victim, if the victim so wishes' in certain cases, including gender-based violence cases. The latter right does not apply if the criminal procedure would be prejudiced, or if the interview is carried out by a prosecutor or judge, although otherwise it appears that the victim's wishes must be complied with in this case.

The second list provides that, during court proceedings, crime victims with specific protection needs are entitled to measures: 'to avoid visual contact between victims and offenders'; 'to ensure that the victim may be heard in the courtroom without being present'; 'to avoid unnecessary questioning about the victim's private life not related to the criminal offence'; and 'allowing a hearing to take place without' the presence of the public.

Both these lists are subject to overriding exceptions, according to Article 23(1). First of all, the relevant measures cannot prejudice defence rights, meaning for instance that some form of cross-examination of a victim who gives evidence in a trial must be possible. Holding a hearing out of the presence of the public is also an exception (albeit a permitted one) to the normal rules on the right to a fair trial set out in Article 6(1) ECHR. Secondly, they must be applied 'in accordance with the rules of judicial discretion', which is presumably especially relevant to the provisions on trials set out in the second list. Third, the special measure 'shall not be made available if operational or practical constraints make this impossible'. It should be noted that the constraints must make the special measure impossible, not merely difficult.

Finally, the relevant special measures shall not be made available if 'there is an urgent need to interview the victim and failure to do so could harm the victim or another person or could prejudice the course of the proceedings'. This final exception should not normally be applicable simply because, for instance, there is a few days' extra delay before holding an interview, unless there is a legal deadline which must be satisfied or reason to believe that the delay in taking evidence would actually affect the legal process.

As with other provisions of the Directive, the relevant provisions of Article 23 are clarified by recitals in the preamble. According to recital 58, 'the victim's concerns and fears in relation to proceedings should be a key factor in determining whether they need any particular measure'. As for the exceptions to special measures, recital 59 indicates that, for example, it might not be possible for a crime victim always to be interviewed by the same police officer, due to the officer's leave, or to be interviewed in a specially adapted building, due to renovation.

6 Training measures

Article 25 sets out the rules relating to training of practitioners. According to Article 25(1), Member States must ensure that ‘officials likely to come into contact with victims’ must ‘receive general and specific training’ in order ‘to increase their awareness of the needs of victims and to enable them to deal with victims in an impartial, respectful and professional manner’. This provision refers specifically to ‘police officers and court staff’, but this list is not exhaustive, as indicated by the words ‘such as’.

Article 25(2) deals more specifically with judges and prosecutors involved in criminal proceedings. Member States must request that ‘those responsible for’ their training ‘make available both general and specialist training’ to increase their awareness of crime victims’ needs. As compared to Article 25(1), there is no reference to training the judges and prosecutors to ‘deal with victims’.

A similar rule applies to the training of lawyers (Article 25(3)). It is not limited in scope to public-sector lawyers, but equally applies to lawyers in private practice.

Next, Article 25(4) requires Member States to ‘encourage initiatives’ to enable ‘those providing victims support and restorative justice services’ to receive training to ‘observe professional standards’, so as to provide such services ‘in an impartial, respectful and professional manner’.

Finally, Article 25(5) sets out a general rule applicable to all types of ‘practitioner’. Their training must enable them ‘to recognise victims and to treat them in a respectful, professional and non-discriminatory manner’.

These provisions are explained further in recital 61 in the preamble, which first of all adds that training should be ‘ongoing’, that it should enable them to identify victims’ ‘needs’ and to deal with victims in a ‘sensitive’ manner. More specifically, those who will probably be involved in the individual assessment of victims’ special protection needs (see above) ‘should receive specific training on how to carry out such an assessment’. Similarly, those who provide victim support or restorative justice services should be trained ‘on the specific support services to which victims should be referred’, or ‘receive specialist training where their work focusses on victims with specific needs and specific psychological training’. Recital 62 also states that Member States should work with civil society organisations and NGOs as regards training.

Taken as a whole, these provisions require all practitioners to be trained as regards crime victims with specific protection needs, which include (as we have seen) those who have suffered from gender-based violence. This also includes, where relevant, training as regards recognition of such persons and of their specific needs. Such training must necessarily involve an understanding of the applicable substantive law regarding hate or bias crime, and of the concept of ‘crime committed with a bias or discriminatory motive which could, in particular, be related to [the victim’s] personal circumstances’, even in the absence of specific criminal law provisions in a given Member State. As recital 62 recognises, civil society organisations and NGOs are well placed to assist in such training. Finally, recital 61 refers to the ‘exchange of best practices’ between Member States in this area. This could include the sharing of curriculum as regards (inter alia) training relating to the victims of hate or bias crime, or possibly even a project to draw up a model curriculum on this subject.

7 Translation tables

The Directive includes references to certain concepts relevant for applying it to hate and bias crimes. The concepts of sexual orientation, gender identity and gender expression should, according to ILGA-Europe, be understood as follows:

a) “sexual orientation”: refers to each person’s capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender.

b) “gender identity”: refers to each person’s deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modifications of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerism (Yogyakarta Principles).

c) “gender expression”: refers to people’s manifestation of their gender identity, and the one that is perceived by others. Typically, people seek to make their gender expression or presentation match their gender identity/identities, irrespective of the sex that they were assigned at birth.

English	Sexual orientation	Gender identity	Gender Expression
Bulgarian	Сексуална ориентация	Полова идентичност	проявление на пола
Croatian	sexuálníorientace	rodová identita, genderová identita	vnějšígenderovéprojevy or vnějšíprojevygenderu
Czech	sexuální orientace	rodová identita, genderová identita	vnější genderové projevy or vnější projevy genderu
Danish	Seksuelt orientering'	kønsidentitet	kønsudtryk
Dutch	Seksuele gerichtheid	Genderidentiteit	genderexpressie
Estonian	Seksuaalne orientatsioon	Sooline identiteet	sooväljendus
Finnish	Seksuaalinen suuntautuminen	Sukupuoli-identiteetti (often used together with "sukupuolen ilmaisu" which means "gender expression")	sukupuolen ilmaisu (noun) ilmaista sukupuoliitaan (verb; "to express one's gender")
French	Orientation sexuelle	Identité de genre	Expression du genre
German	sexuelle Orientierung	Geschlechtsidentität	Geschlechtsausdruck
Greek	σεξουαλικός προσανατολισμός (EU and national legislation: γενετήσιος προσανατολισμός)	ταυτότητα κοινωνικού φύλου or ταυτότητα φύλου	έκφραση φύλου or έκφρασις φύλου
Hungarian	szexuális irányultság	nemi identitás	nemi önkifejezés
Italian	Orientamento sessuale	Identità di genere	espressione di genere
Latvian	seksuālā orientācija	dzimumidentitāte	dzimuma izpausme
Lithuanian	Seksualinė orientacija	Lyties tapatybė	lyties raiška
Maltese	orjentazzjoni sesswali	identità tal-ġeneru	Espressjoni tal-Ġeneru
Polish	Orientacja seksualna	Tożsamość płciowa	ekspresja płciowa
Portuguese	Orientação sexual	Identidade de género	Expressão de género
Romanian	Orientare sexuală	Identitate de gen	expresia identitatii de gen
Slovakian	sexuálna orientácia	rodová identita	rodový prejav
Slovenian	Spolna usmerjenost	Spolna identiteta/spolni izraz	spolni izraz
Spanish	Orientación sexual	Identidad de género	expresión de género
Swedish	Sexuell läggning	Könsidentitet	könsuttryck

8 Conclusions

The 2012 Directive on crime victims has the potential to make a significant contribution to the protection of crime victims in general, and to the protection of victims of hate and bias crime in particular. However, this depends upon its full and timely application by Member States. The following checklist summarises the relevant obligations of Member States, as more fully explained above in this report.

Checklist: Member States' obligations

The crime victims' Directive increases the rights conferred by prior EU legislation, in particular as regards specific protection needs; it does not reduce those rights

The Directive must be applied in a non-discriminatory manner, which includes a requirement to treat people in a different situation differently

The Directive requires special treatment for persons subjected to 'gender-based violence', and specifies that account must be taken both of the nature of the crime and the characteristics of the victim, when it comes to bias crime

The Directive is intended to give effect to the human rights of victims as set out in international treaties and 'soft law' measures such as the Council of Europe's Committee of Ministers Recommendations Rec(2006)8 to member states on assistance to crime victims and Rec(2010)5 to member states on measures to combat discrimination on grounds of sexual orientation or gender identity, and OSCE Ministerial Council Decision 9/09 of December 2009

The concept of a 'family member' in the Directive includes a 'spouse', which includes anyone who was married under the law of any State, whether the couple concerned are of opposite sexes or the same sex, as well as 'the person who is living with the victim in a committed intimate relationship, in a joint household and on a stable continuous basis', which should also encompass a same-sex relationship; Member States cannot limit the number of family members covered by the Directive purely on grounds of sexual orientation

A key element of the Directive is its specific application to 'gender-based violence', namely (inter alia) violence which is 'directed against a person because of that person's gender, gender identity or gender expression'

The Directive requires police officers to acknowledge formally any crime reported to them; this must include the type of crime in question, including hate or bias crimes

Member States must gather and report data on the number and type of reported crimes, including hate or bias crimes, including disaggregated data on the different types of bias crimes; where national law does not define crimes committed due to the sexual orientation, gender identity or gender expression of the victims as bias crimes, it would still be possible and desirable to collect disaggregated data on crimes committed with a discriminatory motive

Member States must ensure victims' access to support services free of charge, which means that they must ensure that such services exist and fund them adequately ; this includes (for victims of gender-based violence) medical support, psychological counselling, trauma care and legal advice

Member States must undertake awareness-raising and research measures regarding victims' rights generally, and the rights of victims of gender-based violence in particular; this could include a 'letter of rights' for victims and raising the awareness of potential victims, and must take account of relevant national criminal law

There is a strong presumption that victims of gender-based violence have specific protection needs, entailing a right to special measures in criminal proceedings, such as protection during criminal investigations (in particular, interviews) and when giving evidence in court; the failure to carry out an individual assessment to identify the existence of such needs, or the results of an inadequate assessment, can be legally challenged

All categories of legal practitioner who come into contact with crime victims need general training on victims' rights and specialist training on the specific protection needs of the victims of gender-based violence