

Victim Support Europe Contribution

ROADMAP FOR THE EVALUATION OF THE
VICTIMS' RIGHTS DIRECTIVE



About Victim Support Europe

Victim Support Europe (VSE) is the leading European umbrella organisation advocating on behalf of all victims of crime, no matter what the crime, no matter who the victim is. VSE represents 61 member organisations, providing support and information services to more than 2 million people affected by crime every year in 30 countries.

Founded in 1990, VSE has been working for 30 years for a Europe, and a world, where all victims have strong victims' rights and services, whether they report the crime or not. We work towards this mission through advocacy to improve European and international laws, through research and knowledge development and through capacity building at the national and local level.

Introduction

Over the last thirty years, policies and rights for victims have developed on the international and European stage. Much progress has been seen including through the adoption of a range of European Union (EU) legislation benefiting victims.

The adoption of the Victims' Rights Directive in 2012 represented an important step forward in the creation of minimum standards on the rights, support and protection of victims of crime. While EU Member States had to implement the provisions of the Directive into their national laws by 16 November 2015, **five years later most of the Member States have not completely transposed the Directive¹** and there remain a **number of fundamental gaps and problems**. Amongst the most important ones are the following:

- A large proportion of **victims never report the crime** or **never reach the services they need** because they are not identified as victims or because of barriers to coming forward;
- For those who report the crime or seek help, many are subject to **secondary victimisation** by a wide variety of actors both inside and outside the justice system, and by society itself – due to lack of knowledge and understanding, lack of protection, poor treatment, and lack of coordinated efforts.
- For those who are identified as victims and require support, in many EU countries **generic and specialised victim support services do not exist or are insufficient**, are not accessible or are not of a high quality. The consequence being that many victims are not able to cope and recover from their trauma.

Whilst such matters relate to the implementation the Directive, knowledge of these issues and the drivers for them are integral to an effective evaluation process.

¹ Report from the Commission to the European Parliament and the Council on the 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, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2020:188:FIN>

VSE welcomes the adoption of the first-ever **EU Strategy on Victims' Rights for 2020-2025**² and the **evaluation of the Victims' Rights Directive planned for 2021**. We believe that the evaluation is essential as the implementation of the 2012 Victim's Rights Directive remains largely unsatisfactory and it is time for the European Commission to assess what are the causes and consequences of the non-implementation of the Directive, and whether the failure to meet the objectives of the Directive are due the Directive itself or due to Member State inaction. It is equally important to understand whether there are gaps in the Directive itself which impede basic objectives of meeting the needs of victims, minimising the harm of crime and ensuring effective, efficient and safe justice for victims.

In what follows, VSE raises in brief a number of issues that the Commission should take into account in undertaking the evaluation of the Victims' Rights Directive, in particular its legal and practical implementation and the consultation process that should be followed.

1. Overall approach to evaluation

To properly assess the efficiency and effectiveness of the Victims' Rights Directive, it is essential to fully understand and properly identify a number of issues:

- **The objectives of the Directive which are driven by the needs of victims.** In particular the challenges victims face as a consequence of a crime. This relates primarily to the need for recognition, respectful treatment, protection from re-victimisation, intimidation and secondary victimisation, and access to support, justice and compensation/ restoration;
- **The problems faced by victims** following a crime and in enjoying their rights;
- **The challenges faced by governments** and other actors in carrying out victim centric responses and the drivers for those problems – and therefore in implementing the Directive.

Given that the EU Victims Directive is a foundational EU legislation establishing rights for all victims of crime, it is essential the evaluation is comprehensive in its approach. This means it should examine:

- Whether the objectives of the Directive themselves sufficiently cover all the problems faced by victims and meet the needs they have – recognising limitations due to legal basis;
- Whether implementation problems are due to inadequacies in the drafting of articles of the Directive, including such matters as lack of clarity, insufficient detail, lack of sufficient obligation on States – and whether these issues have resulted in lack of consistency in implementation across States, a lack of understanding on how to implement, or the ability of States to largely avoid implementation;
- Whether there are gaps in the obligations and rights established in the Directive which prevent the Directive from successfully meeting its objectives. In other words, it is

² Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions EU Strategy on victims' rights (2020-2025) <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52020DC0258>

insufficient to simply examine the success or otherwise of existing articles and issues. It must be examined whether additional rights and obligations are needed.

- Whether identified problems should be met through changes to the current Directive, through specific and separate legislation or through other actions. This is especially relevant when considering actions for specific groups of victims or with respect to broader issues which require a more detailed intervention.

Foundational to a correct evaluation is a detailed analysis of the legal and practical implementation of the Directive. An EU wide recent assessment which examines this in detail is lacking but is essential to determine what problems exist and why they exist. In other words whether the problem of implementation is coming from the **text of the Directive** itself or **from decisions of Member States**.

This analysis must not only look at whether a law is in place and compliant. It must also consider whether victims are in fact able to enjoy their rights, and do in fact enjoy such rights.

If we take the example of the right to information on first contact (article 4 of the Directive) several questions should be examined: does the law exist in the country? Are there procedures in place to apply this law? Did the victims actually receive the information? Do victims genuinely understand the information provided?

It should be noted that whilst some rights and obligations in the Directive can be measured through specific outcomes – a victim does or does not receive information on their rights – for other articles it is not clear what would denote successful implementation. For example, information must be provided in a simple and accessible way. However, what this means precisely is not set out. Similarly, with respect to access to support, it is not clear what are the parameters for determining whether victims genuinely have access to support. The EU must be clear and transparent in explaining what criteria are used to carry out any evaluation. Such criteria should be developed through extensive consultation since a number of them are particularly complex.

2. Consultation and evidence collection

As part of an effective evaluation process, VSE calls on the Commission to ensure an extensive process of consultation and evidence collection in particular through:

Multiple consultation mechanisms

VSE welcomes the Commission's commitment to the consultation of all relevant stakeholders in its evaluation. Whilst a wide range of stakeholders are reflected in the Roadmap, VSE would emphasise the importance of using a range of different consultation mechanisms over a long period of time (online consultation, focus group, surveys, interview...).

Sufficient time for consultation

A clear, inclusive process of consultation requires maximum buy-in and support of all stakeholders, including state actors, civil society and the private sector. It is critical that victims are contacted at an early stage in such process and that are really listened to, through meetings, focus groups, interviews,

or surveys. Consultation should also factor in sufficient time for National civil society organisations to provide in-depth and well-informed responses.

It should also be mentioned that VSE regrets the short timeframe in which the European Commission has given to submit contribution for the roadmap on the evaluation (2 December – 30 December 2020) given national holiday and end of the year holidays.

A consultation process that takes into account abovementioned victim-centric and inclusive approach, will create greater legitimacy for the evaluation on the added value of the Victims' Rights Directive.

Transparency and evidence base

The credibility of any evaluation and subsequent decisions are dependent on an inclusive and transparent process. This requires that the EU Commission is open about what problems exist in which Member States and why those problems exist. The Commission's implementation report on the EU Victims Directive does not provide these level of detail, however.

Equally, there is a significant lack of data within the justice sector. For too long the absence of data has been used to argue that no action is necessary. Data are crucial to understand where the gaps are and whether the actions taken are effective or not. The collection of disaggregated data on victims focussed on how rights are implemented and to what extent, whether victims are receiving and able to act on their rights, and what the outcomes and impacts of victim centric actions should be a fundamental aspect of the EU evaluation Without it, the ability to properly evaluate the Directive is greatly impeded.

Whilst it may not be possible to collect all data during the first evaluation period, significant effort should be made to obtain data from States, EU institutions and agencies and other actors to properly understand the many issues impeding the enjoyment of rights by victims.

3. Examples of problems with respect to the Directive

Whilst VSE has not yet carried out its own evaluation of the Directive, we can already provide examples of some of the issues that will require a specific review. This is not a full and extensive analysis but already provides an indication of some the key issues:

Appropriate measures

Articles 3, 17 and 21 oblige Member States to take appropriate measures with respect to the right to be understood, foreign victims and privacy rights. The EU should examine whether such language is too vague and has resulted in an inadequate or inconsistent protection for victims across the Member States

Simple and accessible language

Article 3 requires that victims are informed using simple and accessible language. It should be determined whether this is sufficiently precise to ensure the objective is achieved that victims understand information.

Prejudice limitations

A range of victims' rights may be limited in order to prevent prejudice to the proceedings, to the rights of the defence, to the fairness of proceedings, to judicial independence (Articles 3, 7, 18, 20, 23, 25).

It is of course correct that fundamental rights and the justice system should not be prejudiced through the implementation of other rights. However, the terminology used is very broad which may result in victims' rights being limited in an inappropriate or disproportionate way.

The evaluation should therefore examine to what extent the prejudice exemption has been used to deny victims their rights, what the impact of this has been, whether alternate appropriate measures have been applied to ensure victims can access rights in another way, and whether there is a sufficiently balanced consideration of victims' rights and other rights – recognising that many victims rights are fundamental rights.

Other vague language

A range of other vague language in the Directive can be used to limit the enjoyment of rights. These include: Contrary to the interests of the victims, reasoned decision, good administration of justice, unnecessary delay, necessary linguistic assistance, national procedural rules, necessary conditions etc.

As with prejudice limitations, the way these are used in practice should be closely assessed to determine whether their use is appropriate and proportionate and whether more specific language or safeguards should be incorporated to prevent their abuse.

Victim Complaint

Article 5 provides victims with the right to receive a written record of their complaint. This was in part established to ensure that victims have proof that they submitted a complaint and that it was correctly recorded, and also to reduce situations where victims were turned away or otherwise prevented from reporting a crime.

Given that reports of victims being turned away or prevented from reporting a crime continue to be received, the EU should examine whether Article 5 sufficiently meets the above mentioned objectives.

Request of the victim

The enjoyment of information, translation and interpretation rights (Articles 5, 6, 7) to some extent depend on the victim making a request. This may be an appropriate approach but it imposes a burden on victims, relies on them being informed of the right to make a request, and relies on them understanding the consequences of making that request or not making it. In effect, it increases the risk that victims who may in fact benefit from the right, do not access it.

Given the risks, the evaluation should examine whether different approaches to the right to request have been adopted and whether this has resulted in an undue limitation in the enjoyment of this right – and whether the impact warrants adjustments to the Directive.

In accordance with the role of the victim

Several victims' rights may be enjoyed subject to the role of the victim in criminal proceedings. This terminology was established to reflect the different justice systems across the EU and to help ensure that rights established in EU law did not inadvertently extend the role of the victim, or indeed reduce their rights or role in some countries. Whilst it is necessary for EU law to take into account diverse judicial systems, the language used is vague and may result in some victims rights being so limited that the objectives of the Article may not be achieved.

The use of this terminology and how victims rights are limited should be carefully examined to determine whether changes are required to ensure a balance between consistent rights across the EU and diversity of justice systems.

Provision of reasoning for decisions

The EU Victims Directive seeks to ensure that victims are treated respectfully, can participate in proceedings and can effectively access their rights. Victims also have fundamental rights to justice including the right to have a crime against them properly investigated and to redress for failings in the process. Recognising these objectives and rights, the EU Directive has established the right to reasoned decisions with respect to the decision to not investigate, to not prosecute and on the final judgment in a trial. Sufficient and clear reasoning is essential to enable victims to determine whether seek a review or appeal of such decisions.

Given the critical nature of this right, the EU should examine whether decisions are sufficiently explained to enable victims to decide whether to challenge a decision and how. Where problems are identified, the Evaluation should examine whether it is necessary to provide additional guidance or rules on the reasoning that should be provided, and whether this should be done through EU legislative amendments.

Enforcement and redress rights

In the case of breaches in defence rights, very strong rights of redress exist with significant consequences for individuals, organisations, investigations and trials. In short, redress rights for defendants create very strong disincentives to breach those rights. An equivalent situation for victims does not exist with many countries having weak rules of redress for victims. The EU evaluation should therefore examine what rights of redress and appeal exist, what gaps exist, whether a victim's right to redress should be established at the EU level and what the best mechanisms would be to achieve this objective.

In addition, to the above mentioned cross cutting issues, numerous aspects of all articles need detailed evaluation. This response cannot cover all these issues, however, VSE highlights below several areas requiring specific and extensive attention:

Right to access victim support services (article 8)

Article 8 of the Victims Directive requires Member States to ensure that victims have access to support services. However, beyond Recital 37 which states that support should be provided through a variety of means, without excessive formalities and through a sufficient geographical distribution across the Member State, there is little explanation of how 'access' is defined.

The consequence is that there is significant variance in the interpretation of 'access' and in the implementation of support services. Some States have extensive services and others minimal services whilst all claim they are compliant with Article 8. Whilst around 15% of any given population will suffer serious crime every year, the number of victims supported in every Member State varies massively.

Without a clear set of criteria which defines the meaning of access, it is almost impossible to determine if States are compliant and if victims genuinely have access to support services. Without such criteria, the right in itself become unenforceable.

It is therefore recommended that the EU evaluation examines in detail the interpretation of access to support, whether victims who need support do not actually receive support and whether this is due to the drafting of Article 8.

Role of civil society organisations in deliver support and facilitating implementation

It is acknowledged that civil society plays a crucial role in providing information and assisting victims in various ways (compensation claim, throughout the criminal proceedings, emotional support, etc.) and their role is expressly recognised in the Victims' Rights Directive (recital 62 and 63). However, in practice, many Member States are still reluctant to work with and support civil society. Moreover, there is some indication that an unforeseen consequence of the Directive is that Member States are taking over roles in assisting victims which have long be carried out by NGOs.

The evaluation should therefore examine whether and how the EU Victims Directive has impacted on the situation of NGOs working for victims and how EU action can ensure victims' rights are achieved through strong collaboration between State and civil society.

Right to legal aid (article 13)

Article 13 requires that victims have access to legal aid in accordance with their role and national proceedings. This right has remained unchanged since it was established in the 2001 Framework Decision on victims' rights, yet with the establishment in the EU victims Directive of a wide range of rights, legal aid and legal assistance have never been so important for victims. The EU Commission recognised in its impact assessment report that it would not consider changes to legal aid rules in the current Directive. Whilst it is well understood that legal aid can be costly, effective access to legal assistance can be critical to the enjoyment of victims rights. Given that overall enjoyment of such rights has clear long term individual, social and economic benefits, and should in any case be accessible, the EU evaluation should make a comprehensive analysis of how legal aid is implemented, what problems arise in implementation and whether EU law should make legal aid and legal assistance more accessible to victims.

Right to decision on compensation from the offender in the course of criminal proceedings (article 16)

As with other articles of the Directive, the wording of Article 16 is the same in the Framework Decision on the standing of victims in criminal proceedings. No changes have been made for 20 years. Yet, research, including through the report of the EU President Advisor Mrs Milquet, has shown that victims face a range difficulties and barriers to access offender compensation³. At least 22 Member States require the victim to seek compensation from the offender before having access to state compensation⁴. Most victims must, therefore, seek offender compensation after an initial verdict in a criminal court, then moving the case into a civil court. For many victims, prolonging contact (albeit only administrative contact) with the offender can cause continued stress and anxiety.

³ Strengthening victims' Rights: From compensation to reparation , Report of the Special Adviser, J. Milquet, to the President of the European Commission, Jean-Claude Juncker, March 2019, available at: https://ec.europa.eu/info/sites/info/files/strengthening_victims_rights_-_from_compensation_to_reparation_rev.pdf

⁴ A journey from crime to compensation: an analysis of victims' access to compensation in the EU, Victim Support Europe, 2019, available at: https://victimsupport.eu/activeapp/wp-content/files_mf/1574261567A_Journey_From_Crime_To_Compensation_2019.pdf

The EU Evaluation must now examine how EU legislation can improve victims' ability to receive compensation from offenders, and whether this should be achieved through an amended EU Victims Directive, through separate legislation or other action.

Rights of Victims Resident in another Member State (article 17)

Victims in cross border situations face a wide range of difficulties in accessing their rights and having their needs met. The current Victims Directive leaves a wide discretion to Member States to minimise difficulties for victims who are resident abroad but provides little guidance specific measures. The EU evaluation should examine the extent to problems are addressed by Member States and whether differences

Training of practitioners (article 25)

Training of professionals who may come into contact with victims is of utmost importance to ensure that victims are treated in a respectful, professional and non-discriminatory manner. It is essential to avoiding re-victimisation and secondary victimisation, and is critical to the effective implementation of victims' rights.

Given its important, the lack of detail on what training is needed and the lack of obligation to be training for most justice practitioners, it is essential that the EU evaluation examines how and to what extent EU training obligations can and should be improved.