

An analysis of the Victims' Rights Directive from a gender perspective



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Report prepared by Sylwia Spurek, PhD



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List of abbreviations

| | |
|--------------|----------------------------------------------------------------------------|
| CEDAW | Convention on the Elimination of All Forms of Discrimination against Women |
| CoE | Council of Europe |
| ECHR | European Court of Human Rights |
| EIGE | European Institute for Gender Equality |
| EU | European Union |
| FRA | European Fundamental Rights Agency |
| UN | United Nations |
| UNDP | United Nations Development Fund |
| UNECE | United Nations Economic Commission for Europe |
| WAVE | Women against Violence Europe |

I. Introduction





I. Introduction

This report analyses 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 replacing Council Framework Decision 2001/220/JHA, also called the 'Victims' Rights Directive'. The analysis has been conducted from a gender perspective ⁽¹⁾. The study is focused on the specificities of the implementation of the Directive vis-à-vis victims of gender-based violence and their access to justice. The aim is to assess the Directive from the perspective of victims of gender-based violence so as to critically examine measures that could be counterproductive or cause unintended effects, as well as those that could support victims.

The report is divided into three parts. The first part of the report — Introduction — includes definitions of gender-based violence that are provided in international documents adopted in both the United Nations' universal systems and in regional systems — namely, the European Union and Council of Europe. It also refers to the most relevant standards for gender-based violence victim protection measures and data collection developed within these systems and by other organisations. The end of the first part provides background information on the context of the Victims' Rights Directive.

The methodology is presented in detail in the second part. The third and essential part of the report is an analysis of the Directive from a gender perspective, taking into account the particular situation of victims of gender-based violence. Every article of the Directive is analysed separately using two methods: firstly, according to the rules of legal interpretation, and secondly, in the form of a SWOT analysis, which identifies the **strengths, weaknesses, opportunities and threats** of the Directive's implementation.

1.1. Definitions

The term 'gender-based violence' has been defined in several international documents. In 1992, in one of its general recommendations, the Committee on the Elimination of Discrimination against Women — a United Nations treaty body that oversees the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) — defined gender-based violence as violence that is directed against a woman because she is a woman or which affects women disproportionately. According to the recommendation, the term includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty ⁽²⁾. It should be noted from the outset that while not all victims of gender-based violence are women, and not all offenders ⁽³⁾ are men, there is nevertheless a marked gender imbalance (most victims are women and most offenders are men). In many cases, therefore, the term 'gender-based violence' may be taken as primarily involving women or girl victims.

The Beijing Platform for Action (BPfA), established at the Fourth UN World Conference on Women (held in Beijing, China in 1995 ⁽⁴⁾), defined the term 'violence against women' as any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life. Accordingly, violence against women encompasses, but is not limited to, physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of girls in the household, dowry-related violence, marital rape, female genital mutilation (FGM) and other traditional practices harmful to women; non-spousal violence and violence related to exploitation;

⁽¹⁾ On the gender analysis, see the United Nations Development Programme publication, <http://www.undp.org/content/dam/undp/library/gender/Institutional%20Development/TLGEN1.6%20UNDP%20GenderAnalysis%20toolkit.pdf>.

⁽²⁾ General Recommendation No 19 on Violence against Women, <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm>.

⁽³⁾ In its use of the term 'offender', this report adopts the definition provided in recital 12 of the Directive: 'The term "offender" refers to a person who has been convicted of a crime. However, for the purposes of this Directive, it also refers to a suspected or accused person before any acknowledgement of guilt or conviction, and it is without prejudice to the presumption of innocence.'

⁽⁴⁾ See <http://www.un.org/womenwatch/daw/beijing/platform/violence.htm>. See also the definition in the Declaration on the Elimination of Violence against Women, <http://www.un.org/documents/ga/res/48/a48r104.htm>.

physical, sexual and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere; trafficking in women and forced prostitution; physical, sexual and psychological violence perpetrated or condoned by the state, wherever it occurs. The Beijing Platform for Action also specifies that violence against women includes violations of the rights of women in situations of armed conflict, including systematic rape, sexual slavery and forced pregnancy. The BPfA definition also includes forced sterilisation, forced abortion, coerced or forced use of contraceptives, prenatal sex selection and female infanticide. The Beijing Platform for Action further recognises the particular vulnerabilities of the following groups of women: women belonging to minorities; the elderly and the displaced; indigenous, refugee and migrant women, including women migrant workers; disabled women; women living in impoverished rural or remote areas, or in detention; destitute women; girls; and women living in poverty.

A definition of gender-based violence was recently formulated in the Council of Europe Convention on preventing and combating violence against women and domestic violence ⁽⁵⁾. According to Article 3 of the Convention, gender-based violence against women means violence that is directed against a woman because she is a woman or that affects women disproportionately (wherein the term ‘women’ also includes girls under the age of 18). ‘Violence against women’ is also defined and understood as ‘a violation of human rights and a form of discrimination against women and shall mean all acts of gender-based violence that result in, or are likely to result in, physical, sexual, psychological or economic harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life’.

The documents adopted at the European level concerning violence against women or gender-based violence use the definitions included in the above-mentioned texts. The Directive will be analysed in detail in the third part of this report.

1.2. Instruments to eradicate gender-based violence

The obligations of Member States to eliminate gender-based violence are determined internationally in human rights law ⁽⁶⁾. One of the most significant instruments is

the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), adopted in 1979 in the UN system. It is often described as an international bill of women’s rights. Though the Convention does not mention gender-based violence, the CEDAW Committee, in its General Recommendation No 19, clarifies that gender-based violence constitutes a form of discrimination against women and is therefore covered by the Convention. General Recommendation No 19 sets out the complex obligations of states in the context of gender-based violence, in terms of laws, awareness-raising, training, prevention, victim support and data collection ⁽⁷⁾. In addition to the Committee recommendations, in order to better understand states’ obligations under CEDAW, one should also have regard to CEDAW Committee Concluding Observations for government reports (in state reporting procedures) and the views put forward under the procedure of the Optional Protocol to CEDAW. For the purpose of this report, the views expressed in several domestic violence cases are worth mentioning. In these cases, the Committee consistently held states accountable for their failure to act with due diligence to protect victims effectively against domestic violence, in line with its General Recommendation No 19. In *A.T. v. Hungary*, the Committee noted the low priority afforded by national courts to cases of domestic violence and condemned Hungary’s failure to eliminate the causes of widespread violence against women in the country ⁽⁸⁾. In the two communications submitted to the Committee against Austria, *Yildirim v. Austria* and *Goecke v. Austria* ⁽⁹⁾, the Committee concluded that the state had breached its obligation of due diligence to protect both deceased women — victims of long-standing domestic violence — primarily by prioritising the perpetrators’ rights to liberty over the physical safety of their partners ⁽¹⁰⁾.

Another UN instrument is the Beijing Platform for Action of 1995, which reaffirms the fundamental principle set out

⁽⁷⁾ See also other CEDAW Committee general recommendations, such as CEDAW General Recommendation No 24 on women and health (1994), which specifies state obligations to address gender-based violence in the context of the health sector.

⁽⁸⁾ Views adopted on 26 January 2005, <http://www.un.org/womenwatch/daw/cedaw/protocol/decisions-views/CEDAW%20Decision%20on%20AT%20vs%20Hungary%20English.pdf>.

⁽⁹⁾ See <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N07/495/37/PDF/N0749537.pdf?OpenElement>; <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N07/495/43/PDF/N0749543.pdf?OpenElement>.

⁽¹⁰⁾ Other legally binding UN instruments could be taken into account in terms of eliminating gender-based violence. For instance, domestic violence has begun to be compared to torture or cruel, inhuman or degrading treatment (see R. Copelon, ‘Intimate Terror: Understanding Domestic Violence as Torture’, in *Human Rights of Women. National and International Perspectives*, ed. R. J. Cook, Philadelphia, 1994, p. 116). In this respect, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment could be treated as a significant UN instrument to eradicate gender-based violence.

⁽⁵⁾ See <http://www.coe.int/t/dghl/standardsetting/conventionviolence/convention/Convention%20210%20English.pdf>.

⁽⁶⁾ The preamble of the Victims’ Rights Directive refers to some of them, including CEDAW and the Convention on preventing and combating violence against women and domestic violence.



in the Vienna Declaration and Program of Action, namely that the human rights of women and the girl child are an inalienable, integral and indivisible part of universal human rights. Under Strategic Objectives D, the Beijing Platform for Action lists the actions to be taken to prevent and eliminate violence against women. In addition, the United Nations General Assembly adopted several resolutions on combating violence against women (see, for example, 'Elimination of domestic violence against women', 'Intensification of efforts to eliminate all forms of violence against women', and 'Strengthening crime prevention and criminal justice measures to eliminate violence against women')⁽¹¹⁾.

There have also been initiatives to harmonise law-drafting standards in Member States at UN level. For instance, the *Handbook for Legislation on Violence against Women* was prepared to assist states and other stakeholders in enhancing existing laws or developing new laws to protect women (2010)⁽¹²⁾. The report *A framework for model legislation on domestic violence* by Radhika Coomaraswamy, the Special Rapporteur on violence against women, reviews its causes and consequences and it could also be useful in the area of domestic violence against women (1996)⁽¹³⁾. It outlines important elements of comprehensive legislation on intimate partner violence (IPV)⁽¹⁴⁾.

The most significant and recent document adopted within a regional system — the Council of Europe — is the Convention on preventing and combating violence against women and domestic violence, often referred to as the 'Istanbul Convention', which entered into force on 1 August 2014⁽¹⁵⁾. It introduces a legally binding framework for state measures to eliminate violence against women, covering areas of integrated policies and data collection, prevention, protection and support, substantive law, investigation, prosecution, procedural law and protective measures, migration and asylum, and international cooperation.

The second legally binding instrument of the Council of Europe is the Convention for the Protection of Human Rights and Fundamental Freedoms. The Convention sets

out a number of fundamental rights and freedoms, such as right to life, prohibition of torture, prohibition of slavery and forced labour, right to liberty and security, right to a fair trial, no punishment without law, right to respect for private and family life, freedom of thought, conscience and religion, freedom of expression, freedom of assembly and association, right to marry, right to an effective remedy, and prohibition of discrimination. More rights are granted by additional protocols to the Convention. All alleged violations of human rights are referred to the European Court of Human Rights (ECHR) in Strasbourg, which deals with individual and inter-state petitions. The ECHR has dealt with gender-based violence cases on multiple occasions, including cases of intimate partner violence. The cases dealing with intimate partner violence refer to a violation of Article 2 on the right to life, Article 13 on the right to an effective remedy, Article 8 on the right to respect for family life, Article 3 on the prohibition of inhuman or degrading treatment, and Article 14 on the prohibition of discrimination. In 2009, in a landmark case, *Opuz v. Turkey*, the ECHR found Turkey in violation of its obligations to protect women from domestic violence, and for the first time held that gender-based violence is a form of discrimination under the Convention for the Protection of Human Rights and Fundamental Freedoms⁽¹⁶⁾.

The adoption of the Convention on preventing and combating violence against women and domestic violence was preceded by several political documents. For example, in 2000, in Recommendation 1450 (2000), the Parliamentary Assembly of the Council of Europe condemned violence against women as being a general violation of women's rights as human beings⁽¹⁷⁾. In turn, the Committee of Ministers of the Council of Europe, in its landmark Recommendation Rec(2002)5 on the protection of women against violence, underlined necessary measures in terms of services, legislation, policymaking, intervention vis-à-vis perpetrators, awareness-raising, education and training, and data collection⁽¹⁸⁾. Analytical studies were prepared regarding

⁽¹¹⁾ See <http://www.un.org/womenwatch/daw/vaw/v-work-ga.htm>. The UN has also adopted separate resolutions on female genital mutilation.

⁽¹²⁾ *Handbook for Legislation on Violence against Women* (2010): <http://www.un.org/womenwatch/daw/vaw/handbook/Handbook%20for%20legislation%20on%20violence%20against%20women.pdf>

⁽¹³⁾ See <http://www.unhcr.ch/Huridocda/Huridoca.nsf/TestFrame/72e640b38c51653b8025675300566722?OpenDocument>.

⁽¹⁴⁾ See also *Handbook on model framework for National Action Plans on violence against women*, <http://www.un.org/womenwatch/daw/vaw/handbook-for-nap-on-vaw.pdf>.

⁽¹⁵⁾ See http://www.coe.int/t/dghl/standardsetting/convention-violence/default_en.asp.

⁽¹⁶⁾ See [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-92945#{"itemid":\["001-92945"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-92945#{). See also other cases: http://www.echr.coe.int/Documents/FS_Violence_Woman_ENG.pdf. At the European level, the Organization for Security and Cooperation in Europe is also operating and adopted OSCE Ministerial Decision No 15/05 'Preventing and Combating Violence against Women', which addresses violence against women as a violation of human rights and a threat to human security. It calls upon OSCE-participating states to take all necessary legislative, policy and programmatic monitoring and evaluation measures to promote and protect the full enjoyment of the human rights of women and to prevent and combat all forms of gender-based violence against women and girls, <http://www.osce.org/mc/17451?download=true>.

⁽¹⁷⁾ See <http://assembly.coe.int/main.asp?Link=/documents/adoptedtext/ta00/erec1450.htm>.

⁽¹⁸⁾ See <https://wcd.coe.int/ViewDoc.jsp?id=280915>.

the results of the monitoring of the implementation of Recommendation Rec(2002)5 in Council of Europe Member States. The implementation of this Recommendation is monitored regularly ⁽¹⁹⁾.

Political commitments addressing gender-based violence have also been made within the European Union. The Council Conclusions of 2014 on preventing and combating all forms of violence against women and girls, including female genital mutilation ⁽²⁰⁾, the Council Conclusions of 2012 on combating violence against women and the provision of support services for victims of domestic violence ⁽²¹⁾, as well as the Council Conclusions on the eradication of violence against women in the EU, adopted in 2010 ⁽²²⁾, should be mentioned. The European Parliament has taken a stand on combating all forms of violence against women on multiple occasions. Three European Parliament resolutions are important to mention here: the 2006 resolution on the current situation in combating violence against women and any future action; the 2009 resolution on the elimination of violence against women ⁽²³⁾; and the 2011 resolution on the priorities and outline of a new EU policy framework to fight violence against women ⁽²⁴⁾. The documents include valuable provisions concerning support for victims, prosecution of perpetrators and services applying a gender equality perspective. However, they have no binding force.

1.3. Sources of data and indicators

One of the obligations of the Victims' Rights Directive concerns data collection. Articles 28 and 29, as well as recital 64, pertain to regular monitoring of the implementation of the Directive. The development of common indicators can provide valuable support to the monitoring of the implementation of the Directive. The European Institute for Gender Equality (EIGE) in its report *Mapping the international activities in the field of data collection on gender-based violence across the EU* reviewed data collection activities by EU bodies and other international organisations, as well as some European-wide civil society organisations ⁽²⁵⁾. Following a list of the activities, below, this section of the report will then focus on the most recent and relevant actions in this field, namely those of the UN, the Council of Europe and selected NGOs:

- (1) European-specific standards for the collection of data on gender-based violence against women have been developed in reports funded by the European Commission, such as the Eurobarometer on Domestic Violence against Women in 1999 and in 2010 ⁽²⁶⁾.
- (2) The European Union Agency for Fundamental Rights (FRA) has collected comparable data on the extent, frequency and severity of violence against women in its report *Violence against women — an EU-wide survey* ⁽²⁷⁾.
- (3) The European Institute for Gender Equality has made significant efforts to map the administrative data sources of EU Member States on violence against women, thereby identifying gaps in official data ⁽²⁸⁾.
- (4) Lastly, mention should be made of indicators adopted at EU level for the follow-up of the Beijing Platform for Action ⁽²⁹⁾.

At the United Nations level, the Report to the Statistical Commission on indicators on violence against women was

⁽¹⁹⁾ *Protecting women against violence. Analytical study of the results of the third round of monitoring the implementation of Recommendation Rec(2002)5 on the protection of women against violence in Council of Europe Member States*, http://www.coe.int/t/dghl/standardsetting/equality/03themes/violence-against-women/cdeg_2010_12en.pdf. See also Recommendation No R(85)4 on violence in the family, <https://wcd.coe.int/wcd/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=604990&SecMode=1&DocId=686100&Usage=2> and Recommendation on social measures concerning violence within the family, <https://wcd.coe.int/wcd/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=569827&SecMode=1&DocId=589942&Usage=2>.

⁽²⁰⁾ See <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%209543%202014%20INIT>.

⁽²¹⁾ See http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/lsa/134081.pdf.

⁽²²⁾ See http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/lsa/113226.pdf.

⁽²³⁾ OJ C 285 E, 21.10.2010, p. 53.

⁽²⁴⁾ OJ C 296 E, 2.10.2012, p. 26. The European Parliament has also adopted separate resolutions on female genital mutilation.

⁽²⁵⁾ See the *Study on international activities in the field of data collection on gender-based violence across the EU*, http://eige.europa.eu/sites/default/files/Study%20on%20international%20activities%20in%20the%20field%20of%20data%20collection%20on%20gender-based%20violence%20across%20the%20EU_0.pdf.

⁽²⁶⁾ See http://ec.europa.eu/public_opinion/archives/ebs/ebs_344_en.pdf. The European Commission called for a common EU framework of indicators and data collection on violence against women: Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee 'Developing a comprehensive and coherent EU strategy to measure crime and criminal justice: An EU Action Plan 2006–2010'. However, such a framework has not yet been put in place.

⁽²⁷⁾ See <http://fra.europa.eu/en/project/2012/fra-survey-gender-based-violence-against-women>.

⁽²⁸⁾ See <http://eige.europa.eu/gender-based-violence/administrative-data-sources>.

⁽²⁹⁾ See <http://eige.europa.eu/internal/bpfa/results/#/92/description>.



prepared in 2009⁽³⁰⁾. This list of indicators is based primarily on two criteria –the availability of data at the national level and the seriousness of the violence. The UN also hosted an Expert Group Meeting on indicators to measure violence against women in 2007, the result of which was ‘Working Paper I: Indicators to measure violence against women’⁽³¹⁾. The United Nations Economic Commission for Europe (UNECE) has carried out activities that take into account gender-based violence specifically in the EU and has developed indicators on violence against women (a survey module)⁽³²⁾. In 2011, UN Women compiled a dataset presenting existing prevalence data from 86 countries on physical and sexual violence against women, forced sexual initiation and abuse during pregnancy⁽³³⁾.

Recent developments in the Council of Europe’s Istanbul Convention and its explanatory report should also be mentioned. The Convention stresses the need to ‘collect disaggregated relevant statistical data’, specifically statistics disaggregated by sex, and common indicators in order to better evaluate the following: the extent of violence against women; the medium- and long-term consequences of violence for victims; the health-based, social and economic costs of violence against women; the efficiency of the judiciary and legal systems in combating violence against women; the causes of violence against women, i.e. the reasons that lead men to be violent and the reasons why society condones such violence; and the elaboration of benchmarking criteria in the field of violence. As the minimum requirement for data on victims and perpetrators, the Convention underlines, inter alia, the relationship between the perpetrator and the victim. The Council of Europe has also published compilations of national legislation studies

that identify a series of relevant categories of administrative data in the field of violence against women and domestic violence⁽³⁴⁾.

It is also important to mention WAVE’s (Women against Violence Europe) activities on developing indicators and data collection, such as the *Guidance report for the improvement of data on gender-based violence against women in the European Union*⁽³⁵⁾ and the country report 2012⁽³⁶⁾.

1.4. The context of the adoption of Directive 2012/29/EU

The Victims’ Rights Directive forms part of a horizontal package of measures, launched by the European Commission in May 2011. Its aim was to strengthen the rights of victims of crime so that any victim in Europe can receive a minimum level of rights, protection, support, access to justice and restoration, and can rely on the same basic level of rights, whatever their nationality and wherever in the EU the crime takes place. Seeking to consolidate the area of freedom, security and justice, and based on the Stockholm Programme and its Action Plan, the Commission has identified as a strategic priority the need for action to strengthen the rights of victims of crime and to ensure that their need for protection, support and access to justice is met. The legislative package, of which this Directive is part, also includes two other elements: a communication on strengthening victims’ rights in the EU and a proposal for a regulation on mutual recognition of protection measures in civil matters⁽³⁷⁾.

⁽³⁰⁾ The Friends of the Chair of the UN Statistical Commission on the indicators on violence against women, <http://www.un.org/womenwatch/daw/vaw/IssuesFocus/Report-of-the-Meeting-of-the-Friends-of-the-Chair-February-2010.pdf>. See also ‘Follow-up to the recommendations of the Friends of the Chair of the United Nations Statistical Commission on statistical indicators for measuring violence against women’, 2012, <http://unstats.un.org/unsd/statcom/doc12/2012-20-ViolenceWomen-E.pdf>.

⁽³¹⁾ See <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N08/642/97/PDF/N0864297.pdf?OpenElement>.

⁽³²⁾ See <http://www1.unece.org/stat/platform/display/VAW>, <http://www1.unece.org/stat/platform/display/VAW/Measuring+violence+against+women>.

⁽³³⁾ Violence against Women Prevalence Data: Surveys by country (2011), http://www.unifem.org/gender_issues/violence_against_women/facts_figures.html.

⁽³⁴⁾ ‘Administrative data collection on domestic violence in Council of Europe member countries’, Council of Europe, 2008, http://www.coe.int/t/dghl/standardsetting/convention-violence/documentation_studies_publications_en.asp.

⁽³⁵⁾ See http://wave-network.org/sites/default/files/PROTECT%20II_Guidance%20Report%202012.pdf.

⁽³⁶⁾ See <http://www.wave-network.org/content/wave-country-report-2012-now-online>. See also the OSCE toolkit of best practices to combat domestic violence in the OSCE region, *Bringing Security Home: Combating violence against women in the OSCE region*, <http://www.osce.org/gender/37438>.

⁽³⁷⁾ Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions ‘Strengthening victims’ rights in the EU’, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52011DC0274>.

The EU has already acted on the rights of victims in criminal proceedings. In addition to the Victims' Rights Directive, other directives — such as Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, replacing Council Framework Decision 2002/629/JHA ⁽³⁸⁾, and Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, replacing Council Framework Decision 2004/68/JHA ⁽³⁹⁾ — have previously been adopted by the EU in order to address the specific situation of victims of these crimes ⁽⁴⁰⁾. Directive 2011/99/EU of the European Parliament and of the Council of 13 December 2011 on the European protection order ⁽⁴¹⁾ and Regulation 606/2013 of the European Parliament and of the Council of 12 June 2013 on mutual recognition of protection measures in civil matters ⁽⁴²⁾ should also be mentioned. As of January 2015, both these EU instruments will enable the circulation of civil and criminal protection measures between EU Member States. Another important instrument in this regard is Council Directive 2004/80/EC of 29 April 2004 relating to compensation for victims of crime ⁽⁴³⁾.

The issue of the role of victims in criminal proceedings was already specifically addressed through Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings ⁽⁴⁴⁾. However, the role and needs of victims in criminal proceedings are still not sufficiently addressed, and the level of rights for victims continues to differ significantly across the EU. As a result, 10 years after the approval of Framework Decision 2001/220/JHA, in light of the Commission's findings with respect to its implementation and application, the decision was made to review and enhance its contents. Two problems were addressed: the Commission underlined that legislation was inadequate for improving the situation of victims, and that

victims' needs were not sufficiently addressed in the Member States ⁽⁴⁵⁾.

The Victims' Rights Directive was therefore prepared to replace Council Framework Decision 2001/220/JHA. The Directive was tabled by the Commission in May 2011. It was adopted on 4 October 2012 by the Council of the EU following a plenary vote in the European Parliament ⁽⁴⁶⁾. The Directive was published in the Official Journal of the European Union on 14 November 2012. According to Article 27, Member States must bring into force the laws, regulations and administrative provisions necessary to comply with the Directive by 16 November 2015.

The Directive is divided into six thematic chapters: General Provisions; Provision of Information and Support; Participation in Criminal Proceedings; Protection of Victims and Recognition of Victims with Specific Protection Needs; Other Provisions; and Final Provisions. The Directive aims to ensure that across the EU:

- victims are treated with respect, and that police, prosecutors and judges are trained to properly deal with them;
- victims receive information on their rights and their case in a way that is understandable to them;
- victim support exists in every Member State;
- victims can participate in proceedings if they wish to and are helped to attend the trial;

⁽³⁸⁾ OJ L 101, 15.4.2011, pp. 14–15.

⁽³⁹⁾ OJ L 335 17.12.2011, pp. 1–17.

⁽⁴⁰⁾ The Council has also endorsed the roadmap for strengthening the rights and protection of victims of crime as the basis for future action, http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/jha/122529.pdf.

⁽⁴¹⁾ OJ L 338, 21.12.2011, pp. 2–18. See also *Protection of the gender-based violence victims in the European Union. Preliminary study of the Directive 2011/99/EU on the European protection order*, www.epogender.eu.

⁽⁴²⁾ OJ L 181, 29.6.2013, pp. 4–12.

⁽⁴³⁾ OJ L 261, 5.8.2004, pp. 15–18.

⁽⁴⁴⁾ OJ L 82, 22.3.2001, pp. 1–4.

⁽⁴⁵⁾ Report from the Commission on the basis of Article 18 of the Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings (COM(2004) 54 final/2 of 16.2.2004), <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52004DC0054>; Report from the Commission pursuant to Article 18 of the Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings (2001/220/JHA) (COM(2009) 166 final of 20.4.2009), <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52009DC0166>; Impact assessment accompanying the Commission proposal for a Directive establishing minimum standards on the rights, support and protection of victims of crime (SEC(2011) 780 final of 18.5.2011), [http://www.europarl.europa.eu/registre/docs_autres_institutions/commission_europeenne/sec/2011/0580/COM_SEC\(2011\)0580_EN.pdf](http://www.europarl.europa.eu/registre/docs_autres_institutions/commission_europeenne/sec/2011/0580/COM_SEC(2011)0580_EN.pdf). See also *Victims in Europe: Implementation of the EU Framework Decision on the standing of victims in the criminal proceedings in the Member States of the European Union*, <http://www.apav.pt/vine/images/reportVinE.pdf>. On the proposal for the commented Directive, the Commission and the Council consulted the European Economic and Social Committee, 'Opinion of the European Economic and Social Committee on the Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions — Strengthening victims' rights in the EU COM(2011) 274 final and on the Proposal for a Directive of the European Parliament and of the Council establishing minimum standards on the rights, support and protection of victims of crime COM(2011) 275 final — 2011/0129 (COD)', <http://www.eesc.europa.eu/?i=portal.en.soc-opinions.19046>.

⁽⁴⁶⁾ See http://europa.eu/rapid/press-release_IP-14-165_en.htm.



- victims are protected both while the police investigates the crime and during court proceedings;
- vulnerable victims are identified — for instance children, victims of rape or intimate partner violence, or those with disabilities — and are properly protected ⁽⁴⁷⁾.

In order to properly transpose the Directive, a guidance document was prepared by DG Justice and Consumers ⁽⁴⁸⁾. This is not legally binding but could be useful in order to implement the Directive. It recalls the positive obligations and existing case law standards of the European Court of Human Rights, the UN Convention on the Elimination of All Forms of Discrimination against Women and the Council of Europe Convention on preventing and combating violence against women and domestic violence. The document underlines the goal of the Directive — to ensure that victims are treated with respect and that the special needs of vulnerable victims are properly addressed. The objective of the Directive is to ensure that victims receive the support they need, that they can participate in proceedings and receive and understand relevant information, and that they are protected throughout criminal investigations and court proceedings. A number of provisions of Council Framework Decision 2001/220/JHA have been maintained in their original form or have been amended only to the extent necessary for clarity of drafting. While implementing the Directive, other documents may be useful, namely *Victim Support Europe Manifesto 2014–2019: Towards a Union of Freedom, Security and Justice for Victims of Crime* ⁽⁴⁹⁾ and the *Handbook for Implementation of Legislation and Best Practice for Victims of Crime in Europe* ⁽⁵⁰⁾.

⁽⁴⁷⁾ See http://europa.eu/rapid/press-release_IP-14-165_en.htm.

⁽⁴⁸⁾ 'Guidance document related to the transposition and implementation of 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 replacing Council Framework Decision 2001/220/JHA', http://ec.europa.eu/justice/criminal/files/victims/guidance_victims_rights_directive_en.pdf.

⁽⁴⁹⁾ See http://ec.europa.eu/justice/events/assises-justice-2013/files/contributions/51.2.1382344283vsemanifesto20142019_en.pdf.

⁽⁵⁰⁾ See http://victimsupporteurope.eu/activeapp/wp-content/files_mf/1385974688NewVersionVSEHandbookforImplementation.pdf.

II. Methodology





II. Methodology

The methodology takes a multidimensional and interdisciplinary approach to the analysis of the Victims' Right Directive from a gender perspective. Every article of the Directive is analysed separately and the following methods and tools are used:

1) Analysis based on the rules of law (interpretation of legal texts), with standardised questions. During the analysis, the following questions are asked about every provision of the Directive:

- whether the provision refers explicitly to the victims of gender-based violence;
- whether the provision applies indirectly to the victims of gender-based violence;
- whether and how the provision affects the situation of victims of gender-based violence;
- whether the structure and content of the provision allows beneficial interpretations of the Directive to support the victims of gender-based violence;
- whether the provision constitutes a too-general legal norm, and whether this will cause unintended effects;
- whether the provision is coherent with other provisions included in the Directive, and can be interpreted independently of other provisions;
- whether the provision corresponds to international normative standards and recommendations, in particular the Convention on the Elimination of All Forms of Discrimination against Women and the General Comments, Concluding Comments and Decisions/Views of the CEDAW Committee, two conventions of the Council of Europe — the Convention for the Protection of Human Rights and Fundamental Freedoms and the judgments of the European Court of Human Rights concerning gender-based violence, especially intimate partner violence (such as *Opuz v. Turkey*) — and the Istanbul Convention (Convention on preventing and combating violence against women and domestic violence).

This part of the analysis enables the assessment and interpretation of the Directive from the perspective of the language used in the Directive, the purposes of the Directive and its historical context (with reference to documents issued prior to the adoption of the Directive). For these purposes, the following rules and methods of legal text interpretation are used: textual, functional, comparative and historical.

2) SWOT analysis. SWOT analysis is used as a tool for organising information and for assessing the regulations of the

Directive in terms of the strengths, weaknesses, opportunities and threats presented by the implementation of the Directive. The material generated during the following legal analysis is subject to a SWOT analysis. As part of this procedure, the material is segregated into four groups: 1) strengths (everything that is an asset and advantageous in the Directive); 2) weaknesses (everything that is a weakness in the Directive); 3) opportunities (everything that generates positive changes for victims of gender-based violence as a result of the Directive's implementation); and 4) threats (everything that generates risk for the situation of victims of gender-based violence as a result of the Directive's implementation). This approach allows an assessment of the Directive in terms of the strengths and weaknesses of the analysed regulations, but also allows the identification of potential opportunities and threats related to the process of the Directive's implementation. The process of identifying strengths and weaknesses on the one hand, and opportunities and threats on the other, also enables an assessment of challenges vis-à-vis the needs and interests of victims of gender-based violence.

The underlying assumption of this analysis is that gender-based violence has a specific nature, different to that of other types of violence and crime. Gender-based violence is often committed by a partner or family member of the victim, or by any other person who knows the victim and knows where the victim lives or works. In this way, it is not uncommon for the victim to be emotionally attached to the perpetrator or even a perpetrator's dependant. Migrant women may be especially vulnerable in this regard, where their right of residence depends on the perpetrator, or where they are dependent on a perpetrator–employer. The victim may also fear the social stigma or have feelings of shame, especially in cases of sexual violence. Hence, victims can often be reluctant to report crimes of gender-based violence, and these crimes may never enter the formal criminal justice system. However, even when the crime has been reported, this will not necessarily result in a criminal conviction, due to the refusal by the police to register complaints, the dismissal of the case by the prosecutor, or the withdrawal of complaints by the victim (if the withdrawal is possible and if the withdrawal results in ending the procedure).

Using the methods explained above, it is possible to conduct an analysis that assesses the Directive from the perspective of the unique situation of victims of gender-based violence and their needs, and that critically examines both measures that could be counterproductive or cause unintended effects, and those that could be beneficial to victims.

III. Analysis of the Directive





III. Analysis of the Directive

Preamble

The Directive Preamble covers citations and 72 recitals. At the beginning of the document, the Parliament and the Council state the legal basis for the Directive and the preparatory acts. Considering the rights of victims of crime, Article 82, paragraph 2 of the Treaty on the Functioning of the European Union, under which it is possible to establish minimum rules, is of key importance for the adoption of the Directive under discussion here. Subsequently, in individual recitals of the Preamble, the Parliament and the Council list the following legal acts and other documents concerning the Directive's subject matter or preceding its adoption: Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings; the Stockholm Programme; the Budapest roadmap; Directive 2011/99/EU of the European Parliament and of the Council of 13 December 2011 on the European protection order; Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims; Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography; and the Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism.

The Preamble also mentions the documents which directly concern the rights of victims of gender-based violence, i.e. the resolution of the European Parliament of 26 November 2009 on the elimination of violence against women (recital 5); the resolution of 5 April 2011 on the priorities and outline of a new EU policy framework to fight violence against women; the United Nations Convention on the Elimination of All Forms of Discrimination against Women (CEDAW); the CEDAW Committee's recommendations and decisions; and the Council of Europe Convention on preventing and combating violence against women and domestic violence (recital 6).

The act of invoking those documents and putting the Directive in a wider context — the international system of anti-violence law — may be considered an opportunity according to the SWOT methodology. This will make the Directive part of the system of international anti-violence law, which will additionally increase its importance.

In line with the Preamble, the objectives of the Directive are to establish minimum standards for the rights, support and protection of victims of crime (recital 67), and to revise and supplement the principles set out in Framework Decision 2001/220/JHA. Additionally, the Directive aims to take significant steps forward in the level of victim protection throughout the Union, in particular within the framework of criminal proceedings (recital 4). Member States may extend the rights set out in the Directive in order to provide a higher level of protection (recital 11). It should also be mentioned that the term 'offender' is defined in the Preamble (recital 12). However, it is to be regretted that this definition is not primarily included in Article 2 of the Directive, which sets out the definitions of the terms used therein. The location of the definition is problematic due to the fact that the Preamble reflects the intentions of the legislator and does not establish specific legal norms. The term 'offender' refers to a person who has been convicted of a crime but also to a suspected or accused person before any acknowledgement of guilt or conviction. It is without prejudice to the presumption of innocence.

The majority of the Preamble recitals refer to respective articles in the Directive that concern the individual rights of, and guarantees for, victims. These will therefore be discussed in the analysis of these provisions. It is worth mentioning here that, in the Preamble, three types of recitals are of crucial importance for the victims of gender-based violence. Recitals that cannot be categorised into one of these groups and may indirectly impact on the situation of the victims of gender-based violence will be analysed together with the respective provisions of the Directive. The recitals that are indicated below will also be analysed in greater detail in the discussion of the corresponding provisions of the Directive.

The first group of recitals are those referring to the victims of gender-based violence (recitals 17, 18, 38 and 57). Recital 17 stipulates that violence directed against a person because of that person's gender, gender identity or gender expression, or which affects persons of a particular gender disproportionately, is to be understood as gender-based violence. Gender-based violence is understood as a form of discrimination and a violation of the fundamental freedoms of the victim, and includes violence in close relationships, sexual violence (including rape, sexual assault and harassment), trafficking in human beings, slavery and other harmful practices, such as forced marriages, female genital mutilation and so-called 'honour crimes'. This recital of the

Preamble emphasises that women victims of gender-based violence and their children often require special support and protection because of the high risk of secondary victimisation, repeat victimisation, intimidation and retaliation connected with such violence. This recital is one of the Directive's strengths, as it places the violence regulated by this Directive not only in a gender-related context but also in a human rights context, which in theory should prevent public bodies responsible for the implementation and application of the Directive from marginalising gender-related issues. Recital 18, which concerns a specific type of violence — violence committed in a close relationship, committed by a person who is a current or former spouse, partner or other family member of the victim, whether or not the offender shares or has shared the same household with the victim — introduces important opportunities for changing the perception of this problem. It emphasises that women are affected disproportionately by this type of violence and that the situation can be worse if the victim is dependent on the offender economically, socially or in terms of her right to residence. Recital 38 states that persons subjected to repeat violence in close relationships, and victims of gender-based violence, are particularly vulnerable or find themselves in situations that expose them to a particularly high risk of harm, and thus shall be provided specialist support and legal protection. This recital is a special supplementation of recitals 17 and 18. This recital clearly draws the attention of the competent authorities to the need to protect and support women victims of violence, which is one of the Directive's strengths. In addition, recital 57 — which lists victims of human trafficking, of violence in close relationships, of sexual violence or exploitation, and of gender-based violence as particularly vulnerable to secondary and repeat victimisation, intimidation and retaliation — points out the particular need for these special measures of protection. Gender-based violence is also mentioned in recital 56 (see below). This recital reinforces the gender-related nature of the Preamble, as indicated in the above-mentioned recitals. This recital creates opportunities to support communication actions aimed at raising public awareness of gender-based violence.

The second group of Preamble recitals that are of crucial importance for victims of gender-based violence are those which refer to the equal treatment of victims and the discrimination they might experience, including gender-based discrimination (recitals 9, 61, 63 and 66). Recital 9 stipulates that victims of crime shall be treated without discrimination of any kind or based on any grounds, such as gender or gender expression, and that gender is to be taken into account in all contacts with a competent authority operating within the context of criminal proceedings and any service coming into contact with victims. Any officials involved in criminal proceedings who are likely to come

into personal contact with victims shall receive appropriate training so that they are able to deal with victims in a non-discriminatory manner, and in relevant cases such training shall be gender sensitive (recital 61). This recital is one of the strengths of the Directive. It indicates that there is a need to improve the training of persons coming into direct contact with victims. However, this recital is also one of the weaknesses of the Directive, because it does not set out explicit and definite obligations in terms of training, nor does it make such training mandatory. This recital simply recommends creating training opportunities. Taking into account the Directive's objective, the provision of care and support by highly qualified staff will be advantageous to victims of gender-based violence. It may be ensured in one way through rigorous formal qualifications and in another way through a system of periodic mandatory training. The current recital does not ensure such standards and, as such, it represents a weakness within the Preamble. Recital 63 is also insufficiently prescriptive. It states that in order to encourage and facilitate making complaints and to allow victims to break the cycle of repeat victimisation, it is essential that reliable support services are available to victims, and that competent authorities are prepared to respond to victims' complaints in a non-discriminatory manner. This recital expresses the intention that authorities and persons responsible for providing support must be properly prepared. In this case, however, there is no reference to the specialist training necessary for preparing those authorities and persons to properly respond to a victim's complaint. Recital 66 generally emphasises that the Directive intends to promote the non-discrimination principle and the principle of equality between women and men. Though a general provision, it also creates an opportunity for a more effective implementation of the Directive in the promotion of gender equality. Within the framework of this SWOT analysis, it should be assumed that each reference to gender issues is a strength of the Directive, and at the same time a chance to create opportunities for more effective awareness-raising among stakeholders and the public in Member States.

The third group of recitals that are important in terms of the rights of victims of gender-based violence are those concerning individual assessment when identifying the special needs of victims as regards protection and determining special protection measures (recitals 55, 56, 58 and 61). Recital 55 stipulates that some victims are particularly at risk of secondary and repeat victimisation, of intimidation, and of retaliation by the offender during criminal proceedings. It is possible that such a risk derives from the personal characteristics of the victim, or from the type, nature or circumstances of the crime. Only through individual assessments, carried out at the earliest opportunity, can such a risk be effectively identified. This provision is a clear strength of the Preamble and of the Directive as a whole. It assumes both



a holistic approach to the case and an individual approach to each victim. It refers both to legal as well as psychological, social and economic issues. Furthermore, recital 56 lists the personal characteristics of the victim (such as gender and gender identity/expression, relationship to, or dependence on, the offender) as well as the type, nature and circumstances of the crime (e.g. sexual violence, violence in a close relationship) that shall be taken into account while conducting individual assessments. This is undoubtedly a strength of the Preamble, as it explicitly refers to the need to make an individual assessment that takes into account the circumstances which characterise the situation of victims of gender-based violence. Recital 61 signals a need for relevant training to be provided to persons who may participate in individual assessments, including police services and court staff, lawyers, prosecutors and judges, and practitioners who provide victim support or restorative justice services. It covers a large catalogue of authorities that are obliged to improve the training of their staff — which is a strength of the regulation — and introduces a systematic, broad approach to victim support.

A positive aspect of the Preamble is that it includes explicit provisions concerning gender-based violence and indicates the need to take special measures to support and protect victims of such violence. Moreover, a broad reference to gender is a strength of the Preamble since it sensitises authorities to this specifically sensitive aspect of violence. An additional strength is the possibility, under those provisions of the Preamble that emphasise the necessity of equal treatment of victims, to take into account the interests of victims of gender-based violence. The need for equal treatment of victims also means that actions to support and protect the victims of gender-based violence (such as victims of violence in close relationships) must be undertaken with equal determination as those addressed at victims of theft or armed robbery committed by a person not related to the victim (cf. judgment of the European Court of Human Rights in the case *Opuz v. Turkey*). Moreover, opportunities for the rights of the victims of gender-based violence to be exercised may arise under those recitals that provide for individual assessment when identifying the special needs of victims in terms of protection and determining special protection measures. This individual assessment, which, as mentioned above, is based in particular on such features as gender and the nature of violence in close relationships, shall indicate whether the victim is at risk of secondary victimisation, or repeat victimisation, intimidation or retaliation by the offender. The victim shall then be offered special means of protection, and the person who will support the victim shall have relevant qualifications and be properly trained.

Despite these positive aspects, attention should be drawn to the overly general wording of these recitals in the Preamble. The role of the Preamble is to explain the objectives of the legal act. When the provisions of the Directive do not elaborate on the content of the Directive's Preamble, and thus do not establish precise legal norms corresponding to the recitals of the Preamble, overly general wording in recitals may cause interpretative difficulties and doubts. These difficulties and doubts may be resolved without taking into account the nature of gender-based violence. This means that the rights of the victims of such violence may be exercised only to a limited extent. Moreover, the majority of the Preamble recitals are worded in gender neutral terms, which may obstruct taking into account the specificity of gender-based violence. Implementation of these recitals requires special monitoring due to the risk of national regulations being developed that would omit the gender dimension. These issues will be discussed in more detail when analysing the individual articles of the Directive.

Article 1. Objectives

Article 1 of the Directive is one of two provisions in Chapter 1 'General Provisions'. Article 1 sets out the Directive's objectives. In line with the legal principles of the European Union, Member States are obliged to adjust their legislation to those objectives by transposing the Directive onto the internal legal regime. Article 1(1) reads that the purpose of the Directive is to ensure that victims of crime receive appropriate information, support and protection, and are able to participate in criminal proceedings. The types of information that the victims are to receive are stipulated in the following provisions of the Directive. Further provisions also refer to support and protection.

The second sentence of Article 1(1) stipulates that Member States shall ensure that victims are recognised and treated in a respectful, sensitive, tailored, professional and non-discriminatory manner each time they are in contact with relevant services and authorities. Article 1(1) also indicates that the rights set out in the Directive shall apply to victims in a non-discriminatory manner.

This provision to a large extent repeats the content of recital 9 of the Preamble ('victims of crime should be recognised and treated in a respectful, sensitive and professional manner without discrimination'). This recital also emphasises the need to treat victims without discrimination — on grounds of gender, for example — and the need to take gender into account in all contact by relevant services. However it does not call for any more specific measures. Therefore, the objectives of the Directive explicitly indicate two important issues — treatment of victims without discrimination and

application of rights set out in the Directive in a non-discriminatory manner.

Two significant guidelines for Member States are important vis-à-vis the exercise of the rights of victims of gender-based violence set out in Article 1. First, the actions of relevant services and authorities shall be performed in a non-discriminatory manner. This is a strength of the Directive, as it explicitly obliges authorities to ensure that victims of violence receive specific treatment — without discrimination on grounds of gender and taking gender into account. The second point worth emphasising is the state's obligation to ensure that victims are recognised. This may be taken as guidance in terms of ensuring that victims of gender-based violence are treated seriously by the authorities. Recognising specific persons as victims means that, for instance, the police or public prosecutor to whom a woman victim of violence turns should not disregard her report and discourage her from making a complaint. This provision is a strength of the Directive, since it obliges authorities to have a specific attitude towards a victim of violence. It also highlights that, regardless of the formal, strictly legal aspect, the psychological aspects of the case also matter. This provision creates an opportunity to promote a proper model for behaviour on the part of authorities and their staff. It also grants victims the right to such treatment by those authorities. This provision should be considered an important element of awareness-raising efforts vis-à-vis the public, including social campaigns concerning the issue of gender-based violence. The message ought to focus on the rights of victims to proper treatment and authorities' obligations to ensure they have an appropriate attitude towards victims.

It should be mentioned here that individual acts of gender-based violence are subject to different levels of penalisation in individual Member States. More importantly, according to recital 13 of the Preamble, the Directive applies in relation to criminal offences committed in the European Union and to criminal proceedings that take place in the EU. This means that the Directive applies solely to such acts that are subject to prosecution and penalisation under internal legal regimes of Member States and that it does not penalise other acts ⁽⁵¹⁾. Therefore, when a given act that constitutes an act of gender-based violence is not a crime under the legal regime of the Member State, the selected rights ensured by the Directive will not apply to the victim of such

violence. It is therefore possible that victims of non-criminalised forms of gender-based violence will not receive support and protection, since they will not be covered by the provisions of the Directive.

Moreover, recital 9 indicates that victims shall be protected from secondary and repeat victimisation, from intimidation and from retaliation, that they shall receive appropriate support to facilitate their recovery, and shall be provided with sufficient access to justice. This may refer to victims of gender-based violence, e.g. victims of sexual violence or victims of violence in close relationships. Such victims are often confronted with an improper attitude on the part of representatives of relevant services or authorities and thus experience secondary victimisation. These victims are often at an even higher risk due to the nature and circumstances of the crime — they may know, or even live with, the offender. They are also more likely to experience the same crime again (repeat victimisation). For the same reasons, a victim of gender-based violence may be particularly at risk of intimidation and retaliation by an offender who does not want the victim to make a complaint or who takes revenge on the victim for making such a complaint.

Regarding Article 1, recital 9 must also be analysed against recital 12. The latter recital explicitly states that the rights set out in the Directive are without prejudice to the rights of the offender. The phrase 'without prejudice to the rights of the offender' may have consequences in terms of victims exercising their rights. There is a risk that the phrase may exacerbate instances where a lack of proper response on the part of the authorities (e.g. failing to remove the offender from the premises where (s)he lives with the victim) is justified by invoking the rights of the offender (e.g. to premises). For this reason, this recital and the related provisions of the Directive require special monitoring in terms of the implementation of this provision in the national regulations of Member States.

The third sentence of Article 1(1) explicitly stipulates that the rights set out in the Directive shall apply to victims in a non-discriminatory manner, including with respect to their residence status. However, in line with recital 10 of the Preamble, the Directive does not determine the conditions of residence of victims of crime in the territory of the Member States, nor does making a complaint (and participating in criminal proceedings) create any rights regarding the residence status of the victim. This recital also stipulates that Member States shall take the necessary measures to ensure that the rights set out in the Directive are not conditional on the victim's residence status in their territory or on the victim's citizenship or nationality. In the case of victims of gender-based violence whose residence status could depend on the offender — e.g. victims of violence in

⁽⁵¹⁾ 'Guidance document related to the transposition and implementation of 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 replacing Council Framework Decision 2001/220/JHA', http://ec.europa.eu/justice/criminal/files/victims/guidance_victims_rights_directive_en.pdf.



close relationships — the possibility to exercise the rights of these victims may be limited.

Article 1(2) in turn concerns the interests of child victims. Where the victim is a child, the child's best interests shall be a primary consideration and shall be assessed on an individual basis, taking due account of the child's age, maturity, views, needs and concerns. The child and the holder of parental responsibility, or another legal representative, where applicable, shall be informed of any measures or rights specifically focused on the child.

This provision corresponds to recital 14 of the Preamble, which refers to the United Nations Convention on the Rights of the Child, under which children shall be considered and treated as the full bearers of rights set out in the Directive. The provision does not refer directly to victims of gender-based violence. Nevertheless, under this provision, the interest of a child in a given case is to be individually assessed. The wording of this provision is rather general, but it enables the shaping of the provisions in such a way that the interests of girl victims of gender-based violence are taken into account and properly secured. Due to the lack of detailed provisions in the Directive, this kind of implementation will depend on Member States, and so it creates an opportunity to take into account the gender aspect in national regulations. However, the general wording of the Directive means that special monitoring is required in this regard.

Article 2. Definitions

Article 2, the second general provision of the Directive, provides definitions of four terms used in the Directive. The Preamble also defines the term 'offender' (see comments on the Preamble). Pursuant to Article 2(1)(a), the term 'victim' means a natural person who has suffered harm, including physical, mental or emotional harm, or economic loss which was directly caused by a criminal offence, and family members of a person whose death was directly caused by a criminal offence and who have suffered harm as a result of that person's death.

Two parts of this definition are important for the situation of victims of gender-based violence, namely 'harm ... directly caused by a criminal offence' and 'death was directly caused by a criminal offence'. A victim of gender-based violence is a victim under the Directive only when this violence constitutes a criminal offence under the legal regime of a given Member State. Only in such a situation will the victims of gender-based violence be covered by this definition. It is important to bear in mind that not all forms of gender-based violence are criminalised and therefore not all victims are covered by the Directive. Moreover, only

when gender-based violence is a criminal offence will the definition of the term also cover children witnessing gender-based violence, e.g. violence in a close relationship experienced by their mother ⁽⁵²⁾.

Article 2 also includes a definition of the term 'child' as any person below 18 years of age (Article 2(1)(c)). This provision also provides a definition of the term 'family members'. Under the Directive, a family member is the spouse or person living with the victim in a committed intimate relationship, in a joint household and on a stable and continuous basis, such as relatives in direct line, siblings and dependants of the victim (b). Pursuant to paragraph 2, Member States may establish procedures to limit the number of family members who may benefit from the rights set out in the Directive and, in relation to family members of a deceased person, procedures to determine which family members have priority in relation to the exercise of those rights.

In some cases, the death of the victim may be directly caused by a criminal offence of gender-based violence perpetrated by one of her or his family members, as defined in the Directive (see above). It may also be the case that the offender suffers harm as a result of the victim's death, for example, in situations where the offender was the victim's dependant. Paradoxically, therefore, the Directive seems to leave open the possibility of a perpetrator of gender-based violence being deemed a victim. The fact that the Directive does not address this problem is a weakness.

With reference to these definitions, recital 19 of the Preamble highlights that a person shall be considered a victim regardless of whether an offender is identified, apprehended, prosecuted or convicted, and regardless of the familial relationship between them. Emphasising that a given person is a victim regardless of whether an offender is prosecuted or convicted is crucial for cases of violence in close relationships, which are often treated as low-harm criminal offences or private conflicts between partners. Such an approach leads to a potentially high number of decisions not to prosecute. In such cases, the offender is not convicted of a crime. This provision is one of the Directive's strengths from the perspective of gender-based violence, as it makes providing support and protection independent of the offender's conviction, which may or may not occur. Recital 19 of the Preamble also ensures that the provisions of the Directive can be extended to situations where the offender — for example, the victim's partner or former partner — was not held accountable. Another important part

⁽⁵²⁾ See also a document developed by the European Economic and Social Committee: Opinion on 'Children as indirect victims of domestic violence' (*Official Journal of the European Union*, C 325 of 30.12.2006, p. 60), <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2006:325:0060:01:PL:HTML>.

of this recital and a strength of the Directive is the following phrase: 'regardless of the familial relationship between them'. This indicates that a family member may be an offender and that close relationship does not exclude a criminal offence. Under the Directive, the person against whom an offence was committed — even if in familial relationship with the offender — is a victim. Nevertheless, the caveat in this recital — that the Directive is without prejudice to any national administrative procedures required to establish that a person is a victim — gives cause for concern. In the case of victims of gender-based violence, who are particularly at risk of secondary victimisation, their participation in additional procedures provided for in the legal regimes of individual Member States may have a negative impact on exercising their rights under the Directive. From the perspective of gender-based violence, this is a weakness of the Directive. Implementation of these provisions may lead to the exclusion of victims of gender-based violence from support and protection. That is why implementation in this respect requires ongoing and detailed monitoring, both at the stage of developing national regulations and at the stage of their application.

It should also be emphasised that the Directive does not standardise the role of victims in criminal proceedings in the legal regimes of individual Member States, which leads to a situation where certain rights of those victims will not be exercised as part of criminal proceedings. This poses a serious threat in terms of executing a common policy and developing common standards within Member States. The Directive itself points out that the role of victims in the criminal justice system, and whether victims can participate actively in criminal proceedings, varies across Member States, depending on the national system (recital 20). This may lead to a situation where the rights of victims in terms of their role in criminal proceedings will not be exercised uniformly.

The last definition referred to in Article 2(1) is the definition of the term 'restorative justice' (d). This term is to be understood as any process whereby the victim and the offender are enabled, if they freely consent, to participate actively in the resolution of matters arising from the criminal offence, through the help of an impartial third party. It should be emphasised here that in cases of gender-based violence, where the victim knows the offender or remains in a close relationship with the offender, the victim is at risk of intimidation or retaliation, and the victim's ability to refuse restorative justice services may be limited. For more details, see comments on Article 12.

Article 3. Right to understand and to be understood

This provision opens Chapter 2 of the Directive, which is entitled 'Provision of Information and Support'. This article concerns the issues relating to communication with the victims, in particular during their very first contact with the authorities. Pursuant to paragraph 1, Member States shall take appropriate measures to assist victims in understanding and being understood from this first contact and during any further necessary interaction they have with a competent authority in the context of criminal proceedings, including where information is provided by that authority. Paragraph 2 specifies that communications with victims are to be given in simple and accessible language, orally or in writing. Such communications shall take into account the personal characteristics of the victim, including any disability which may affect their ability to understand or to be understood. Paragraph 3 stipulates that unless contrary to the interests of the victim or unless the course of proceedings would be prejudiced, victims may be accompanied by a person of their choice in their first contact with a competent authority where, due to the impact of the crime, the victim requires assistance to understand or to be understood. These provisions are one of the Directive's strengths from the perspective of gender-based violence. They draw attention to the need for professional behaviour on the part of authorities when in contact with the victim, from their very first contact with the victim. Those provisions also highlight the need to adjust behaviour (mode of communication) to a specific group of victims. In an operational way, the provision draws attention to the mode of communication, e.g. simplicity of language and forms of communication. A weakness of this regulation is its lack of reference to the training of authorities in this regard. The mode of communication with the victim is of key importance not only in the process of ensuring a sense of security and exercising other rights under the Directive, but also for the effectiveness of the investigation conducted by the authorities. This lack of connection between the recommendations regarding mode of communication, and the training process needed to achieve this, is a weakness of the regulation.

Recital 21, which corresponds to Article 3, explains that the victim's knowledge of the language used to provide information, as well as their age, maturity, intellectual and emotional capacity, literacy, and any mental or physical impairment, shall be taken into account. This recital comprehensively underlines the importance of properly adjusting the mode of communication to a specific target group. When determining the criteria, it refers to psychological, demographic and social aspects, as well as to the victim's health. In this way the importance of proper communication



between the authority and the victim is emphasised in the Directive. This is one of the Directive's strengths. In addition, such a broad and multipronged approach to the victim highlights the importance of proper training among staff working for authorities. Without proper training for the staff responsible for liaising with the victim, these provisions will not be effective. However, recital 21 does not explicitly refer to the need for training.

In the case of victims of gender-based violence, the need to be understood, especially during the first contact with the relevant authority, is particularly crucial. As already indicated, victims of gender-based violence often do not make complaints because of fear, shame and social stigma. If victims of gender-based violence decide to report the offence, they should certainly be ensured the right to be understood from their very first contact with the authorities. In the case of some groups of victims of gender-based violence, the right to understand also plays a substantial role. This could be the case of uneducated or disabled victims, as well as of migrant workers or victims of human trafficking (for more details, see comments on Article 7).

From the perspective of gender-based violence, when it comes to accompanying the victim by a person of their choice in their first contact with a competent authority, this person cannot be the offender, e.g. the person inflicting violence in a close relationship, since this would be contrary to the interests of the victim under Article 3(3).

Article 4. Right to receive information from the first contact with a competent authority

Article 4(1) obliges Member States to ensure that victims are offered specific information, without unnecessary delay, from their first contact with the competent authority in order to enable them to access the rights set out in the Directive. The Directive lists the relevant categories of information. This article indicates that the extent or detail of information may vary depending on the specific needs and personal circumstances of the victim and the type or nature of the crime. Additional details may also be provided at later stages, depending on the needs of the victim and the relevance, at each stage of proceedings, of such details.

The aim of Article 4 of the Directive is to enable victims to exercise the rights set out in the Directive. Victims who, upon their first contact with the competent authority, receive the necessary information in simple and accessible language will be aware of their rights to support and protection. In the case of victims of gender-based violence, the

right to information is very important. Women, as particularly vulnerable victims, should have full information on the available support and protection. As in the case of the right to be understood set out in Article 3, exercising the right to information depends on providing the information in a clear and accessible way. Some victims of gender-based violence, such as uneducated, disabled or elderly victims, as well as — for language reasons — migrant workers or victims of human trafficking, may have difficulties in understanding the information that is communicated to them and, as a result, their right to information stipulated in Article 4 will not be fully exercised. The potential threat in this context is the fact that these victims of gender-based violence are not explicitly indicated in the provision. As has already been mentioned in the comments on Article 3, taking into account the fear felt by victims of gender-based violence, their right to information from the moment of first contact should be particularly respected. If victims of gender-based violence have decided to make a complaint despite the circumstances, they should feel from the moment of first contact that they are being treated seriously. This may be ensured by the relevant authority adopting the appropriate attitude and providing the victim with all the information referred to in Article 4 of the Directive. From this perspective, Article 4 is one of the Directive's strengths, since it highlights the importance of conducting the first contact with the victim properly.

When analysing and assessing this provision from the perspective of legal interpretation, it should be emphasised that though this provision does not refer directly to victims of gender-based violence, it can influence their situation. Additionally, by emphasising the importance of the right to information, Article 4 supports — both internally (this is a strength of the Directive) and externally (creating an opportunity for effective implementation) — the function of the Directive to enable the victim to make informed decisions about taking further steps against the offender and to obtain specific services.

It is worth mentioning that, pursuant to Article 3(2) setting out the right to understand, information may be provided either orally or in writing. Article 4 stipulates that the extent or detail of the information may vary. The first contact may take place both when the victim is making a complaint to a given authority and at the crime scene, directly after the crime has been committed. A relevant authority — usually the police in the case of contact on the crime scene — shall provide adequate information according to the circumstances. It should be noted that in the case of victims of gender-based violence, e.g. victims of violence in close relationships, a victim will often not be able to assimilate detailed information at the crime scene. The authority should leave the victims with the information in writing in such situations, so that they can acquaint themselves with it when they are ready. Some information given orally should be repeated. It is this information that will enable

the victim to obtain the support or protection that is the most urgent at a given moment. The authority should also take into account that, in the case of some victims of gender-based violence, it will not be sufficient to give the address of the website where all the information may be found. Victims living in rural areas, or disabled or elderly victims, may not have access to the internet or possess the skills necessary to use it. In line with the CEDAW Committee General Recommendation No 19, states are to ensure that protection and support are available to rural victims. Article 4 does not take into account this specificity, focusing only on the language of communication and not on the tools. This is a threat since the provision can be interpreted in any number of ways, and thus the provision risks being implemented in a manner that will not guarantee the proper comfort and sense of security to victims in contact with the authorities. This provision will require special monitoring, both during the Directive's implementation and at the stage of applying national regulations within Member States.

All the categories of information listed in Article 4(1) may be useful for the victims of gender-based violence. For this reason, the fact that this information is listed in detail is a strength of Article 4. The type of support available to the victim and where the information may be obtained, as well as how and under what conditions the victim may obtain protection, including protection measures (a), (c) and (d), are all of vital importance here. A victim of gender-based violence should be given information about the support available at the appropriate moment, and support services should be available depending on the victim's needs. The best solution would be to guarantee that victims are given information about available support and also that a representative of the support services contact them to offer specific services⁽⁵³⁾. Furthermore, victims of gender-based violence should

receive all relevant information about protection measures. This will make it possible for the victim to turn towards this protection as early as the first contact with the competent authority. After making a complaint, victims of gender-based violence, in particular victims of violence in close relationships, who know or live with the offender, are at greater risk of more drastic and life-threatening violence.

For the victims of gender-based violence, information about the procedures for making a complaint, and the role of the victim in such procedures (b), is also important. The victims of gender-based violence, in particular victims of violence in close relationships and victims of sexual violence, are often discouraged from making a complaint, giving evidence incriminating the offender, and continuing proceedings. Knowledge about their role in the procedures may help them feel more capable and limit the risk of secondary victimisation. For this reason, this is a strength of Article 4 from the perspective of gender-based violence. In addition, information about available procedures for making complaints in the case that the victim's rights are not respected by the competent authority operating within the context of criminal proceedings (h) may help here. In the case of victims of gender-based violence, who more frequently experience secondary victimisation by experiencing harmful behaviours, for example on the part of police officers or public prosecutors, it is important that they are informed about the procedures for making a complaint in such a situation.



Other information given to victims includes the contact details of the liaison officer for their case. In the case of victims of gender-based violence, it is essential that the victim can contact the same person and is not forced to contact different staff members who do not know the case and to whom the victim must describe the whole case from the beginning. The Directive, however, does not mention the need to limit the number of staff victims are in contact with within a given service or authority. This is a weakness from the perspective of gender-based violence.

⁽⁵³⁾ An optimum model in this regard functions in Austria in cases of intimate partner violence. One of its characteristics is ongoing cooperation between law enforcement bodies, the justice system and non-government organisations acting against intimate partner violence, in particular women's organisations. The police, who in Austria are entitled to issue an eviction order against the offender in cases of intimate partner violence, informs the relevant organisation or institution dealing with support and assistance for victims that such an order has been issued. Such an organisation immediately contacts the victim (without waiting for the victim to make contact) and offers legal assistance and psychological support. It was assumed that without this element of victim support, a victim might be left all alone. Equally importantly, relevant regulations regarding personal data protection were also introduced in Austria: the police may provide the personal data of victims to institutions supporting and assisting victims, to the extent necessary for provision of this support. See A. Dearing, 'The Austrian Model of Counteracting Domestic Violence', unpublished material; R. Logar, 'The Austrian Model of Intervention in Domestic Violence Cases', Expert Group Meeting organised by the UN Division for the Advancement of Women, 17–20 May 2005, Vienna, Austria, p. 10; A. Dearing and B. Haller, 'Comparative Overview in preparation of the EUCPN – Workshop on domestic violence in Vienna', 18 May 2006, p. 39, www.eucpn.org.



Regarding the category of information that concerns available restorative justice services (j), great caution should be exercised in offering these services to victims of gender-based violence to ensure that a fully consensual decision is reached. Article 4 does not introduce any limitations regarding information on the reference of victims of gender-based violence for mediation. This may pose risks for these victims in terms of exercising their rights. Therefore it constitutes a threat in the implementation process. Due to the growing importance of the mediation mechanism in the resolution of legal disputes, in case of literal implementation of this provision, such instruments may be offered automatically, without taking into account the social, economic or psychological condition of the victim of violence. This provision belongs to the group of provisions that require particular monitoring in the process of implementing the Directive.

For the purpose of comparative legal analysis, it should be mentioned that the Council of Europe Convention on preventing and combating violence against women and domestic violence stipulates in Article 56(1)(c) that States' parties shall take the necessary legislative or other measures to protect the rights and interests of victims, including their special needs as witnesses, at all stages of investigations and judicial proceedings, in particular by informing them, under the conditions provided for by internal law, of their rights and the services at their disposal, the follow-up given to their complaint, the charges, the general progress of the investigation or proceedings, their role therein, and the outcome of their case. Due to the reference to the 'conditions provided for by internal law' and the general wording of this provision, the Convention will not be particularly helpful for implementation of Article 4 of the Directive.

In order for the victim to be able to exercise the right to information referred to in Article 4 of the Directive, a relevant authority must first have all the information required. Another requirement is the provision of relevant training regarding the appropriate way to provide this information and on communicating with victims, in order for the latter to feel that they are being treated with dignity. The general information referred to in Article 4 ought to be widely disseminated, including by the media, so that it reaches potential victims, including victims who have not as yet come into contact with the authorities. The issue of training and raising awareness, as well as the assessment of the Directive in this context, will be presented in more detail in the comments on Articles 25 and 26. As in the case of provisions concerning training, including the Preamble provisions, the assessed Article 4 does not refer to the obligation of ensuring the existence of a training system within Member States; it simply emphasises the importance of training. This provision does not specify the scope and level of substantive

training. Through discretionary interpretation of this provision and discretionary implementation by Member States, this may lead to different standards as regards the level of training among the staff of authorities responsible for assisting victims in these countries. The problem of the quality of training is particularly significant due to the stressful nature of the activities performed and the scope of the measures undertaken (in different locations), as well as the diversity of groups of authorities responsible for providing help (social workers, law enforcement bodies, public prosecutor's offices, among others). This situation means that particular attention should be paid to the training system. This is not the case in Article 4 or the preceding provisions, which thereby constitutes a threat to the effective implementation of the Directive in accordance with its objectives.

Article 5. Right of victims when making a complaint

Article 5(1) obliges Member States to ensure that victims receive written acknowledgement of the formal complaint made by them to the competent authority of the Member State, stating the basic elements of the criminal offence in question. Paragraphs 2 and 3 concern victims who do not understand or speak the language used by the competent authority. Such victims who wish to make a complaint with regard to a criminal offence shall be able to make the complaint in a language that they understand or by receiving the necessary linguistic assistance. The victims, if they so request, shall receive a translation, free of charge, of the written acknowledgement of their complaint, in a language that they understand.

Article 5 does not specify what basic information about the reported criminal offence is to be included in this acknowledgement. These items are indicated in recital 24 of the Preamble: they include information about the crime, such as the type of crime, the time and place, and any damage or harm caused by the crime, as well as a file number and the time and place the crime was reported (which serves as evidence that the crime has been reported). Recital 63 is also important here. It highlights the need to ensure that the competent authorities are prepared to respond to victims' complaints in a respectful, sensitive, professional and non-discriminatory manner. This is likely to encourage victims to report crimes and therefore potentially avoid repeat victimisation, which is a strength of the Directive. This recital also stipulates that measures are to be put in place to enable third-party reporting, including by civil society organisations. It also states that use should be made of communication technologies such as email, video recordings and online electronic forms for making complaints.

Taking into account the content of the provision and the intentions of recitals 24 and 63, Article 5 is a strength of the Directive, as it sets specific tasks for authorities. In terms of its implementation, it also creates opportunities that will enable victims of gender-based violence to exercise their rights. The moment of making a complaint, and thus some of the guarantees under Article 5, is very important for the victims of gender-based violence. As has already been mentioned, such victims are particularly at risk of secondary victimisation from the moment of the first contact with the authorities, including the moment of making a complaint. Victims of violence in close relationships and victims of sexual violence are often discouraged from making a complaint. The obligation of issuing an acknowledgement of a complaint being made formalises the actions of the authority accepting the complaint and may limit the risk of secondary victimisation. This is a strength of the Directive. On the other hand, this provision does not provide for any document to be issued when the authority refuses to accept the complaint. This is a weakness of this provision. In this regard, the provision also represents a threat, since it does not provide any possibilities or guarantees to victims of gender-based violence whose case is refused. Moreover, this provision does not refer in any way to situations where the crime is prosecuted on the basis of complaint instead of *ex officio* prosecution⁽⁵⁴⁾. It ought to apply to such a prosecution and enable the victim to obtain a relevant acknowledgement of complaint. The lack of such a reference is a legal gap and a weakness of the provision.

Recital 25 stipulates that the delayed reporting of a criminal offence due to fear of retaliation, humiliation or stigmatisation shall not result in a refusal to acknowledge the victim's complaint. This is of huge importance to victims of gender-based violence, especially victims of violence in close relationships, who may be afraid of revenge by the offender. These victims often make a complaint after many years of continuing violence. Therefore, in such situations a victim cannot be refused the acknowledgement of the complaint. This is a strength of the Directive, and creates an opportunity to strengthen national regulations by implementing these solutions in the legal systems of Member States.

In the case of paragraph 2 and the possibility for the victim to receive the necessary linguistic assistance, it should be stressed that this assistance should not be provided by the offender in a given case. The provision, however, does not refer to this possible situation, which may pose a threat to the exercise of the victim's rights. This constitutes one of the weaknesses of this provision in the context of gender-based violence. There is also the threat that a provision excluding

an offender from the group of entities providing assistance will not be introduced in national regulations.

Article 6. Right to receive information about their case

Article 6 concerns the victim's right to receive information about the criminal proceedings instituted as a result of the complaint made about the criminal offence suffered by the victim. Once the victim has been informed about this right under Article 6(1), they have the right to receive information, upon request, about any decision regarding the following: not to proceed with or to end an investigation; not to prosecute the offender; the time and place of the trial; and the nature of the charges against the offender. Paragraph 2 refers to the right of the victims — depending on their role in the relevant criminal justice system — to receive (also upon request) information about any final judgment in the trial and about the state of the criminal proceedings, unless, as in exceptional cases, the proper handling of the case may be adversely affected by such notification to the victim. In paragraph 3, the Directive explicitly indicates that information about decisions not to proceed with or to end an investigation, or not to prosecute the offender, as well as information about any final judgment in a trial, must, with some exceptions, include the reasons or a brief summary of the reasons for the decision concerned. Pursuant to paragraph 4, the wish of victims as to whether or not to receive information shall be binding *vis-à-vis* the competent authority, unless that information must be provided due to the victim's entitlement to active participation in the criminal proceedings. Importantly, Member States shall allow victims to modify their wish at any moment, and shall take such modification into account.

In line with recital 26, the objective of this provision is to treat victims in a respectful manner and to enable them to make informed decisions about their participation in criminal proceedings. Victims are informed that they may receive information about the criminal proceedings instituted as a result of the complaint made about a criminal offence suffered by the victim. Victims may also submit a request for specific information. The information is provided to victims solely upon request, except for, in fine, the information referred to in paragraph 4. The provision is thus formulated so as to ensure that victims have the right not to be informed and to have their wish not to receive information about the case respected, as was pointed out in the assessment of the

⁽⁵⁴⁾ It should be mentioned that, until recently, the offence of rape was prosecuted in Poland only if a complaint was made.

implementation of Framework Decision 2001/220/JHA ⁽⁵⁵⁾. However, providing information only upon the victim's request may generate risks when it comes to the rights of the victims of gender-based violence, which will be discussed below.

According to recital 27, information is to be provided to a victim at her or his last known correspondence address or via the electronic contact details given to the competent authority by the victim. In exceptional cases, for example, due to the high number of victims involved in a case, it shall also be possible to provide information through the press, via an official website of the competent authority, or through a similar communication channel. It should be indicated at this point that — as has already been mentioned in the comments to Article 4 — in the case of some victims of gender-based violence, providing information via the internet will not be sufficient. Victims living in rural areas, or disabled or elderly victims, may not have access to the internet or the skills necessary to use it. However, the Directive does not address this problem, which is a weakness in this respect. It does not contain an explicit statement that the communication channel should be selected based on a consideration of the individual circumstances of the victim and her or his needs. Such a solution poses the threat that national regulations will copy the standard catalogue of communication tools set out in the Directive. Such a solution exempts the authority from non-standard actions that would ensure effective outreach towards victims in terms of the provision of information.



Recital 29 indicates that victims shall receive updated contact details for communication about their case, unless the victim has expressed a wish not to receive such information. As has already been mentioned, in the case of victims of gender-based violence, it is essential that the victim may

contact the same member of staff and is not forced to contact different staff who do not know the case and to whom the victim must reiterate all the details of the case. The telephone number or email address of the contact person may change, for example, but the contact person should not be changed. The Directive does not give any guidelines in this regard, which should be considered a weakness of this provision. There is a threat that this provision will be interpreted literally, and a risk that the victim will have to contact different persons during the proceedings.

In the case of victims of gender-based violence, the option of receiving information about decisions not to proceed with or to end an investigation, or not to prosecute the offender, as well as information about any final judgment, with reasons or a brief summary of reasons for the decision concerned, is very important. In this regard, it is a strength of the Directive. A victim is thus informed about the outcome of the proceedings. In the cases of gender-based violence, in particular of violence in close relationships, an offender often remains unpunished — authorities either refuse to investigate or terminate proceedings. If the victim knows the reasons for such a decision on the part of the authority, this makes it possible for the victim to exercise her or his right to appeal against the authority's decision. If the victim submits a request to receive the relevant information about the decision not to proceed with or to end an investigation, or not to prosecute the offender, the authority is obliged to provide at least brief reasons for the decision, which makes the process more open and transparent, and may lead to greater deliberation by the authority when taking such decisions ⁽⁵⁶⁾. This is a strength of the Directive from the perspective of gender-based violence, and offers an opportunity for victims of gender-based violence to be treated more seriously. Interpretatively speaking, this provision is clear: it limits the number of potential interpretations and facilitates the proper implementation of the Directive in the national regulations of Member States.

Articles 6(3) and (4) contain key provisions in terms of victims of gender-based violence, namely regarding their safety. Pursuant to paragraph 5, Member States shall ensure that victims are offered the opportunity to be notified, without unnecessary delay, when the person remanded in custody, prosecuted or sentenced for criminal offences concerning them is released from or has escaped detention. Furthermore, Member States shall ensure that victims are informed of any relevant measures taken to protect them in case of the release or escape of the offender. Paragraph 6 specifies that victims shall, upon request, receive this information, at

⁽⁵⁵⁾ 'Victims in Europe: Implementation of the EU Framework Decision on the standing of victims in the criminal proceedings in the Member States of the European Union', <http://www.apav.pt/vine/images/reportVinE.pdf>.

⁽⁵⁶⁾ It should be mentioned that pursuant to recital 30, 'the reasons for that decision should be provided to the victim through a copy of the document which contains that decision or through a brief summary of the reasons for the decision'.

least in cases where there is a danger or an identified risk of harm to the victim (unless the notification carries an identified risk of harm to the offender). Even though in paragraph 6 the Directive indicates that the victims will receive this information, upon request, where there is a danger or an identified risk of harm to them, this statement is relatively general, and does not refer explicitly to the situation of victims of gender-based violence. Recital 32 explains only that the reference to ‘identified risk of harm to the victims’ shall cover such factors as the nature and severity of the crime and the risk of retaliation. The threat is to be individually assessed, but the specificity of gender-based violence is not properly taken into account here, which represents a weakness in the Directive.



In the case of victims of gender-based violence, in particular victims of violence in close relationships and victims of sexual violence, protection of the victim and ensuring the victim's security are both extremely important. If the offender is apprehended, remanded in custody or imprisoned, the offender is isolated from the victim, which ensures the victim's protection against the offender. If the offender is released from custody or prison, or escapes, and the victim is not informed, there is a greater risk of the victim's repeat victimisation, intimidation or retaliation by the offender. In the case of the victims of violence in close relationships, the victim might be surprised by the offender's return home. In such a case, the victim does not have a chance to take actions that would ensure her or his protection, e.g. submitting a request for a restraining order, a ban on contact or — in the case of victims of violence in close relationships — an eviction order (if such protection measures are available within the legal regime of the Member State). Thus, by requiring Member States to provide victims with this information only upon their request, this provision generates specific risks for the rights of victims of gender-based violence (as set out in the Directive), and even for such victims' life and health. Therefore, this represents a threat from a SWOT perspective, as national regulations could replicate such oversights in the process of implementing the Directive.

Of course, victims may change their decision and ask for such information to be provided, but if they have not already submitted a request to inform them about the release or escape of the offender from custody or prison, they are at risk of further acts of violence. If the victim requested such information in their first contact with the competent authority, it is recommended that her or his wish should be respected and executed throughout the entire proceedings, and that relevant authorities inform each other immediately about such a wish on the victim's part. The Directive does not mention here the obligation of informing the victim about changes to or the revocation of protection measures, such as a ban on contact, a restraining order or an eviction order for the offender. Such information is of crucial importance for the victims of violence in close relationships and victims of sexual violence. Failure to inform the victim about such changes or the revocation of such measures also generates the risk of repeat victimisation ⁽⁵⁷⁾. This is a legal gap and a weakness in the provision. An obligation to provide information about the release or escape of the offender, or the revocation of or changes to protection measures — ex officio and not upon the request of the victim — should be considered. The sole case in which this information should not be given to the victim is when the latter clearly states that she or he waives this right and has been previously instructed about the consequences of such a waiver.

It should be indicated at this point that, in Article 56(1) (b), the Council of Europe Convention on preventing and combating violence against women and domestic violence stipulates that parties shall take the necessary legislative or other measures to protect the rights and interests of victims, including their special needs as witnesses, at all stages of investigations and judicial proceedings, in particular by ‘ensuring that victims are informed, at least in cases where the victims and the family might be in danger, when the perpetrator escapes or is released temporarily or definitively’. The Convention thus orders the introduction of a mechanism whereby the victim is mandatorily informed about the offender's release or escape. The danger for the victim or her or his family is the fundamental, but not the only, condition. Regarding Article 6, the implementation of the Directive should take into account the provisions of the Convention ⁽⁵⁸⁾.

⁽⁵⁷⁾ S. Spurek, ‘Izolacja sprawcy od ofiary. Instrumenty przeciwdziałania przemocy w rodzinie’ (‘Isolation of the offender from the victim. Instruments for counteracting domestic violence’), Warsaw 2013, p. 277.

⁽⁵⁸⁾ It should be mentioned that the Directive does not introduce the victim's right to appeal against the decision to release the offender or the right to be heard as part of this procedure. Due to the comprehensive nature of the issues relating to the option or obligation of taking a stance in these cases, in particular among victims of violence in close relationships, this issue will not be analysed in more detail in this report.



Under paragraph 6, victims shall receive this information unless there is an identified risk of harm to the offender resulting from the notification. This provision deals with cases where there is a risk of retaliation against the offender⁽⁵⁹⁾, but this caveat is not explicitly formulated in the provision. This wording is much broader and might be interpreted more generally, which, from a SWOT perspective, constitutes a threat of an unfavourable implementation of the Directive in terms of the security of victims of gender-based violence.

When implementing Article 6, the introduction by Member States of procedures for informing victims, including procedures where victims state what kind of information they wish to receive, may be of key importance. However, introducing relevant instructions about the consequences of a victim not receiving a given piece of information should also be considered. When victims at the first contact specify the kind of information they wish to obtain, their wish ought to be communicated between authorities without undue delay, if possible with the use of modern technologies and electronic means of communication.

It should be mentioned that, in Article 56(1)(c), the Council of Europe Convention on preventing and combating violence against women and domestic violence stipulates that parties shall take the necessary legislative or other measures to protect the rights and interests of victims, including their special needs as witnesses, at all stages of investigations and judicial proceedings, in particular by ‘informing them, under the conditions provided for by internal law, of their rights and the services at their disposal and the follow-up given to their complaint, the charges, the general progress of the investigation or proceedings, and their role therein, as well as the outcome of their case’. This provision is relatively general and partly overlaps — in terms of information categories — with Articles 4 and 6, but it does not provide for the mode or mechanisms for providing this information. Furthermore, it refers the right to information to the ‘conditions provided for by internal law’, which does not guarantee the full exercise of this right. For this reason, this provision in the Convention will not be particularly helpful for recommendations concerning the Directive’s implementation.

Article 7. Right to interpretation and translation

Article 7 refers to victims who do not understand or speak the language of the criminal proceedings. They have the right to interpretation and translation. They shall be able to take advantage of free-of-charge interpretation, at least during any interviews or questioning of the victim during criminal proceedings before investigative and judicial authorities, during police questioning, and during their active participation in court hearings and any necessary interim hearings. This right depends on the victim’s filing a request and on the victim’s role in the relevant criminal justice system in criminal proceedings (paragraph 1). Victims shall also be provided with translations of information essential to the exercise of their rights in criminal proceedings in a language that they understand, free of charge, to the extent that such information is made available to victims, at the very least any decision putting an end to criminal proceedings, and upon the victim’s request, the reasons or a brief summary of reasons for such a decision (paragraph 3). To this end, it is possible — without prejudice to the rights of the defence and in accordance with rules of judicial discretion — to use communication technology such as video conferencing, telephone or the internet, unless the physical presence of the interpreter is required in order for the victims to properly exercise their rights or to understand the proceedings. Further paragraphs of this article refer to the translation of information about the time and place of the trial, ensuring an oral translation or oral summary of essential documents, instead of a written translation, and assessing whether victims need interpretation or translation. According to the Directive, victims may challenge a decision not to provide interpretation or translation.

Recital 34 explains that victims shall be treated in a respectful manner and that they shall be able to access their rights. For this reason, it is important to provide the victim with free oral translation during questioning and active participation in court hearings, according to the victim’s role in the relevant criminal justice system in criminal proceedings. Interpretation and translation must be ensured solely within the scope necessary for the victims to be able to exercise their rights.

Article 7 is related to Articles 3 and 5 (see comments on those provisions) and, similarly to those regulations, it may be of vital importance for the exercise of the rights of victims of gender-based violence who are migrants or victims of human trafficking. Linguistic barriers should not restrict such victims in exercising the rights set out in the Directive. Without translation or interpretation, these victims will not be able to exercise the rights set out in the Directive, and they are particularly vulnerable. Therefore, the authorities shall ensure — within the scope set out in Article 7 — that such victims have access to information about support and protection, and they

⁽⁵⁹⁾ ‘Guidance document related to the transposition and implementation of 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 replacing Council Framework Decision 2001/220/JHA’, http://ec.europa.eu/justice/criminal/files/victims/guidance_victims_rights_directive_en.pdf.

shall be understood by those authorities. This provision is not directly addressed to such victims but, through its general wording, it also covers such groups. This is a strength of the Directive. Such groups should be provided with a relatively broad scope of access to translation and/or interpretation. It is also important for the translation to be reliable and render the specificity of cases of gender-based violence. The qualifications of translators and interpreters may be crucial here. The adequate training of such translators and interpreters should limit the risk of victims of gender-based violence suffering secondary victimisation. Yet the Directive does not provide detailed guidelines in this respect: though it explicitly refers to the training of specific professional groups, it does not mention translators and interpreters (see comments on Article 25). This may generate a threat for the victims of gender-based violence to exercise their rights, as there is a risk that this professional group will not be included in national regulations.

It should be mentioned that, in Article 56(1)(h), the Council of Europe Convention on preventing and combating violence against women and domestic violence stipulates that parties shall take the necessary legislative or other measures to protect the rights and interests of victims, including their special needs as witnesses, at all stages of investigations and judicial proceedings, in particular by providing victims with independent and competent interpreters when victims are parties to proceedings or when they are supplying evidence. The Convention thus also highlights the need for interpreters to be properly qualified, but, similarly to the Directive, it does not specify the issue of their training when it comes to the skills required to communicate with victims.

Article 8. Right to access victim support services



Pursuant to Article 8(1), victims shall have access to confidential victim support services, free of charge, which act in the interests of the victims before, during and for an appropriate time after criminal proceedings.

This provision is a clear strength of the Directive from the perspective of gender-based violence. It explicitly indicates that access to support services shall be free of charge and confidential. Recommendation Rec(2002)5 of the Committee of Ministers of the Council of Europe provides similar guidelines. Thus, this provision responds to the guidelines in this Recommendation. Article 8(1) of the Directive also emphasises that support may be necessary, and is to be provided during and after criminal proceedings. Victims will therefore be covered by access to support at all times, whenever necessary, regardless of whether proceedings have already been instigated, are pending or have been terminated. Overall, therefore, this provision deserves to be positively assessed.

The Directive underlines that the right to support is one of the key issues that the Directive regulates. For this reason it is important to formulate the support-related provisions in a precise and specific manner. It should be mentioned that Framework Decision 2001/220/JHA referred to the issues of support only in Article 13, which applied exclusively to specialist services and victim support organisations. The provision of the Directive is much broader but it does not indicate the need to ensure access to support through the proper geographic distribution of support centres and the provision of facilities for the disabled. This is a clear gap in this regulation, and thus constitutes a weakness of the Directive in this respect. As it clearly relates to the organisational and financial obligations of Member States, the lack of such a regulation creates a threat of Member States implementing this provision to the letter. Recital 37 of the Preamble does admittedly indicate that there is to be a sufficient geographical distribution of support centres across the Member State so as to allow all victims the opportunity to access such services, but this point has not been stipulated in this provision⁽⁶⁰⁾. As a result, victims of gender-based violence, e.g. victims living in rural areas or disabled victims, may have limited access to support services. The Beijing Platform for Action pointed out the problem of disabled women accessing support services. Furthermore, the CEDAW Committee's views in the case *A.T. v. Hungary* should be mentioned here. The victim of domestic violence was unable to use the services provided by the shelter, as no shelter in the country was equipped to receive victims with a disabled child. The lack of explicit provision in the Directive regarding the special needs of certain groups of victims when accessing support services poses problems, and means that this provision will require special monitoring at the implementation stage.

⁽⁶⁰⁾ DG Justice and Consumers, in its guidance document, also pointed out the need to provide support in rural areas; 'Guidance document related to the transposition and implementation of 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 replacing Council Framework Decision 2001/220/JHA', http://ec.europa.eu/justice/criminal/files/victims/guidance_victims_rights_directive_en.pdf.



Article 8(3) also provides no guarantees in this respect. It refers very generally to establishing free-of-charge and confidential specialist support services, but does not include any guidance as to how they operate. When it comes to the victims of gender-based violence, this provision does not resolve the legal gap mentioned above.

Paragraph 2 obliges Member States to facilitate the referral of victims, by the competent authority that received the complaint and by other relevant entities, to victim support services. The phrase 'by other relevant entities' may have a positive impact on victims of gender-based violence, as some of them do not contact the authorities that receive the complaint (since they do not make a complaint as such). Yet such victims do have contact with doctors, social workers or other entities, for example. According to this provision in the Directive, those entities shall also refer victims to support services. In this part of the provision, the Directive also indicates that victims shall have access to such services 'in accordance with their specific needs' and those of their family members — 'in accordance with their specific needs and the degree of harm suffered as a result of the criminal offence committed against the victim'. From the perspective of gender-based violence, the fact that the provision refers to the specific needs of victims is a positive thing. Considering

the content of the Preamble's recitals concerning this group of victims, this provision will help better take into account the needs of the victims of gender-based violence. On the other hand, the first part of paragraph 2 concerns the referral of victims, for example by the police, to support services. Under recital 40 of the Preamble, repeat referrals are to be avoided. This is also highlighted in recital 62, which states that Member States are to consider developing 'sole points of access' or 'one-stop shops'. These intentions correspond to those set out in the provisions of the Convention on preventing and combating violence against women and domestic violence. In this context, these provisions should be positively assessed. The Istanbul Convention emphasises the need for coordinated multi-agency cooperation to allow for a comprehensive and appropriate handling of referrals in cases of violence. Article 18 of the Convention mentions mechanisms to provide for effective cooperation between all relevant state agencies — including the judiciary, public prosecutors, law enforcement agencies, local and regional authorities as well as non-governmental organisations and other relevant organisations and entities — when protecting and supporting victims and witnesses of all forms of violence, including by referring them to general and specialist support services. The Explanatory Report to the Convention provides examples of such cooperation — for example, services located in the same or neighbouring buildings. They are the so-called 'one-stop shops'. Another international document — Recommendation of the Committee of Ministers Rec(2002)5 — indicates the need for such coordinated cooperation. The Recommendation emphasises that the support ought to be provided in a coordinated, multi-pronged and professional way. Yet the articles of the Directive do not explicitly provide such recommendations. These are set out in the Preamble and through reference to the aforementioned documents. From the perspective of gender-based violence, this is not sufficient, and this provision is one of the Directive's weaknesses in that regard.

Pursuant to Article 8(4), victim support services and any specialist support services may be set up as public or non-governmental organisations, and may be organised on a professional or voluntary basis. Such a solution will facilitate using the experience and knowledge of non-governmental organisations specialised in providing support for victims, which should be positively assessed. It may also have a positive impact on the exercise of the rights of victims of gender-based violence. Those provisions are one of the Directive's strengths, as they provide for a wide range of entities that may perform victim support roles. This provision also creates a significant opportunity to include non-governmental organisations in this process when the provision is implemented in Member States.

There is a caveat in paragraph 5 that access to any victim support services cannot be dependent on a victim making a formal complaint about a criminal offence to a competent authority. As has been already indicated, victims of gender-based violence often do not make complaints because of fear, shame and social stigma. There is no explicit reference in this provision to victims of gender-based violence. Nevertheless, it may have a positive impact on victims exercising their rights. Making access to victim support dependent on a victim making a complaint could lead to a situation where many victims of gender-based violence would not be eligible for support. From the perspective of protecting victims of gender-based violence, this provision is a strength of the Directive, as it forces services to actively act on their own initiative, and not because of a victim's complaint. Once implemented by Member States, this provision (paragraph 5) creates an opportunity for a change of perception of the problem of gender-based violence and of the obligations of Member States in the process of counteracting this violence.

Article 9. Support from victim support services

Article 9 supplements Article 8 and refers to the types of support available. Victim support services shall provide the following, unless they are provided by other public or private services (paragraph 1): information, advice and support relevant to the rights of victims, including accessing national compensation schemes for criminal injuries and participating in criminal proceedings, including in preparation for attendance at trial; information about or direct referral to any relevant specialist support services in place; emotional and, where available, psychological support; advice relating to financial and practical issues arising from the crime; advice relating to the risk and prevention of secondary and repeat victimisation, of intimidation and of retaliation; and methods of preventing these phenomena. This provision is relatively general but quite comprehensively lists the types of services that are to be made available. For this reason, it should be positively assessed. However, it is worth noting that the provision does not specify how individual types of support should be administered, which may generate risks for the exercise of some victims' rights.

Moreover, pursuant to paragraph 2, Member States shall encourage victim support services to pay particular attention to the specific needs of victims who have suffered considerable harm due to the severity of the crime. This is also a positive guideline, but the wording is somewhat vague and left open to interpretation, and does not ensure therefore that it will be mandatorily taken into account by the services in their operations. This provision is a weakness of Article 9.

Paragraph 3 refers to specialist support services and their operations. This provision explicitly covers the victims of gender-based violence. It highlights the need for targeted and integrated support for victims with specific needs, such as victims of sexual violence, victims of gender-based violence and victims of violence in close relationships, including trauma support and counselling (see comments on Article 8 for more information on integrated support). Moreover, the victims of these types of violence are explicitly mentioned, in recital 38, as persons who are particularly vulnerable or who find themselves in situations that expose them to a particularly high risk of harm. This recital explicitly states that persons subjected to repeat violence in close relationships and victims of gender-based violence are part of this group. This is a clear strength of the Directive: as a group, victims of gender-based violence do not have to be 'construed' from the context of the Directive and its other provisions. In this way, specific services might be more accessible to the victims of these forms of violence, which creates an opportunity for the effective implementation of this provision in national regulations.

This provision indicates a form of specialist support — shelters for victims in need of a safe place due to an imminent risk of secondary and repeat victimisation, of intimidation or of retaliation. Recital 38 also mentions other forms of support — 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, advocacy and specific services for children as direct or indirect victims. The provision of Article 9 itself does not list the services indicated in the recital, which is a weakness and a gap in this provision from the perspective of gender-based violence.



It is worth mentioning that the majority of international documents concerning gender-based violence refer in detail to the types of support and assistance that are to be made available to victims. The documents indicate the forms of support (e.g. the Beijing Platform for Action,

CEDAW Committee General Recommendation No 19, Recommendation of the Committee of Ministers Rec(2002)5 and refer in detail to the mode of their provision. For example, the Convention on preventing and combating violence against women and domestic violence sets out in Article 24 an obligation to set up telephone helplines and at the same time specifies that these are to be state-wide, round-the-clock (24/7) and free-of-charge services, providing advice to callers and ensuring confidentiality or due regard for callers' anonymity. It should also be mentioned that the Convention includes an explicit obligation to set up referral centres for victims from one specific group, i.e. centres providing extensive support to the victims of rape or sexual violence (Article 25) ⁽⁶¹⁾. Although the Directive focuses to a large extent on providing support for victims, its provisions do not comprehensively list the types of specialist support that are to be made available, nor do they specify the ways of providing these different types of support. In light of this, and in light of other international obligations, this is a weakness of the Directive.

Article 10. Right to be heard

Article 10 is the first of the eight provisions of Chapter 3 of the Directive, entitled 'Participation in Criminal Proceedings'. This provision sets out an obligation for Member States to ensure that victims may be heard during criminal proceedings and may provide evidence. Where a child victim is to be heard, due account shall be taken of the child's age and maturity (paragraph 1). In paragraph 2, the provision stipulates that the procedural rules shall be determined by national law.

This provision is very general, thus leaving significant discretion to Member States in terms of the implementation and execution of this provision. The recitals of the Preamble specify only that victims shall be permitted to make statements or explanations in writing (recital 41), and that the right of child victims to be heard in criminal proceedings shall not be precluded solely on the basis that the victim is a child or on the basis of the victim's age (recital 42). The vagueness of the wording of this provision leaves it open to the risk that it will be implemented to the letter in the national systems of Member States.



It should also be mentioned here that the provision does not govern the time and mode of hearing of the victim and refer in this term to national law. Yet the mode of questioning, including the place and the scope of questions, as well as the qualifications of the person conducting interviews of victims, may cause secondary victimisation. However, the provision does refer to the method by which an authority collects evidence (for more information see comments on Article 20). The gap in this provision consists in the absence of regulations in this regard. It is worth noting that Framework Decision 2001/220/JHA was slightly more detailed in this respect. In Article 3, apart from setting out the right to be heard and to supply evidence, the Framework Decision stipulates that authorities shall question the victims only insofar as necessary for the purpose of criminal proceedings. There are no such regulations in Article 10 of the Directive.

Moreover, we should remember that the exercise of the victims' rights in criminal proceedings might be limited, due to the different role accorded to victims in criminal proceedings in the criminal justice systems of individual Member States, as emphasised by the Directive (recital 20). The possibilities of exercising the right to be heard — as in the case of other procedural rights — might be limited under national law, which is permitted under the Directive. Therefore, there may be situations where the victim will not be assured the right to be heard, e.g. at every stage of criminal proceedings or vis-à-vis issues handled in the course of criminal proceedings that are important for the victim. For this reason, this provision receives a negative assessment in this analysis. As regards comparative legal analysis, it should be mentioned that, in Article 56(1)(d), the Istanbul Convention unfortunately does not give any further guarantees, as it states that the victims, 'in a manner consistent with the procedural rules of internal law', shall have the right to be

⁽⁶¹⁾ It is not possible to present here the types of support dedicated to the victims of gender-based violence. For more information about different types of support, see a comprehensive EIGE report *Violence against Women. Victim Support: Report*, <http://eige.europa.eu/content/document/violence-against-women-victim-support-report>.

heard and to supply evidence. It thus refers to the internal provisions of a given Member State.

The implementation of Article 10 may also reflect one further caveat: the principle provided for in the Directive stating that the rights set out in the Directive are without prejudice to the rights of the offender (recital 12). In the criminal proceedings referred to this provision, the rights of the offender must be specifically ensured in a given legal system, which may cause restrictions to the exercise of the victim's rights.

This provision refers to all victims, and thus all victims may suffer from the aforementioned limitations. This provision does not give any special rights to the victims of gender-based violence, even though the limitations may be experienced most acutely by particularly vulnerable victims, including victims of sexual violence (adults or children) and girls who are victims of forced marriage or female genital mutilation. The wording of this provision, and the content of the aforementioned recitals of the Preamble, means that the decision as to the mode of implementation of this provision — and the subsequent execution of national regulations adopted following the transposition of the Directive — are left to Member States. From a SWOT perspective, this represents a threat since this provision, if implemented to the letter, not only does not strengthen the rights of victims but may also reinforce the view that the protection of victims must not limit the rights of the offender.



It is important to stress that this provision should be construed in the context of the rule of non-discrimination of victims, for example on grounds of gender. This means that the victims of gender-based violence ought to have the same right to be heard as, for example, the victims of theft. However, this point is not made evident in the provision if one takes into account the different role accorded to victims in the legal systems of Member States. For example, different acts of gender-based violence may be treated as offences of lesser importance, which may impact on the role of a victim in criminal proceedings. In the context of

gender-based violence, this provision is one of the Directive's weaknesses, as it does not improve the legal provisions that are currently in force in the European Union and its Member States.

Article 11. Rights in the event of a decision not to prosecute

Article 11 is a further provision concerning criminal proceedings. Pursuant to paragraph 1, Member States shall ensure that victims, in accordance with their role in the relevant criminal justice system, have the right to a review of a decision not to prosecute, while the national law sets out the principles of such review. Paragraph 2 introduces a caveat whereby, in accordance with national law, the role of the victim in the relevant criminal justice system will be established only after a decision to prosecute the offender has been taken. In such cases, Member States shall ensure that, as a minimum, the victims of serious crimes have the right to a review of a decision not to prosecute. The procedural rules for such a review shall be determined by national law.

Similarly to Article 10 therefore, Article 11 refers to the procedural rules of national law. The role of the victim may differ in individual legal systems. For this reason, the comments on Article 10 and the assessment of that provision as a weakness in the Directive remain valid here. More importantly, Article 11(2) states that the 'victims of serious crimes have the right to a review of a decision not to prosecute'. This may further restrict the victims of gender-based violence exercising their rights. Such acts of violence, e.g. violence in close relationships, are often treated as offences of lesser importance. In this way, when the role of the victim in the relevant criminal justice system is established only after a decision to prosecute the offender has been taken, victims of gender-based violence may not have the right to review a decision not to prosecute. The conclusion of the present SWOT analysis, then, is that there is a threat that the rights of these specific victims of violence will not be strengthened as a result of the implementation of this Directive.

It should also be noted that Article 6 concerning the right to information refers to the 'decision not to proceed with or to end an investigation or not to prosecute the offender', while Article 11 refers solely to the 'decision not to prosecute'. Pursuant to recital 43, this right refers to a review of decisions not to prosecute taken by prosecutors and investigative judges or law enforcement authorities such as police officers, and not to decisions taken by courts. The recital does not indicate the type of decision but stipulates only who takes the decisions. This is not explained in paragraph 5 either (which concerns the 'decision of the prosecutor not to prosecute,



if such a decision results in an out-of-court settlement'). Considering recital 44 ('A decision ending criminal proceedings should include situations where a prosecutor decides to withdraw charges or discontinue proceedings'), it may be concluded that Article 11 also concerns all the decisions referred to in Article 6. Nevertheless, this is not explicitly stated in Article 11. In paragraph 3, this provision refers to notifying the victims about their right to receive sufficient information to decide whether to request a review, but it also mentions the 'decision not to prosecute'. The differences in the wording of Articles 6 and 11, and the content of Article 11, may lead to a situation where the Member States will implement this provision to the letter. This is a threat for the effective implementation of the Directive and for improvement of the protection of victims of violence. It will restrict the right to a review referred to in this provision.

There is also a threat associated with the translation of this provision. It is a principle that all language versions of EU documents are equivalent. But, for example, there is inaccuracy in the Polish language version of the Directive. The Polish version of the Directive in this provision refers to 'decyzja o odmowie ścigania', which would rather be an equivalent of 'refusal to prosecute' (cf. the wider concept of 'decyzja o zaniechaniu ścigania', which is an equivalent of the 'decision not to prosecute'). Lack of uniform wording of Articles 6 and 11 and the risk of different translation of these phrases into the national languages poses a threat to the implementation of the Directive and for establishing uniform or similar legal standards as regards victim protection in the European Union ⁽⁶²⁾.

Article 11 refers to all victims, and thus all victims may suffer from the aforementioned limitations and the exercise of their rights may be limited due to the aforementioned interpretative doubts. This may particularly impact on the victims of gender-based violence, which is a weakness in the Directive. The statistics show that in cases of violence in close relationships, for example, the decision not to prosecute or to discontinue proceedings is issued relatively often ⁽⁶³⁾. The

possibility of a review of this decision is therefore very important for the victims of gender-based violence.

Paragraph 4 mentions review by the highest prosecuting authority which took a decision not to prosecute. As a rule, under recital 43, any review of a decision shall be carried out by a different person or authority than that which made the original decision. This is a favourable solution, for it facilitates a two-step procedure and a double review of the grounds for taking the decision not to prosecute. From the perspective of gender-based violence, this is one of the Directive's strengths, for it creates an opportunity for the Directive to be implemented in Member States in a manner compliant with the Directive's intentions and objectives. As mentioned above, this provision is of particular importance for the victims of gender-based violence.

Article 12. Right to safeguards in the context of restorative justice services

Article 12(1) refers to the measures taken to safeguard the victim from secondary and repeat victimisation, from intimidation and from retaliation, to be applied when providing any restorative justice services. This provision lists the conditions of applying such services in order for the objective to be achieved. It must be ensured that the restorative justice services are used only if they are in the interest of the victim, subject to any safety considerations, and are based on the victim's free and informed consent, which may be withdrawn at any time. Furthermore, before agreeing to participate in the restorative justice process, the victim is to be provided with full and unbiased information about that process and the potential outcomes, as well as information about the procedures for supervising the implementation of any agreement. The offender must first acknowledge the basic facts of the case. Other conditions are that each agreement is a result of voluntary understanding and that it may be taken into account in all further criminal proceedings. It is also specified that discussions in restorative justice processes which are not conducted in public are confidential and will not subsequently be disclosed, except with the agreement of the parties or as required by national law due to an overriding public interest. Pursuant to paragraph 2, Member States shall facilitate the referral of cases, as appropriate to restorative justice services, including through the establishment of procedures or guidelines on the conditions for such referral.

As explained in recital 46, restorative justice services (such as victim-offender mediation, family group conferencing and sentencing circles) can be of great benefit to the

⁽⁶²⁾ 'Dyrektywa Parlamentu Europejskiego i Rady 2012/29/UE z dnia 25 października 2012 r. ustanawiająca normy minimalne w zakresie praw, wsparcia i ochrony ofiar przestępstw. Komentarz', (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 replacing Council Framework Decision 2001/220/JHA. Commentary), ed. E. Bieńkowska and L. Mazowiecka, Warsaw 2014, p. 18.

⁽⁶³⁾ In this way, the Member States often act in a manner that is contradictory to the Recommendation of the Committee of Ministers Rec(2002)5 obliging prosecutors to treat violence towards women as an aggravating circumstance in the process of deciding whether prosecution lies in the public interest. See also Article 46 of the Istanbul Convention.

victim, but require safeguards to prevent secondary and repeat victimisation, intimidation and retaliation. Factors such as the nature and severity of the crime, the ensuing degree of trauma, the repeat violation of the victim's physical, sexual or psychological integrity, power imbalances, and the age, maturity or intellectual capacity of the victim — which could limit or reduce the victim's ability to make an informed choice or could prejudice a positive outcome for the victim — shall be taken into consideration in referring a case to the restorative justice services and in conducting restorative justice.

The definition of restorative justice is set out in Article 2 of the Directive. As was indicated in the comments on Articles 2 and 4, the victims of gender-based violence should be offered restorative justice services with a large dose of prudence. In cases of gender-based violence, where the victim knows the offender or remains in close relationship with the offender, the victim is at risk of intimidation or retaliation. An imbalance of power in the relationship may limit the possibility of the victim refusing restorative justice procedures. Under Article 48 of the Istanbul Convention, mandatory alternative dispute resolution processes, including mediation and conciliation, are prohibited in relation to all forms of violence covered by the scope of the Convention. Pursuant to Article 10 of Framework Decision 2001/220/JHA on mediation in the course of criminal proceedings, the European Court of Justice issued an important judgment for victims of domestic crimes and thus refers to violence in close relationships as well as to other gender-based domestic violence. In the event of a literal implementation of this provision by Member States, there is a risk that the services will — in line with the provisions of the Directive and national regulations — always refer such cases for mediation. In particular, given the growing importance of the mediation mechanism in resolving legal disputes, if Member States interpret the Directive to the letter in this regard, they may enact provisions that will not take into account the specific features of gender-based violence, as no explicit caveat is included here. On the other hand, Member States must take into account the safeguards set out in paragraph 1. Here the provision is an opportunity as it states the premises for applying restorative justice services, even though the victims of gender-based violence are not explicitly mentioned. In addition, the aforementioned recital of the Preamble, which indicates the factors that may lead to the referral of victims to restorative justice services, will be helpful in the proper implementation of the provision. Some of these factors indirectly point to a particularly vulnerable group — victims of gender-based violence — by mentioning the nature of the offence, recurring violations of bodily, sexual and psychological integrity, and imbalance of power. In this respect, the legal and practical implementation of the Directive by Member States must receive particularly close monitoring.

While monitoring the implementation of the Directive by Member States, attention should be paid to discrepancies in the translation of paragraph 1. For example, in the Polish translation, the phrase 'access to safe and competent restorative justice services' was translated as 'dostęp do bezpiecznych i zadowalających usług w zakresie sprawiedliwości naprawczej' (i.e. 'satisfactory' is used rather than 'competent'). Thus there is a mistranslation of the word 'competent' ⁽⁶⁴⁾. In other provisions of the Directive this word is used in the context of the competent authority/authorities, i.e. the authority which is assigned specific statutory tasks (thereby obligating the authority to execute these tasks). It is unclear whether this provision concerns relevant (specified, suitable) services, or rather the execution of the relevant tasks in a competent (professional) way. As in the case of Article 11, differences in translations and doubts as to the meaning of individual phrases are a threat for the effective implementation of the Directive in compliance with the Directive's objectives.

Article 13. Right to legal aid

According to Article 13, Member States shall ensure that victims have access to legal aid, including legal advice and representation in the lawsuit ⁽⁶⁵⁾. Member States have an obligation to provide legal aid only where victims have the status of parties to criminal proceedings. Furthermore, the conditions or procedural rules under which victims have access to legal aid shall be determined by national law. Both caveats in this provision, referring to the status of a victim in criminal proceedings and to national law, may limit the exercise of the victim's right to legal aid.

These restrictions may particularly affect victims of gender-based violence who do not make a complaint and whose cases will never be dealt with as part of the criminal justice system. Due to economic constraints, such victims

⁽⁶⁴⁾ W. Zalewski, 'Rozdział 3. Udział w postępowaniu karnym' (Chapter 3. Participation in Criminal Proceedings) in 'Dyrektywa Parlamentu Europejskiego i Rady 2012/29/UE z dnia 25 października 2012 r. ustanawiająca normy minimalne w zakresie praw, wsparcia i ochrony ofiar przestępstw. Komentarz' (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 replacing Council Framework Decision 2001/220/JHA. Commentary), ed. E. Bieńkowska and L. Mazowiecka, Warsaw 2014, p. 157.

⁽⁶⁵⁾ DG Justice and Consumers emphasised in its guidelines that this concerns free legal advice and representation in a lawsuit, 'Guidance document related to the transposition and implementation of 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 replacing Council Framework Decision 2001/220/JHA', http://ec.europa.eu/justice/criminal/files/victims/guidance_victims_rights_directive_en.pdf.



will not be able to obtain commercial legal aid (for example, a victim of violence in a close relationship who is economically dependent on the perpetrator). This provision is therefore a weakness of the Directive and in this respect limits active action on the part of Member States and specific services. As in the other assessed regulations of the Directive, such constraints represent a threat to the effective legal and practical implementation of this act.

It is worth mentioning that practically all international obligations concerning gender-based violence indicate the need to ensure that victims can access free or at least affordable legal services (Beijing Platform for Action, Recommendation of the Committee of Ministers Rec(2002)5, Istanbul Convention). The Directive is the latest regulation on this subject in the European public sphere and, regarding gender-based violence, does not expand Member States' obligations.

Article 14. Right to reimbursement of expenses

Article 14, like Articles 10–13, refers to the procedural rights of victims. Member States shall reimburse expenses incurred by victims who actively participate in criminal proceedings and in accordance with their role in the relevant criminal justice system. The conditions or procedural rules under which victims may be reimbursed shall be determined by national law.

This provision contains two limitations. Firstly, it refers to the role of the victim in a given legal regime, and secondly, to the stipulations of national law regarding the conditions or procedures for reimbursing expenses. These may limit the exercise of the victim's right to reimbursement of expenses and weaken the implementation of the Directive. Moreover, under this provision the right to reimbursement of expenses may be exercised only with regard to expenses incurred through the victim's active participation in criminal proceedings. In line with recital 47 of the Preamble, expenses shall be covered only to the extent that the victim is obliged or requested by the competent authorities to be present and actively participate in the criminal proceedings. For example, the expense incurred by a victim observing the course of the trial will not be reimbursed if a competent authority does not consider the victim's presence at or participation in the proceedings necessary, even if the victim deems it necessary for the exercise of her or his rights. Recital 47 also specifies that Member States shall be required to reimburse only the necessary expenses of victims in relation to their participation in criminal proceedings, and shall not be required to reimburse victims' legal fees. Recital 47

also narrows the concept of expenses to subsistence costs, travel costs and loss of earnings. In addition, it limits the right to reimbursement of expenses.

As is the case in the restrictions to legal aid discussed in the comments on Article 13, the aforementioned limitations may particularly impact the victims of gender-based violence. Due to economic or financial constraints, these victims may have reduced opportunities to take part in criminal proceedings (e.g. victims of violence in close relationships who are economically dependent on the perpetrators). The costs of their participation will be reimbursed only to the extent deemed necessary by the authority and at its discretion. Any remaining costs will not be reimbursed, and poorer victims will not be able to participate in other activities or to observe the trial. This would represent a financial burden for them. From the perspective of gender-based violence, this provision is therefore a weakness of the Directive.

Article 15. Right to the return of property

Article 15 refers to the right of victims whose property was seized in the course of criminal proceedings, to have it returned to them without delay. The recoverable property, unless required for the purposes of criminal proceedings, is returned following a decision by a competent authority. The conditions or procedural rules under which such property is returned to the victims shall be determined by national law.

Due to the caveat in this provision referring to the rules of national law, this provision does not effectively ensure the exercise of victims' rights. Furthermore, under recital 48 of the Preamble, property shall be returned as soon as possible to the victim of the crime, subject to exceptional circumstances, such as in a dispute concerning ownership or where the possession of the property or the property itself is illegal. The reference to 'dispute concerning ownership' referred to in this provision may concern cases of violence in close relationships, where it is not clear who is the owner of the property seized in criminal proceedings, for instance in premises where the victim and the offender lived together. In such a situation, it will be difficult to exercise the victim's rights to the property being returned. This can be considered a threat from a SWOT perspective. In contrast, the fact that there is no reference to the victim's role in the legal regime or to the victim's status in criminal proceedings is a positive aspect of this provision.

Article 16. Right to a decision on compensation from the offender in the course of criminal proceedings

Article 16 concerns the victim obtaining a decision on compensation from the offender in the course of criminal proceedings, with the exception of cases where national law provides for such a decision to be made in other legal proceedings. Moreover, Member States shall promote measures to encourage offenders to provide adequate compensation to victims. As explained by recital 49, the right to a decision on compensation from the offender also applies to victims resident in a Member State other than the Member State where the criminal offence was committed.

Framework Decision 2001/220/JHA contained a similar provision. Under Article 9 of the Framework Decision, each Member State is to ensure that victims of criminal acts are entitled to obtain a decision within reasonable time limits on compensation by the offender in the course of criminal proceedings, except in cases where national law provides for compensation to be awarded in another manner. Member States shall also take appropriate measures to encourage the offender to provide adequate compensation to victims.

Both Article 16 of the Directive and Article 9 of the preceding Framework Decision refer to the decision on compensation from the offender. State compensation is governed by Directive 2004/80/EV. More importantly, the right set out in Article 16 of the Directive is the victim's right to a decision on compensation and not the right to compensation. The Directive does not govern the issue of the right to compensation, situations where the offender is not able to pay or the issue of enforcing the decision that the offender provide compensation. Under this provision, the Member State is obliged only to 'promote measures to encourage offenders to provide adequate compensation to victims'. These are legal gaps and a weakness of the Directive.

The Directive does not cover situations that may apply to victims of gender-based violence. In the case of violence in close relationships, for example in marriage, it may be difficult to obtain a decision on compensation from the offender if the spouses have a joint marital property regime. There is a risk that the offender will pay compensation from funds held in common by the two spouses. The Directive therefore does not identify the specificities involved in the exercise of the right to compensation by victims of violence in close relationships.

Conversely, the fact that there is no reference to the victim's role in the legal regime or to the victim's status in criminal proceedings is a positive aspect of this provision (in contrast to Articles 10 and 11). However, this provision potentially exempts Member States from the obligation to issue a decision on compensation, if national law provides for such a decision to be made in other legal proceedings, such as in civil law instead of criminal proceedings. This may significantly limit the exercise of this right and must be considered a threat in the SWOT analysis.

It should also be mentioned that there are provisions on compensation for victims in the Istanbul Convention. Under the Convention, parties shall take the necessary legislative or other measures to ensure that victims have the right to claim compensation from perpetrators for any of the offences established in accordance with the Convention (Article 30, paragraph 1). Moreover, under the Convention, if the damage is not compensated by the perpetrator, the obligation to compensate a victim who sustained serious bodily injury or impairment of health lies with the state. The state may later claim compensation from the perpetrator for compensation awarded to the victim. There is no such mechanism in the Directive to guarantee compensation for the victim, and this is a weakness.

Article 17. Rights of victims resident in another Member State

Article 17 seeks to minimise the difficulties faced by victims who are residents of a Member State other than that where the criminal offence was committed, particularly with regard to the organisation of proceedings. In such cases, the authorities of the Member State where the offence was committed must take a statement from the victim immediately after the complaint is made to the competent authority. Furthermore, for the purpose of hearing victims who are resident abroad, the competent authorities must as far as possible have recourse to the provisions on video conferencing and telephone conference calls laid down in the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union of 29 May 2000. Moreover, Member States shall ensure that victims of a criminal offence committed in a Member State other than that where the victims reside may make a complaint to the competent authorities of the Member State of residence, if they are unable to do so in the Member State where the criminal offence was committed or, in the event of a serious offence, as determined by the national law of that Member State, if they do not wish to do so. In such cases, the complaint is transmitted without delay by the competent authority to which the victim made the complaint to



the competent authority of the Member State in which the criminal offence was committed, provided the mandate to institute proceedings has not been exercised by the Member State in which the complaint was made.

Framework Decision 2001/220/JHA contained an almost identical provision (Article 11).

The provision may refer to victims of gender-based violence, for example victims of sexual violence. If a victim of rape does not wish to make a complaint to the authority of the Member State in which the criminal offence was committed, the victim may submit a complaint to the authority of the Member State where she or he resides. The complaint is transmitted to the Member State where the offence was committed, unless proceedings have been instigated in the Member State where the victim resides. Under recital 50 of the Preamble, the obligation to transmit complaints shall not affect the Member States' mandate to institute proceedings and is without prejudice to the rules of conflict relating to the exercise of jurisdiction, as laid down in Council Framework Decision 2009/948/JHA of 30 November 2009 on the prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings. The possibility for victims to make a complaint in the victim's 'own' Member State may have a positive impact on the rights of the victim and the decision to report a crime. In this regard, the provision is compliant with the Istanbul Convention. Under Article 62(2) of the Istanbul Convention, the victims of an offence committed in the territory of a party other than the one where they reside may make a complaint before the competent authorities of their state of residence. The only risk posed by the implementation and application of Article 17 is a degree of discretion accorded to Member State authorities when assessing whether an offence is 'serious'.

Recital 51 specifies that if the victim has left the territory of the Member State where the criminal offence was committed, that Member State shall no longer be obliged to provide assistance, support and protection, except for that which is directly related to any criminal proceedings it is conducting regarding the criminal offence concerned, such as special protection measures during court proceedings. The Member State of the victim's residence shall provide the assistance, support and protection required for the victim to recover. This is rational and favourable to the victim's interests: the victim is provided with support and protection in the place of the victim's residence. In addition, the use of video conferencing and telephone conference calls when the victim is heard during proceedings is favourable to the victim. The victim does not have to travel and return to the Member State where the offence was committed.

Article 18. Right to protection

Article 18 is the first of the seven provisions of Chapter 4 of the Directive, entitled 'Protection of Victims and Recognition of Victims with Specific Protection Needs'. Its aim is for victims to be able to exercise their right to protection. This is the main objective of the Directive aside from ensuring the right of victims to support. It stipulates that, without prejudice to the rights of the defence, Member States shall ensure that measures are available to protect victims and their family members from secondary and repeat victimisation, from intimidation and from retaliation (including against the risk of emotional or psychological harm), and to protect the dignity of victims during questioning and when testifying. Where necessary, such measures shall also include procedures established under national law for the physical protection of victims and their family members.

Article 18 covers all provisions to protect victims from secondary and repeat victimisation and from intimidation and retaliation, and to protect the dignity of victims during questioning and when testifying. There was a similar provision in Framework Decision 2001/220/JHA. In line with Article 8 of the Framework Decision, each Member State shall ensure a suitable level of protection for victims and, where appropriate, for their families or persons in a similar position, particularly as regards their safety and the protection of their privacy, where the competent authorities consider that there is a serious risk of reprisals or firm evidence of serious intent to intrude upon their privacy.

Article 18 of the Directive is very broad in terms of victim protection. It is also very general and does not clearly specify the obligations of Member States. This is a threat to the correct implementation of the Directive, and as a result, for the exercise of the victim's rights. Only the purpose of these measures is directly stated, i.e. counteracting secondary and repeat victimisation, intimidation and retaliation, and protecting the dignity of victims during questioning and when testifying. Moreover, it is clearly stated that the measures concern questioning, testifying and physical protection. No other situations or measures are indicated. Given the wording of this provision, Member States may decide at their discretion what measures to provide for in executing the measures indicated in the provision. The guidelines of DG Justice and Consumers recommend specific measures to Member States, but this document is not

legally binding ⁽⁶⁶⁾. The provision lacks precise, specific and detailed wording concerning protection measures. There is a risk that these measures will be provided to victims only to a limited extent, that is to say according to the extent that Member States deem appropriate.

It should be emphasised that the phrase ‘without prejudice to the rights of the defence’ is a weakness in this provision. Priority is thus given to the procedural right of the offender’s defence. In this context, the rights of the victim are less important. This is harmful to victims and weakens the tone of the Directive ⁽⁶⁷⁾.

The issues related to questioning, testifying and the protection of privacy will be discussed in the comments on subsequent articles, which explicitly refer to these points. In the comments on Article 18, attention should be drawn to physical protection procedures covered by recital 52 of the Preamble, which are of special importance for the rights of the victims of gender-based violence. It should also be noted that the Directive does not standardise the physical protection measures operating in Member States. Furthermore, the measures referred to in Directive 2011/99/EU on the European protection order and Regulation 606/2013 on mutual recognition of protection measures in civil matters are applied.

In line with recital 52, measures shall be available to protect the safety and dignity of victims and their family members, and specifically to protect them from secondary and repeat victimisation, from intimidation and from retaliation, through, for example, interim injunctions or protection or restraining orders. The recital therefore refers to protection measures that are important for the victims’ safety. These

measures play an important role in the exercise of the rights of victims of gender-based violence, not only due to the fact that they are at risk of secondary victimisation, intimidation and retaliation (as referred to in Article 18). Many of these victims live with the offender (e.g. victims of violence in close relationships) or know the offender (e.g. many victims of sexual violence). As a result, the physical isolation of the offender from the victim and the application of temporary protection measures such as a ban on contact, a restraining order or an eviction order are of vital importance for the victim’s safety or life and for the exercise of the victim’s rights. These issues were indicated in international documents. The importance of the right to protection was emphasised in the Beijing Platform for Action. The Recommendation of the Committee of Ministers Rec(2002)5 states that the police should be able to enter the residence of an endangered person and arrest the perpetrator. Moreover, as an interim measure, the court should have the powers to ban the perpetrator from contacting, communicating with or approaching the victim, or residing in or entering certain defined areas. The Istanbul Convention also contains detailed regulations in this regard. It emphasises the need for immediate protection of victims (Article 50). It also stipulates that in order to ensure the safety of the victim, the authorities shall make an assessment of the lethality risk, the seriousness of the situation and the risk of repeated violence (Article 51). The Convention explicitly states that in situations of immediate danger, competent authorities are granted the power to order a perpetrator of domestic violence to vacate the residence of the victim or person at risk for a sufficient period of time and to prohibit the perpetrator from entering the residence of or contacting the victim or person at risk. Under the Convention, these measures shall give priority to the safety of victims or persons at risk (Article 52). In Article 53, the Convention states the conditions for issuing restraining or protection orders. These include ensuring the immediate protection of the victim without placing undue financial or administrative burdens on the victim; issuing the order, if necessary, on an *ex parte* basis; issuing orders with immediate effect; issuing orders irrespective of, or in addition to, other legal proceedings; and ensuring effective, proportionate and dissuasive criminal or other legal sanctions for the breaches of orders.

In Article 18, the Directive refers very generally to this type of measure by mentioning ‘procedures for the physical protection of victims and their family members’. Furthermore, the Directive refers in this respect to national law. The only premise concerning these measures indicated in this provision is the phrase ‘when necessary’. The Directive does not specify various necessary elements that are stated in the aforementioned documents. It does not indicate what specific measures should be available, in what cases they should be ensured and who should have the power to apply them.

⁽⁶⁶⁾ ‘Guidance document related to the transposition and implementation of 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 replacing Council Framework Decision 2001/220/JHA’, http://ec.europa.eu/justice/criminal/files/victims/guidance_victims_rights_directive_en.pdf.

⁽⁶⁷⁾ E. Bieńkowska and L. Mazowiecka, ‘Preambuła’ (Preamble) in ‘Dyrektywa Parlamentu Europejskiego i Rady 2012/29/UE z dnia 25 października 2012 r. ustanawiająca normy minimalne w zakresie praw, wsparcia i ochrony ofiar przestępstw. Komentarz’, ed. E. Bieńkowska and L. Mazowiecka, Warsaw 2014, p. 52. It should be noted that the Economic and Social Committee emphasised that the Directive should ensure balance between the rights of the victims and of the offenders, ‘Opinion of the European Economic and Social Committee on the Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions — Strengthening victims’ rights in the EU COM(2011) 274 final and on the Proposal for a Directive of the European Parliament and of the Council establishing minimum standards on the rights, support and protection of victims of crime COM(2011) 275 final — 2011/0129 (COD)’, <http://www.eesc.europa.eu/?i=portal.en.soc-opinions.19046>.



This provision does not refer at all to the need to introduce sanctions where measures are breached by the offender, to make the availability of such measures independent of the stage of the proceedings or investigation, and to make the measures immediately applicable in cases where there is a threat to victims or their families. These gaps are a clear weakness of the Directive. As mentioned above, the provision also gives priority to the offender's right of defence. In this respect, the implementation of the Directive may not only be inconsistent but also very unfavourable to victims, in that it does not provide them with specific guarantees of security and protection by isolating the offender.

Article 19. Right to avoid contact between victim and offender

Article 19 is another provision concerning victim protection and refers to preventing contact between the offender and victim and, where necessary, their family members, within premises where criminal proceedings are conducted, unless the criminal proceedings require such contact. Furthermore, Member States shall ensure that new court premises have separate waiting areas for victims. Framework Decision 2001/220/JHA contained similar provisions (see Article 8(3) and Article 15).

Recital 53 of the Preamble explains that distress to the victim shall be prevented during court proceedings, in particular as a result of visual contact with the offender and his or her family or associates, or with members of the public. To that end, amenities shall be ensured, especially in relation to court buildings and police stations, such as separate entrances and waiting areas for victims. In addition, Member States shall, to the greatest extent possible, plan the criminal proceedings so that contact between offenders, and victims and their family members, are avoided, such as by summoning victims and offenders to hearings at different times.

This provision thus refers to all premises where criminal proceedings are held, and is not restricted to the premises where the trial is held. This is a strength of this provision, since it refers to the introduction of measures ensuring that the victim is not at risk of contact with the offender, whether in the police station or at the public prosecutor's office. However, this provision does not refer directly to situations where, as a result of the offence, it is necessary to provide medical assistance both to the victim and to the offender. In such a case, there is a risk that they will 'meet' in the same hospital. A victim may encounter a similar problem when it is necessary to undergo forensic medical tests (e.g. the

victims of sexual violence). It is unclear whether hospitals or other healthcare centres are covered by this regulation.

Moreover, the right of victims referred to in this provision will not be exercised if 'the criminal proceedings require such contact'. The phrase 'criminal proceedings require' is so broad that from the perspective of this SWOT analysis, this provision should be considered a threat. Member States may interpret this term broadly. It is therefore possible that the victim will not be able to avoid contact with the offender. Avoiding contact with the offender is particularly important for victims of gender-based violence, who are at risk of secondary and repeat victimisation, intimidation and retaliation. Ensuring the right of non-contact is of particular importance to such victims. However, the provision does not refer to the victims of gender-based violence. Moreover, due to the above-mentioned limitations of the provision, there is a relatively greater risk that their rights will not be exercised in this respect.

On the other hand, the second sentence of Article 19 — that new court premises shall have separate waiting areas for victims — is very specific and thus favourable to the exercise of victims' rights. Here the regulation does not leave any space for discretionary interpretation of the obligation imposed on Member States. This is an opportunity from the perspective of this SWOT analysis. However, this provision does not refer to existing premises and does not oblige Member States to gradually adjust their infrastructure to ensure victims can exercise their rights. This is a weakness of the Directive.

Article 20. Right to protection of victims during criminal investigations

Article 20 refers to protection of victims during criminal investigations with regard to three issues. Firstly, interviews of victims shall be conducted without unjustified delay after the complaint about a criminal offence has been made to the competent authority. The number of interviews of victims shall be kept to a minimum. The interviews shall be carried out only where strictly necessary for the purposes of the criminal investigation. Secondly, victims may be accompanied by their legal representative and a person of their choice, unless a reasoned decision has been made to the contrary. Thirdly, medical examinations shall be kept to a minimum and carried out only where strictly necessary for the purposes of the criminal proceedings.



These regulations should be assessed as favourable to victims. The victim is to be questioned as soon as they make a complaint. The subsequent questioning and all medical examinations are to be limited to cases where it is absolutely necessary. For the victim's comfort, the victim is to be accompanied by a person of their choice, unless a reasoned decision has been made to the contrary (for example, where the offender is the person of their choice). However, the provision lists ideas and not specific solutions. This is a weakness of the Directive. Recital 53 of the Preamble explains that the number of unnecessary interactions between the authorities and the victim shall be limited through, for example, video recording of interviews and allowing the use of video in court proceedings. Unfortunately, Article 20 itself does not provide for such specific regulations. Member States may thus decide at their discretion on how to ensure the exercise of the victim's right in this respect, as well as which measures are to be introduced, for example not to question the victim on numerous occasions about the same aspects of the case.

In some cases, and as was mentioned in reference to Article 18, the phrase 'without prejudice to the rights of the defence' may pose a threat to the exercise of the victim's rights (for more information see comments on Article 18).

Article 20 refers to all types of victims. It does not focus on victims who are particularly at risk, including the victims of gender-based violence. That is why the questioning and medical examinations of such victims will be presented in more detail in the comments on Article 23.

Article 21. Right to protection of privacy

Article 21 refers to the measures aimed at protecting privacy, including the protection of personal data about the victim that is taken into account in the individual assessment provided for under Article 22, and images of victims and of their family members during criminal proceedings. Member States shall ensure that competent authorities apply such measures. The article also concerns measures to prevent the public dissemination of any information that could lead to the identification of a child victim (paragraph 1). Furthermore, Member States shall encourage the media to take self-regulatory measures while respecting freedom of expression and information and the freedom and pluralism of the media (paragraph 2).

First of all, Member States shall protect the privacy of victims, including personal data that is taken into account in the individual assessment provided for in Article 22, such as their age, gender and gender identity or expression, ethnicity, race, religion, sexual orientation, health, disability, residence status, communication difficulties, relationship to or dependence on the offender and previous experience of crime (this personal data is listed in recital 56 of the Preamble). Secondly, images of victims and their family members shall be protected. In the case of a child victim, information that could lead to the identification of the victim shall be strictly protected. Framework Decision 2001/220/JHA also provided for the protection of privacy and the photographic image of victims and their families. These provisions are a response to the problem flagged by the Economic and Social Committee regarding the Proposal for a Directive, namely the problem of the media publishing photos or



personal data of victims without their consent⁽⁶⁸⁾. It is worth mentioning that the Istanbul Convention (Article 56(1)(f)) also draws attention to the need to protect victims' privacy and image.

Under recital 54 of the Preamble, protecting the privacy of the victim can be an important means of preventing secondary and repeat victimisation, intimidation and retaliation. It can be achieved through a range of measures, including non-disclosure or limitations on the disclosure of information concerning the identity and whereabouts of the victim. This provision, even though not explicitly focused on the rights of victims of gender-based violence, impacts on their situation. As provided for in the Directive itself (see recital 57 specifically), the victims of such violence are particularly at risk of secondary and repeat victimisation, intimidation and retaliation. On the one hand, their privacy should be protected due to very personal and intimate issues that may be the subject of the proceedings (e.g. in cases of sexual violence or violence in close relationships). On the other hand, protection of victims' personal data may be necessary to ensure their safety and protect them from the offender or the offender's family or friends. For example, disclosure of data concerning the victim's address may increase the risk of the aforementioned negative events, retaliation included. This provision may refer in particular to girls — victims or potential victims of female genital mutilation, forced marriages and honour crimes. For this reason, it is a strength of the Directive that Article 21 draws attention to the need for protection of victims' privacy and image and for the absolute protection of data concerning child victims.

Unfortunately, Article 21 does not explicitly provide even an example of measures that the Member States shall introduce into criminal proceedings. This represents a threat to the correct and effective implementation of the Directive in terms of protection of victims' rights. In addition, paragraph 2 of this provision, which 'encourages' the media to self-regulate, is very 'soft'. Member States do not have the tools to influence the media, in particular commercial media, and self-regulation will depend solely on the good will of the media. Bearing in mind the freedom of media but also taking into account the human rights of victims, Member States should introduce national regulations that

will enable the exercise of the victims' right to privacy. The freedom of the media might also be limited where it is necessary to protect fundamental human rights and freedoms. The measures introduced by Member States could consist in banning the media from publishing images or data concerning victims and providing for relevant sanctions where this ban is breached. Nevertheless, Article 21 does not directly provide for such measures and is problematic from this perspective.

Article 22. Individual assessment of victims to identify specific protection needs

Pursuant to recital 55 of the Preamble, some victims are particularly at risk of secondary and repeat victimisation or of intimidation and retaliation by the offender during criminal proceedings. It is possible that such a risk derives from the personal characteristics of the victim or the type, nature or circumstances of the crime. Only through individual assessments, carried out at the earliest opportunity, can such a risk be effectively identified. For this reason, Article 22 of the Directive obliges authorities to individually assess the victim to identify, firstly, her or his specific protection needs. Secondly, authorities are obliged to determine whether and to what extent the victims would benefit from special measures in the course of criminal proceedings, as provided for under Articles 23 and 24, due to their particular vulnerability to secondary and repeat victimisation, intimidation or retaliation.

Individual assessments shall take into account, in particular, the personal characteristics of the victim, the type or nature of the crime and the circumstances of the crime. More importantly, pursuant to paragraph 3, as part of the individual assessment particular attention is to be paid to the following groups of victims: victims who have suffered considerable harm due to the severity of the 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 victims whose relationship to and dependence on the offender make them particularly vulnerable. In this regard, victims of terrorism, organised crime, human trafficking, gender-based violence, violence in a close relationship, sexual violence, exploitation or hate crime, and victims with disabilities, shall be duly considered. At the same time, the Directive stipulates that child victims shall be presumed to have specific protection needs due to their vulnerability to secondary and repeat victimisation and to intimidation and retaliation (paragraph 4). The extent of the individual assessment may be adapted according to

⁽⁶⁸⁾ 'Opinion of the European Economic and Social Committee on the Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions — Strengthening victims' rights in the EU COM(2011) 274 final and on the Proposal for a Directive of the European Parliament and of the Council establishing minimum standards on the rights, support and protection of victims of crime COM(2011) 275 final — 2011/0129 (COD)'; <http://www.eesc.europa.eu/?i=portal.en.soc-opinions.19046>.

the severity of the crime and the degree of apparent harm suffered by the victim (paragraph 5).

Recital 56 of the Preamble explains that the personal characteristics of the victim to be taken into account when making an individual assessment include the victim's gender and gender identity or expression, ethnicity, race, religion, sexual orientation, health, disability, residence status, communication difficulties, relationship to or dependence on the offender and previous experience of crime. The type or nature and the circumstances of the crime include but are not limited to the following: whether it is a hate crime; a crime displaying bias or a crime committed with a discriminatory motive; sexual violence; violence in a close relationship; whether the offender was in a position of control; whether the victim's residence is in a high-crime or gang-dominated area; or whether the victim's country of origin is not the Member State where the crime was committed. Recital 57 of the Preamble emphasises that there is a high rate of secondary and repeat victimisation, intimidation and retaliation among the victims of human trafficking, violence in close relationships, sexual violence or exploitation, gender-based violence, hate crime, and victims with disabilities and child victims. Under recital 57 'there should be a strong presumption that those victims will benefit from special protection measures'.

Under this provision, children are thus deemed to be victims with specific needs who shall receive special protection measures. This is the only group of victims that is distinguished in such a way. This may have a favourable impact on the rights of girls who are victims of gender-based violence, such as female genital mutilation, forced marriages or sexual violence. The Directive assumes that these girls have special needs. All other victims are subject to full individual assessment and their needs are identified. This provision draws attention to the victims of gender-based violence. Firstly, this provision refers to the fact that they are at particular risk of secondary and repeat victimisation, intimidation and retaliation. The victims of gender-based violence are particularly vulnerable to these phenomena. The Directive itself states this explicitly in recital 17 and the aforementioned recital 57. Secondly, pursuant to recital 56, individual assessment is made based on the individual personal characteristics of the victims, such as gender, relationship with the offender or dependence on the offender, and the type, nature and circumstances of the crime (e.g. violence in close relationships, sexual violence and discrimination-related crimes). Thirdly, this provision also explicitly obliges Member States to take into account victims of this form of violence. Article 22 should be positively assessed in this regard. Victims of gender-based violence are mentioned here and particular attention is to be paid to them at the individual assessment stage, which should be handled with particular

care. This means that they shall be considered to have specific needs, that these needs will be noticed and not be disregarded, and that the competent authority will establish whether and to what extent the victims shall be granted the special measures referred to in Articles 23 and 24. This is a strength of the Directive.

Furthermore, the emphasis the provision places on individual assessments being carried out with the close involvement of the victim and taking into account their wishes is favourable for victims of gender-based violence (paragraph 6).

The operational dimension of the individual assessment is a weakness in this provision. In line with Article 22, the assessment shall be performed in a 'timely' manner and 'in accordance with national procedures'. However, it is not specified when the individual assessment is to be performed (and by whom). The provision does not indicate that the individual assessment should take place during the first contact with the competent authority, so as to establish whether the victim has specific needs and should be offered specific measures provided for in Articles 23 and 24. Failure to perform the assessment at this point will in turn reduce scope for minimising the risk of secondary and repeat victimisation, intimidation or retaliation. However, the provision does not include any stipulations in this area. Secondly, the phrase 'in accordance with national procedures' refers to the legal regimes of individual Member States instead of establishing a uniform model for performing individual assessments. The provision does not determine the mode and mechanisms for performing this assessment, nor the entity responsible or the mode and frequency of updates to the assessment. This poses a threat in terms of the Directive being implemented in a way that is favourable to victims, in particular victims of gender-based violence, for whom the individual assessment should be particularly thorough. Unfortunately, there are no practical regulations in this regard in the Directive. Nor can such operational regulations be found in international documents concerning victims of gender-based violence. The Istanbul Convention includes a regulation only indirectly related to making an individual assessment, and this refers to risk assessment. Under Article 51 of the Convention, parties shall ensure that an assessment of the lethality risk, the seriousness of the situation and the risk of repeat violence is carried out by all relevant authorities, and that it duly takes into account, at all stages, the fact that perpetrators of acts of violence possess or have access to firearms. This provision only partly regulates the assessment of the situation and refers to ensuring the victim's security. Unlike Article 22 of the Directive, it does not also refer to ensuring that the victim's other specific needs are met. This means that Article 22 allows a great deal of discretion to Member States in determining



the rules, including the method and conditions of making an individual assessment. In the context of this SWOT analysis, it is therefore negatively assessed.

Article 23. Right to protection of victims with specific protection needs during criminal proceedings

Article 23 refers to the measures available to victims with specific protection needs during criminal investigations and court proceedings. During criminal investigations, interviews with such victims shall be carried out in premises designed or adapted for that purpose. They shall be conducted by or through professionals trained for that purpose, by the same persons (unless this is contrary to the good administration of justice). All interviews with victims of sexual violence, gender-based violence or violence in close relationships, unless conducted by a prosecutor or a judge, shall be conducted by a person of the same sex as the victim, if the victim so wishes, provided that the course of the criminal proceedings will not be prejudiced. During court proceedings, such victims are ensured the following: measures to avoid visual contact between victims and offenders including during the giving of evidence, by appropriate means including the use of communication technology; measures to ensure that the victim may be heard in the courtroom without being present, in particular through the use of appropriate communication technology; measures to avoid unnecessary questioning about the victim's private life where this is not related to the criminal offence; and measures allowing a hearing to take place without members of the public being present.

Therefore, if it was established as part of the individual assessment that the victim had specific needs (and victims of gender-based violence are particularly taken into account in this assessment — see comments on Article 22), they shall be offered specific protection measures. The measures listed in Article 23 refer to interviewing victims, namely where, how and by whom the interview shall be performed. All these measures are very important for the victims of violence in close relationships and other types of gender-based violence. Ensuring that a victim is questioned in an appropriate room and by a trained professional — always the same person and a person of the same sex as the victim (if requested by the victim, which is important in the case of sexual violence, for example) — may be crucial in limiting the risk of the victim experiencing secondary victimisation. This objective may be achieved during court proceedings by ensuring that the victim is interviewed

using communication technology or without the presence of members of the public. Importantly, the provision explicitly prohibits unnecessary questioning about the victim's private life. This is particularly important in the case of sexual violence, where the victim often experiences secondary victimisation when — unnecessarily — questioned about her or his private life or when the victim's past sexual experience is publically analysed. This provision directly refers to specific aspects of the questioning process and is very practical. In this respect it is a strength of the Directive. The provision will also facilitate the Directive being correctly implemented by Member States and thus will help victims of gender-based violence to exercise their rights. Moreover, this provision responds to the obligations stated in international documents dedicated to the victims of gender-based violence. In Recommendation Rec(2002)5, the Committee of Ministers emphasised that the police should question victims in premises that are designed to establish a relationship of confidence between the victim and the police officer, and that victims should have the possibility to be heard by a woman officer should they so wish. For this purpose, this Recommendation stresses the need to increase the number of women police officers. In the Recommendation, the Committee also highlighted the need to introduce procedures to prevent humiliating questioning of victims. The Istanbul Convention in turn indicated that the parties shall take the necessary legislative measures to ensure that, in any civil or criminal proceedings, evidence relating to the sexual history and conduct of the victim shall be permitted only when it is relevant and necessary (Article 54). Victims shall also be enabled to testify in the courtroom without being present or at least without the presence of the alleged perpetrator, notably through the use of appropriate communication technologies (Article 56(1)(i)). In this respect, this provision of the Directive should be positively assessed. By referring to these aspects of testifying, it facilitates the exercise of the rights of victims of gender-based violence and mitigates the risk of secondary victimisation.

Article 24. Right to protection of child victims during criminal proceedings

Article 24 supplements Article 23 in situations when the victim is a minor. In such cases, in addition to the measures provided for in Article 23, Member States shall ensure that all interviews with the child victim are audiovisually recorded during criminal investigation, and that these recorded interviews are used as evidence in criminal proceedings. In instances where there is a conflict of interest between the holders of parental responsibility and the child victim, or where the child victim is unaccompanied or separated from

the family, competent authorities shall appoint a special representative during criminal investigations and proceedings. Where the child victim has the right to a lawyer, she or he has the right to legal advice and representation in her or his own name in proceedings where there is, or there could be, a conflict of interest between the child victim and the holders of parental responsibility. Where the age of a victim is uncertain and there are reasons to believe that the victim is a child, the victim shall, for the purposes of the Directive, be presumed to be a child.

Recital 60 explains that where a guardian or a representative is to be appointed for a child, those roles may be performed by the same person or by a legal person, an institution or an authority.

It should be indicated that the measures provided for in this provision with regard to a child were also provided for in Directive 2011/36/EU (on preventing and combatting trafficking in human beings) ⁽⁶⁹⁾. Due to the inclusion of this provision in Directive 2012/29/EU, these measures will be applied not only to children who are victims of human trafficking or sexual exploitation, but also to child victims of all criminal offences ⁽⁷⁰⁾. This is one of the Directive's strengths.

However, the Directive does not refer in this provision to child victims of gender-based violence. Taking into account their interests will be essential in the case of appointing a special representative for child victims, where the holders of parental responsibility are precluded from representing the child victim as a result of a conflict of interest between them and the child victim. First, it will be necessary to assess whether there is such a conflict of interest. This provision does not specify the meaning of the term 'conflict of interest', and leaves it open to interpretation by Member States — and potentially to authorities applying the provisions adopted in this regard by Member States. This generates specific risks, and is a weakness of the Directive from the perspective of gender-based violence.

It should be indicated that girls may be victims of other criminal offences than those affecting boys. This applies in particular to female genital mutilation, sexual exploitation, sexual violence and forced marriages. The Beijing Platform for Action in its strategic objective referring to the girl child (Objective L.7), the Istanbul Convention (Article 38) and the Recommendation of the Committee of Ministers Rec(2002)5 all point out these specific problems ⁽⁷¹⁾. Moreover, the Recommendation determines the measures to be taken when the victim is a child. These actions should be taken to prevent secondary victimisation and gender-insensitive treatment on the part of the police, medical and social personnel, and judges.

Therefore, in the case of girls, it will be important to establish whether they are victims of gender-based violence, and whether the offenders are or are not their parents or other family members taking care of them. In such situations, as provided for in Article 24(1)(b) and (c), a special representative should be appointed for the child, as there may be an obvious conflict of interest between the child and her or his parent or guardian.

This provision of the Directive is worded in gender neutral terms, and thus might miss the specificity of gender-based violence. It fails to mention the fact that the conflict of interest may arise more often in the case of victims of gender-based violence. In addition, it does not specify the qualifications required for the child representative. In this regard, the provision is too general and is a weakness of the Directive. It requires diligent implementation for the rights of girl victims of gender-based violence to be exercised.

⁽⁶⁹⁾ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:101:001:0011:EN:PDF>.

⁽⁷⁰⁾ 'Guidance document related to the transposition and implementation of 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 replacing Council Framework Decision 2001/220/JHA', http://ec.europa.eu/justice/criminal/files/victims/guidance_victims_rights_directive_en.pdf.

⁽⁷¹⁾ It should be mentioned that other Recommendations of the Committee of Ministers refer directly to the rights of a child, in particular: Recommendation No R (79) 17 concerning the protection of children against ill-treatment; Recommendation No R (91) 11 concerning sexual exploitation, pornography and prostitution of, and trafficking in, children and young adults; Recommendation No R (93) 2 on the medico-social aspects of child abuse; and Recommendation Rec (2001) 16 on the protection of children against sexual exploitation.

Article 25. Training of practitioners



Article 25 of the Directive sets out an obligation for Member States to ensure training for persons who are likely to come into contact with victims. Pursuant to paragraph 1, officials likely to come into contact with victims, such as police officers and court staff, receive both general and specialist training to a level appropriate to their contact with victims. Training aims to increase their awareness of the needs of victims and enable them to deal with victims in an impartial, respectful and professional manner. Paragraphs 2 and 3 refer to the training of judges and prosecutors involved in criminal proceedings and other lawyers. The persons responsible for training these groups shall make available both general and specialist training to increase the awareness of judges and prosecutors about the needs of victims. Pursuant to paragraph 4, Member States shall encourage initiatives enabling staff providing victim support and restorative justice services to receive adequate training to a level appropriate to their contact with victims and to observe professional standards that ensure such services are provided in an impartial, respectful and professional manner. Paragraph 5 determines training objectives in accordance with the duties involved, and the nature and level of contact the practitioner has with victims. Training shall aim to enable the practitioner to recognise victims and to treat them in a respectful, professional and non-discriminatory manner.

This provision is explained in recital 61. It mentions two types of training — initial and ongoing. Any person likely to come into personal contact with victims shall be able to access and receive such training, to a level appropriate to her or his contact with victims; so that she or he is able to identify victims and their needs, and deal with them in a respectful, sensitive, professional and non-discriminatory manner. Professionals, who may participate in the individual

assessment to identify the special protection needs of victims and determine special protection measures, shall also receive detailed training on making such an assessment. In line with recital 61, where appropriate, such training shall take into account the gender aspect. Member States' actions on training shall be complemented by guidelines, recommendations and the exchange of best practices in accordance with the 'Budapest roadmap' ⁽⁷²⁾.

Article 25 directly indicates professional groups that shall undergo appropriate training: police officers and court staff, judges, prosecutors, other lawyers and persons providing support and restorative justice services to the victim. Additionally, this provision explicitly indicates the training objective: to enable the practitioner to recognise victims and to treat them in a respectful, professional and non-discriminatory manner. The practitioners who shall perform the individual assessment shall also be trained in this regard. This provision does not apply directly to the victims of gender-based violence, but it applies indirectly to the exercise of their rights. Thus, from the perspective of gender-based violence, it follows that practitioners should be trained in such a way as to be able to recognise the needs of victims and their special needs. Victims of sexual violence, victims of gender-based violence and victims of violence in close relationships have such special needs. For this reason, practitioners ought to be guaranteed participation in training that covers the issues which will later enable them to properly recognise the needs of victims.

This also applies to performing the individual assessment referred to in Article 22. Under Article 22(3), the officials responsible for such assessment must be trained in such a way as to pay particular attention to victims of gender-based violence, victims of violence in close relationships and victims of sexual violence. This is also confirmed by the Commission proposal for the Directive. The proposal indicated that training should cover issues which would assist officials in treating victims in a respectful manner, identifying protection needs and providing them with appropriate information to help them cope with proceedings and access their rights. It also stated that training should cover issues including: awareness of the negative effects of crime on victims and the risk of causing secondary victimisation; skills and knowledge, including special measures and techniques, required to assist victims and minimise any trauma to the victim, in particular from secondary victimisation; recognising and preventing intimidation, threats and harm to victims; the availability of services providing information and support specific to the needs of victims and the means of

⁽⁷²⁾ Resolution of the Council of 10 June 2011 on a Roadmap for strengthening the rights and protection of victims, in particular in criminal proceedings (2011/C 187/01) [http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32011G0628\(01\)&from=EN](http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32011G0628(01)&from=EN).

accessing these services ⁽⁷³⁾. As already mentioned, victims of gender-based violence are particularly at risk of secondary and repeat victimisation, intimidation and retaliation by the offender. For this reason, training for practitioners ought to take into account the issue of gender-based violence. Importantly, this was clearly indicated in a recital of the Directive's Preamble, which states that, where appropriate, training shall be gender sensitive. This is definitely appropriate in the case of training staff who perform individual assessments, since such training should include the issue of victims of gender-based violence. It should therefore be noted that both in itself and in tandem with related regulations, this provision is a strength of the Directive when it comes to indicating the scope of training and explicitly listing which professional groups it concerns. By contrast, the fact that the training is not mandatory for some groups of practitioners in paragraph 4, together with the very general listing of these practitioners, is a weakness.

In line with Article 14 of the Decision 'Training for personnel involved in proceedings or otherwise in contact with victims', each Member State, through its public services or by funding victim support organisations, shall encourage initiatives enabling personnel involved in proceedings or otherwise in contact with victims to receive suitable training, with particular reference to the needs of the most vulnerable groups. This obligation shall apply in particular to police officers and legal practitioners. It is explained in the Preamble to the Directive that training persons coming into contact with victims is important both for the victims and for achieving the purposes of the proceedings (recital 11).

For the purpose of comparative legal analysis and coherence in implementing legal obligations, other legally or politically binding documents should be considered. Article 15 of the Convention on preventing and combating violence against women and domestic violence deals with the training of professionals. Under this provision, parties shall provide or strengthen appropriate training for the relevant professionals dealing with victims or perpetrators of all acts of violence covered by the scope of this Convention. The training is to concern the prevention and detection of such violence, equality between women and men, the needs and rights of victims, as well as how to prevent secondary victimisation. The training shall also include coordinated multi-agency cooperation issues to allow for a comprehensive and appropriate handling of referrals in cases of violence covered by the scope of this Convention. The Directive focuses on the training of persons coming into contact with the victims and does not mention the training of persons dealing with offenders, as is explicitly indicated in the

Convention. In terms of exercising the rights of the victims of gender-based violence, training for persons coming into contact with the offender may be important. Taking into account the specificity of gender-based violence, including but not limited to violence in close relationships or sexual violence, persons coming into contact with offenders ought to undergo such training so that when in contact with offenders they do not reproduce harmful stereotypes. Such training may mitigate the risk of the repeat victimisation of the victim, retaliation or revenge. From the perspective of gender-based violence, the Directive's lack of reference to training for practitioners coming into contact with offenders is a weakness. The provision of the Convention also includes a positive guideline as to the scope of training: it shall cover the issue of equality between women and men. Taking into account the provisions of many legal acts ⁽⁷⁴⁾ on gender-based violence, during training courses it is necessary to explain the mechanisms of this violence and its origins, which are closely related to gender-based discrimination and follow harmful stereotypes on gender roles. It is also emphasised in these documents that such violence is a significant barrier to achieving equality between women and men and exercising women's human rights. The guidelines on training are included in the Beijing Platform for Action. The platform obliged the states to establish, improve, develop and finance training for individual professional groups, including judges, lawyers, doctors, teachers, social services, police officers and migration services. This training is to sensitise those persons to the nature of gender-based violence. The Recommendation of the Committee of Ministers Rec(2002)5 states that the training for these professional groups should cover counteracting domestic violence and other forms of violence against women. The CEDAW Committee General Recommendation No 19 stresses the need for gender-sensitive training.

Such elements therefore should be included in training for practitioners coming into contact with victims. However, as regards training issues, the Directive mentions only 'gender sensitivity' ('where relevant'), and this is insufficient.

Article 25 does not explicitly refer to victims of gender-based violence. It refers to them indirectly by invoking in this provision victims' needs and referring to non-discriminatory treatment of victims. This is also confirmed by a recital in the Directive's Preamble, in which gender sensitivity is mentioned as part of training to be provided. Furthermore, the Commission's Conclusion preceding the adoption of the Directive indicated the objectives of this provision and referred to mitigating the risk of secondary and repeat victimisation, intimidation and retaliation, which are important in cases of gender-based violence. This provision also

⁽⁷³⁾ See <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0275:FIN:EN:PDF>.

⁽⁷⁴⁾ For more details, see chapter 1.2. of this report.



explicitly indicates professional groups that shall be trained, and thus leaves no interpretative doubts as to the training target groups. However, it does not list all the groups that ought to undergo such training, such as migration services, social workers, teachers or psychologists. The provision does not explicitly mention the scope and detailed content of training, which has to be interpreted using other provisions in the Directive. The above-mentioned documents may also be helpful in this respect. For example, if a victim makes a complaint about the way she or he has been treated by an authority, this should result in obligatory training for employees in order to ensure that the victim's rights can be exercised. Such a response could be considered when victims exercise their right to make a complaint under Article 4(1)(h) and the complaint is legitimate. The Directive itself, however, does not cover such regulations.

Article 26. Cooperation and coordination of services

Article 26(1) refers to cooperation between Member States. To improve the access of victims to the rights set out in this Directive and under national law, cooperation between Member States at least aims to include the exchange of best practices, consultation in individual cases and assistance to European networks working on matters directly relevant to victims' rights. Article 26(2) obliges Member States to take appropriate action aimed at raising awareness of the rights set out in the Directive, reducing the risk of victimisation, and minimising the negative impact of crime and the risks of secondary and repeat victimisation, intimidation and retaliation. Such action may also be performed using the internet. Member States shall in particular target groups at risk, such as children and victims of gender-based violence and violence in close relationships. Such action may include information and awareness-raising campaigns and research and education programmes, where appropriate in cooperation with relevant civil society organisations and other stakeholders. These provisions are a strength of the Directive, as they are explicit about the scope and purpose of such cooperation. They also highlight the specificity of gender-based violence.

Framework Decision 2001/220/JHA contained a similar provision. In Article 12 it obliged Member States to cooperate in order to facilitate the more effective protection of victims' interests in criminal proceedings, whether in the form of networks directly linked to the judicial system or links between victim support organisations. This provision was therefore very general.

In implementing Article 26 of the Directive, the results of the Daphne programme to prevent and combat violence against children, young people and women and to protect victims

and groups at risk, carried out over a dozen years, should be useful ⁽⁷⁵⁾. The aim of this programme was to popularise and share information and experiences and promote best practice between Member States, in particular with regard to combating violence against women. It is worth referring to reports from the phases of this programme and considering how to best exploit forms of best practice ⁽⁷⁶⁾. The Directive itself does not indicate explicitly the forms and instruments for executing this provision. It is also very general, which may hamper the proper implementation of the Directive.

Furthermore, the provisions of the Council of Europe Convention on preventing and combating violence against women and domestic violence refer to cooperation — both international (paragraph 1) and with non-governmental organisations — when it comes to awareness-raising (paragraph 2). Special attention should be paid to Article 13 of this Convention, which concerns awareness-raising. Under this provision, parties shall promote or conduct, on a regular basis and at all levels, awareness-raising campaigns or programmes, including in cooperation with national human rights institutions and equality bodies, civil society and non-governmental organisations, especially women's organisations, where appropriate, to increase awareness and understanding among the general public of the different manifestations of all forms of violence covered by the scope of this Convention, their consequences on children and the need to prevent such violence. Parties shall ensure the wide dissemination of information among the general public on measures available to prevent acts of violence covered by the scope of this Convention. Thus, the Convention highlights the need for cooperation with relevant

⁽⁷⁵⁾ Decision No 293/2000/EC of 24 January 2000 adopting a programme of Community action (the Daphne programme) (2000 to 2003) on preventive measures to fight violence against children, young persons and women (OJ EU L 34 of 9.2.2000, p. 1), <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CEL:EX:32000D0293:EN:HTML>; Decision No 803/2004/EC of the European Parliament and of the Council of 21 April 2004 adopting a programme of Community action (2004 to 2008) to prevent and combat violence against children, young people and women and to protect victims and groups at risk (the Daphne II programme) (OJ EU L 143 of 30.4.2004, p. 1), <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:143:0001:01:PL:HTML>; Decision No 779/2007/EC of the European Parliament and of the Council of 20 June 2007 establishing for the period 2007–2013 a specific programme to prevent and combat violence against children, young people and women and to protect victims and groups at risk (Daphne III programme) as part of the General Programme 'Fundamental Rights and Justice' (OJ EU L 173 of 3.7.2007, p. 19), <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2007:173:0019:01:PL:HTML>.

⁽⁷⁶⁾ For information about the projects financed as part of the Daphne programme, see *Report from the Commission to the European Parliament and the Council. Report on the interim evaluation of the Daphne III Programme 2007–2013*, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0254:FIN:PL:PDF>.

non-governmental organisations. The Directive itself refers on several occasions to cooperation with non-governmental organisations. However, taking into account the scope of the Directive — protecting and supporting the victims of violence — it seems that it should emphasise this cooperation to a much greater extent.

Under Article 26(2) of the Directive, actions are aimed at reducing the risk of secondary and repeat victimisation, intimidation and retaliation. As has previously been indicated, the risks of secondary and repeat victimisation, intimidation and retaliation particularly refer to victims of gender-based violence. Moreover, the provision clearly indicates the at-risk groups, which explicitly include victims of gender-based violence and violence in close relationships. This is a strength of the Directive. In line with the explicit wording of this provision, the actions, in particular information and awareness-raising campaigns and research and education programmes, ought to a large extent to be addressed to those victims. They should also be based on cooperation between relevant civil society organisations acting for women's rights and feminist organisations. However, the Directive does not explicitly indicate the organisations with such a profile, and it includes the phrase 'where appropriate'. Thus, the need for cooperation with organisations will be subject to assessment. Experience and knowledge of these organisations enables actions to be properly conducted in terms of the organisations' scope and the victims they work with. The phrase 'where appropriate' may limit cooperation with organisations, which may adversely impact on the exercise of the rights of victims of gender-based violence.

In line with recital 62, Member States shall work closely with organisations, in particular in policymaking initiatives, information and awareness-raising campaigns, research and education programmes and in training, as well as in monitoring and evaluating the impact of measures to support and protect victims of crime. Those actions should concern not only the rights set out in the Directive but also the phenomenon itself and the forms of gender-based violence. In this respect the Directive remains silent, which should be negatively assessed. Raising awareness of this type of violence may also have a preventive nature. The Directive does not cover preventive measures, which is definitely a weakness. Actions aimed at raising awareness may also produce positive outcomes.

As has previously been emphasised, the internet is mentioned as a potential tool in this provision. However, the internet should not be used when actions are to be directed at those victims of gender-based violence who may not

have access to the internet or relevant skills to use it (e.g. elderly, disabled or rural victims). The lack of an explicit caveat in this respect is a weakness in this provision and, as has already been mentioned, there is a threat that national regulations may 'copy' the narrow catalogue of communication tools between authorities and victims.

Articles 27–32. Final provisions

The last chapter of the Directive covering Articles 27–32 is entitled 'Final Provisions' (Chapter 6). These provisions set out the following: the effective date of the Directive (Article 31: the Directive came into force on 15 November 2012, i.e. on the day following its publication in the Official Journal of the European Union); its addressees (Article 32: the Directive is addressed to Member States in accordance with the Treaties). Article 30 states that the Directive replaces Framework Decision 2001/220/JHA. These provisions are not important in terms of the exercise of the rights of victims of gender-based violence.

Moreover, Chapter 6 sets some important dates. Article 27 indicates the Directive's transposition deadline: Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 16 November 2015. Prior to that date, under Article 29, the Commission is to submit a report to the European Parliament and to the Council. This obligation stems from the Commission's role in the process of monitoring the implementation of EU law. In the report, the Commission is to assess the extent to which Member States have taken the necessary measures to comply with this Directive, accompanied, if necessary, by legislative proposals. Under Article 29, the report is to include in particular a description of action taken under Articles 8, 9 and 23, i.e. the provisions concerning support for victims and protection of victims with special needs during criminal proceedings. This wording explicitly suggests that the implementation of the above-mentioned provisions is to be thoroughly analysed. It therefore shows that the rights set out in these provisions are given priority. This is a reference to the victims of gender-based violence, since they are explicitly mentioned in Articles 9 and 23 (for more details, see comments on Articles 9 and 23). This is a strength of the Directive. In its report, the Commission should therefore provide an in-depth analysis of the implementation of these provisions and formulate potential legislative proposals. The Commission report should provide data that will be helpful in assessing the implementation of the Directive implementation in the context of the victims of gender-based violence.



Moreover, in line with Article 28, Member States shall communicate data and statistics to the Commission. The first deadline for the submission of such data is 16 November 2017, with deadlines following every three years thereafter. Member States are to communicate available data to the Commission showing how victims have accessed the rights set out in this Directive. Under recital 64, systematic and adequate statistical data collection is recognised as an essential component of effective policymaking in terms of the rights set out in this Directive. The recital also indicates data types and sources. Statistical data shall include at least the number and type of reported crimes and, as far as such data are known and are available, the number and age and gender of the victims. Relevant statistical data can include data recorded by the judicial authorities and by law enforcement agencies and, as far as possible, administrative data compiled by healthcare and social welfare services, public and non-governmental victim support or restorative justice services, and other organisations working with victims of crime. Judicial data can include information about reported crime, the number of cases that are investigated, and persons prosecuted and sentenced. Service-based administrative data can include, as far as possible, data on how victims are using services provided by government agencies and public and private support organisations, such as the number of referrals by police to victim support services and the number of victims that request, receive or do not receive support or restorative justice.

The obligation to collect data refers in general to data concerning all victims and their rights set out in the Directive. However, Member States should also collect and provide

the Commission with data on gender-based violence (number of offences and their nature), the victims of this violence and whether or not and how the rights of these victims are exercised, in particular whether they receive support and protection and, if so, what it is. This not only reflects the fact that victims of gender-based violence are covered within the scope of the Directive. Victims of gender-based violence are explicitly indicated in the recitals of the Preamble and in individual provisions of the Directive. The obligation for Member States to collect and provide such data also directly stems from Article 29 concerning the scope of the Commission's report, where special attention is placed on assessing the implementation of provisions referring to the rights of victims of gender-based violence. For this reason, Member States shall refer particularly to the obligation set out in Article 28 regarding collecting and providing data on the exercise of the rights of victims of gender-based violence, as set out in the Directive. If read alongside other provisions of the Directive and the recitals of its Preamble, this provision should provide an opportunity for Member States to properly implement their obligations with regard to collecting and providing data. On the other hand, it is a weakness that the Directive does not explicitly or specifically state what data should be collected to assess the implementation of the Directive as regards victims of gender-based violence. This gap in the catalogue of data poses the risk that national regulations will not take this data into account either. If this is the case, assessing the effectiveness of the implementation of the Directive and of individual national regulations will be impossible or seriously hindered.

IV. Summary





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Directive 2012/29/EU discusses support and protection for all victims of crime. It includes many provisions directly or indirectly referring to the victims of gender-based violence. These provisions point to gender-based violence explicitly, refer to the issue of gender, or concern individual assessment and the needs of victims. By and large, they do not regulate the issues of support and protection for victims of gender-based violence in an optimum manner. Furthermore, some provisions do not account for the specific nature of gender-based violence at all. This is the conclusion of the analysis of the Directive's provisions using law interpretation methods. Consequently, the SWOT analysis performed for each of the Directive's provisions showed that virtually each provision represents a strength and a weakness, an opportunity and a threat. The majority of provisions analysed introduce new, or emphasise the meaning of existing, duties on the part of Member States with respect to victim support and protection. They are therefore strengths. Nonetheless, it is very frequently the case that these provisions are

too general or do not provide any reference to instruments such as codes of conduct, in the absence of which the application of legal solutions can prove very limited. These are weaknesses. A significant number of provisions in the Directive allow them to be implemented in the spirit of the Directive. However, their general content or lack of reference to victims of gender-based violence can be viewed as a threat, in that Member States may implement the Directive to the letter and to the detriment of victims of violence of this type. As per the adopted methodological assumptions, the conclusion of the analysis produced from the perspective of statutory interpretation was later subjected to a SWOT analysis. For these reasons, the provisions could not be classically arranged into four SWOT groups. Uniform control is also significant due to the fact that the Directive forms one consistent catalogue of regulations and can support and protect victims, including victims of gender-based violence, only when taken as a whole.

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