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## **CCBE RESPONSE TO COMMISSION CONSULTATION ON VICTIMS' RIGHTS**

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## CCBE Response to Commission Consultation on Victims' rights

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### Introduction

The Council of Bars and Law Societies of Europe (CCBE) is the representative organisation of around 1 million European lawyers through its member bars and law societies from 31 full member countries, and 11 further associate and observer countries. The CCBE responds regularly on behalf of its members on policy issues which affect European citizens and lawyers.

The CCBE would like to submit the following comments in response to the Commission Consultation on Victims' Rights.

### I. GENERAL QUESTIONS

#### 1. **What are the main obstacles and problems faced by victims of crime or violence in relation to the five categories of needs (Recognition, Protection, Support, Access to Justice, Compensation and Restoration)?**

**Recognition:** Until the approval of the Stockholm programme, the issue of victim's rights has not received adequate attention or legislative action in the area of EU judicial cooperation, although some specific legislation exists on issues such as victims of terrorism. The current move to debate and potentially legislate for the protection of victims - irrespective of their location - and to facilitate their freedom of movement without prejudicing their other rights is an important step. It implies that the recognition of their right to protection is an objective of the EU and the Member States. The aim now should be one of achieving instruments that guarantee the protection of victims. In order to achieve this aim, the approach needs to consider the special needs of the most vulnerable groups in society including: women, children, disabled people, migrants and the elderly.

**Protection:** It is evident that this is the primary need of the victims of violent crimes. The measures of protection need to prevent renewed violence and provide security that can only be granted if risk and exposure are correctly ascertained and measured. Therefore, the main obstacle faced by victims of violent crimes, and especially the victims of gender violence, is that measures to protect their physical and psychological integrity are not always adequate. For this reason it is necessary to introduce systems of preliminary evaluation that will allow means to assess the level of risk as well as to adopt measures of protection adapted to each particular case.

**Support:** The victims of violent crime require economic, social, psychological and legal support. It is therefore of importance that the EU and the Member States recognise and assume the need to create national and cross-border networks to interact and coordinate efforts to assist victims in all these fields independently of whether the victim is changing residence or moving freely from one Member State to another. Furthermore, it is frequently difficult to ascertain what support facilities are provided by each Member State. This could be addressed at the point of reporting a crime i.e; in police stations, so that the EU national concerned will be provided with the full range of assistance available.

**Access to Justice:** This is another main obstacle for victims. First of all, victims, due to their general degree of vulnerability, deeply fear having to face a process in which they do not know the characteristics and consequences. This fear may, on many occasions, prevent them from providing information about the crimes that they have suffered. Therefore, one of the first problems that arises is the lack of information in addition to the lack of access to adequate legal assistance and/or legal aid at an early stage and before introducing their claim. Preliminary legal information and preliminary legal assistance and/or legal aid is the only mechanism available to guarantee adequate access to justice, their right to defence and consequently the judicial redress and ascertainment of all their rights. Free legal aid, as appropriate, is an unavoidable measure to prevent a situation whereby the victim's lack of resources hinders access to justice and judicial redress.

**Compensation and restoration:** The main obstacles for a victim to obtain compensation and restoration can lie in the evidence brought to Court in order to allow for the adequate measuring and quantification of damage. This evidence would require facilitating the access of/to the victim to provide legal evidence and to access legal evidence by third parties in order to help to contribute to its

evaluation and eventual redress as well as to the financial situation of the aggressor (which would require the formation of an institutional fund as a guarantee).

**2. What concrete initiatives would you suggest to ensure the five categories of victims' needs are met? Do you think the EU can contribute to these initiatives and if so how?**

A) Initiatives that address victim's needs in the five categories mentioned above could begin with the following measures:

1.- Protection order: a legal instrument that grants a protective status to the victim. Within its framework different measures of protection could be addressed, for example, criminal, social, civil and administrative as well as in the sphere of employment or to facilitate economic support through public funding if the victim requires and is entitled to it.

2.- Victim support offices: These offices need to provide the victim with general information on the resources at their disposal in order to provide them with support in all areas (economic, social, psychological, etc.), protection and access to justice (legal aid, legal assistance), and to facilitate contact with different public/semi-public institutions that can provide for these services (health centres, social services, Bars, Courts, etc.). These offices should assume a function of coordination amongst all the institutions involved with the needs of victims.

3.- Concerning the guarantee of the right to access to justice and judicial protection, the competent authorities should regulate and finance:

a) The recognition of the right to legal assistance to victims of violent crimes that prove a lack of resources to litigate, through the appropriate channels, namely the Bars or in some countries, through the competent Courts. Legal aid should include legal assistance in all the legal proceedings in which the interests or the rights of the victim can be at stake in relation to the violence suffered.

b) Creation at the Bars of specific services of permanent vigilance to facilitate that victims, in case of urgency, receive immediate and specialised legal assistance. These services of permanent vigilance are a cornerstone in providing preliminary legal advice and legal assistance at the earliest stage.

c) Create forensic teams that may, in urgent cases, provide a risk assessment of the victim taking into account their situation and circumstances, gathering previous information from social, health and police services and creating a psychological report of the victim and the aggressor. This should not prejudice the adoption of measures in respect of procedural guarantees that may urgently protect the victims and guarantee their integrity.

B) The EU may contribute to all these initiatives through legislative initiatives and other "soft laws" as well as through the creation of specific budgetary provisions. This would allow the setting up of the above-stated measures and enhance their current efficiency at cross-border and EU wide level.

**3. Are you aware of good practices, initiatives, programmes (including training programmes) or tools that contribute to meeting the needs of victims?**

Further to those measures already described in previous responses to the questionnaire, we would like to bring to the attention of the European Commission good practices adopted in some EU countries.

- Measures of social awareness and training: campaigns in media, inclusion in education programs, training programs and formal/informal dialogue with victims groups\_for those professionals that cooperate directly in victim's protection (namely judges, policemen, prosecutors, lawyers, forensic teams, social workers and health services),

- Creation of specialised services of attention to the most vulnerable victims with such services being created within the police, within legal aid services, within the Courts, etc. This service should receive specific training as stated in the previous paragraph.
- Protocols for action and coordination amongst those professionals already cited such as civil, criminal and administrative jurisdictions, security bodies and Courts, health protocols, etc.

#### 4. How could existing EU legislation on victims be improved to meet the needs of victims?

By its own admission, the Commission recognises that the implementation of Council Framework Decision on the standing of victims in criminal proceedings (2001/220/JHA) has been very disappointing. The Commission also recognises that the “*vague drafting has caused difficulties in implementation and enforceability. Rights have not been implemented uniformly and a person falling victim to crime in one state could have fewer or weaker rights and support compared to another state.*” The Commission also recognises that “*The 2004 Directive on compensation to crime victims (2004/80/EC) also requires that all States have in place state compensation schemes for victims of violent intentional crime and that cross border claims are possible and assisted. Implementation has been satisfactory but procedural difficulties exist and applications for cross border claims are rarely made*<sup>1</sup>.”

The Commission’s own analysis identifies the problem and answers the question to some degree. EU legislation needs to be implemented, enforced and drafted in a precise manner. The drafting of a Directive on victims’ rights should be as precise as a Directive in the fields of taxation for example. There should not be varying standards in the quality and enforcement of Directives depending on the subject matter. Otherwise, EU legislation can be too general in nature and, while it may be implemented to varying degrees, its effective implementation can remain poor or non-existent.

#### 5. Is sufficient information and data collected on victims' policies and needs? How do you think such information should be collected (e.g. specific studies and research, national or EU wide victim satisfaction surveys)?

Concerning the first question, the situation is different in each Member State regarding different types of victims and crimes.

Generally speaking, in some countries, the collection is adequate to reflect the victim’s needs but insufficient to provide a response to those needs. There can exist a lack of coordination between the institutions that are involved and a lack of resources for the real enforcement of those measures that need to be politically and legally approved.

In a significant number of jurisdictions, there is an inadequate collection of data which is a major obstacle to identify possible improvements together with the absence of specialized institutions or the insufficiency of regulatory frameworks.

Concerning the second question, efforts to establish common and comparative mechanisms would be of great interest. This exercise of collecting facts and figures should be broadened to all EU countries with uniform criteria so that an adequate standard of protection can be met within the area of freedom, security and justice.

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<sup>1</sup> Report from the European Commission on the implementation of the 2004 Directive on Compensation to crime victims (SEC(2009) 495)

## II. SPECIFIC QUESTIONS BASED ON THE NEEDS OF VICTIMS

### RECOGNITION

#### **6. Do you think victims related training should be compulsory for practitioners? How do you think the quality of training programmes can be improved?**

The CCBE would need clarification with regard to what is meant by the term “practitioner”. Does it include court officials, prosecution, defence counsel, police forces, medical practitioners and personnel; teachers, members of victim support organisations etc?

Training should be provided to those involved with victims, but compulsory training might have a negative effect as it might distort who would benefit most from the training. Furthermore the CCBE would not support a position whereby only ‘specially trained’ professionals should be involved with victims, for example the CCBE would not support a position whereby only ‘specially trained’ professionals should carry out questioning during a trial (as mentioned below). Targeted and specifically focused training would be beneficial. Furthermore, as the experiences and impact of victims can vary from one victim to another, it is most important that the right people are trained to deal with the specific experience of the victim. This would not necessarily mean that all practitioners should be trained in all areas.

Regarding the quality of training programmes, the experience of victims themselves should inform the needs of any training programme. This would result in having practical input from those most affected in any training programmes. The quality of the training programs can also be improved with the participation of front-line professionals in contact with victims so that the transmission of knowledge is practical, adapted to the reality of the situation and from a “top-down” approach.

#### **7. How should it be ensured that the individual needs of victims are properly assessed (e.g. individual needs assessment when reporting crime)?**

The needs of the victims need to be evaluated by professionals specifically trained to assist them and to activate, within each of their fields of competence and experience, the adequate measures of support and protection. The victim should be informed and heard prior to the adoption of those measures.

The special situation of victims who are minors should be emphasised. Minors should be provided with assistance by specially trained professionals. A list of qualified professionals for minors should be provided in each Member State (and be available on the internet). It is important that minors be provided with immediate assistance and care. Representation of minors whose parents are not present or willing to give support should also be addressed.

#### **8. How do you think vulnerable victims should be identified? What special measures should be available to them (e.g. provide testimony only once, legal assistance always available, specially trained professionals carry out questioning)?**

Vulnerable victims can be identified by categories (identifying as “vulnerable a priori” those victims of certain types of crimes –sexual harassment, gender violence, terrorism - or by an age group -such as minors and elderly population - but this would not avoid that some victims fall outside of the scope due to their subjective situation or other circumstances that might well lead them to be considered as specially vulnerable. Accessibility, attention and care by specialised professionals should be the focus. In the framework of the proceedings and in order to guarantee their rights, access to legal assistance or legal aid is essential and of fundamental importance.

Regarding special measures for vulnerable victims, the CCBE would like to caution that victims’ procedural rights have the potential to undermine the rights of defendants. Rights of defendants must, in our view, not be undermined by those of victims. The interests of victims, and those of society as a whole, are not furthered by diminishing the rights of defendants. The CCBE could not support any measure that would undermine the trial process. In this regard it is unclear what the Commission means by a vulnerable victim providing his or her testimony only once. If this means in the case of an alleged offence against a minor or a person suffering some form of incapacity that the testimony would be pre-recorded and shown in the trial this would clearly be unacceptable. The evidence of the

complainant must be susceptible to cross-examination to vindicate the rights of an accused. Legal assistance 'always being available' is also a matter of serious concern. In the first place it is not clear why or what form of legal assistance should be provided to victims and how this would impinge on the trial process. It should not therefore lead to a situation where the purported victim could be legally represented by a lawyer having a right of audience in a criminal trial. It should be noted that certainly in common law jurisdictions criminal cases are prosecuted on behalf of the People against the alleged offender and not on behalf of the alleged victim. Furthermore the CCBE would not support a position whereby only 'specially trained' professionals should carry out the questioning as the role of the Judge in the trial process is to ensure that the trial proceeds in accordance with law. In the event of a purported victim's rights being in any way interfered with as a result of the questioning or manner of questioning of the victim, it is for the Judge concerned to deal with this issue. Furthermore the CCBE could not subscribe to a situation where a practitioner would not be permitted to take a brief as a defender or prosecutor without having specific training in relation to victims as it must be emphasised that the former's role is to represent their client's interests and the latter is to represent the Public Prosecutor.

## PROTECTION

### **9. Do you think measures are needed to protect a victim's privacy and if so how (e.g. court orders, code of conduct)?**

Directive 95/46/EC relating to the protection of personal data should be applied to penal matters, so that information on natural persons (victims, witnesses and others) is not disseminated freely and does not harm their private life. Within this framework, a code of conduct could be adopted by each various actor involved in the process.

### **10. How do you think the victim should be protected from an offender/ potential offender in particular in relation to:**

#### **a) Intimidation/ further harm (e.g. separation of offender and victim in court/police station through protocols)?**

It is fundamental to avoid, to the maximum possible degree, the visual confrontation between the victim and the suspect of aggression. It is not only an issue of possible intimidation but mainly because it can have a dissuasive element for the victim to know that the confrontation is going to take place. This may lead to the withdrawal of the claim or to non-appearance in Court and therefore leads to the impossibility of proving the crime without a testimony or without cooperation of the victim.

The victim can be protected through different measures such as measures of distancing (from the person, the job place, the residence and even from the family of the victim, measures forbidding communication by any means, being forbidden to carry and fire weapons, imprisonment, etc.). Those measures can be adopted by a judicial body through a protection order or legal guarantee with the aim of safeguarding the personal integrity of the victim.

#### **b) As regards protection orders, what do you think is the most feasible and effective option to achieve EU wide protection?**

The European protection order would be an adequate mechanism to provide recognition of the validity of orders issued by any competent authority within the EU. This order should include recognition of legal aid and a mechanism to facilitate coordination between the legal defence in both countries (issuing and host Member State). Such an order is the only envisaged mechanism to grant protection to the integrity of the victim within the European Area as well as to grant the victims integrity when they are exercising their fundamental right of freedom of movement. This right could otherwise be endangered, compromised and limited for the victims. This type of initiative could also be promoted with neighbouring EU countries and others in order to grant to citizens what is not only an EU fundamental right but also a recognised human right. The role of EU Delegations and Consular authorities in this respect could be further studied.



## SUPPORT

### **11. How do you think victim support organisations can be assisted to provide effective services to victims?**

We consider that the protection of victims, attention to their needs as well as guarantees of their rights is a responsibility of the EU and national Public Administrations. The CCBE is committed to the provision of access to legal assistance and/or legal aid in the best possible conditions (through training, deontology, independence and other features of the professional service) which may vary from country to country mostly depending on the legal framework, competences and on the public economic support. Private civil society associations also develop relevant support in this area. Nevertheless, it has to be clear that the efforts of professional institutions and other civil society associations cannot avoid public responsibility in providing effective services.

### **12. What services do you think they should provide?**

Complementary support services as well as assistance for recovery and support.

### **13. Do you think foreign and/or domestic victims should be provided immediate basic assistance (e.g. hotel accommodation, food vouchers, phone calls)? If so, who should provide such assistance (e.g. consular authorities, other government agencies, victim support organisations, tourist industry)?**

We consider necessary the delivery of basic, specialised and immediate assistance to several types of victims, such as the most vulnerable groups. Concerning lodging, it is recommended that these victims are offered accommodation if they need it preferably in first instance in a hostel or special lodging for victims. In such a hostel, they can be adequately protected and make first contact with fully integrated assistance services.

Regarding foreign victims, we understand the difficulties that consular authorities may face to provide immediate and full assistance. Nevertheless, we consider that they need to be informed of the situation of the victim, provide information and facilitate access to all available resources in the country where the victim is. This should include, amongst others, contact with the host Bar, as well as contacts with his/her home country lawyer. In case of lack of basic measures of protection in the host country, an EU Member State consular authority should provide all possible support, which obviously will not be sufficient and efficient enough in the long run. Therefore, we believe that the governmental authorities of the host country should provide resources directly, since EU citizenship is complementary to the respective nationality.

## ACCESS TO JUSTICE

### **14. How should we ensure that victims fully understand their rights and the information they are given (e.g. Translation and interpretation available to all victims who don't understand, legal assistance, simplification of forms and documents, information provided through different media)?**

Explaining their rights in a language that they understand would be a start. Providing legal assistance would also be a necessary step. There could also be an information office in the court for victims.

Information on victims' rights should be provided by a legal professional. It is, together with simultaneous access to a lawyer, the first step in providing legal assistance and access to justice. A translator or interpreter should only assist in the transmission of information. The simplification of forms as a principle is always desirable, not only for victims but also for any citizen.

15. **Should victims have a right to provide information before key decisions are made, such as decisions to stop an investigation or prosecution, and to seek the review of such decisions afterwards (e.g. through a senior official, ombudsman, court).**

The classification of a person as a victim before a final decision of a court is always a contradiction to the presumption of innocence. In criminal proceedings, according to the rule of law, the question whether someone is a victim or not has to be decided at the end of the proceedings. An early determination of someone being a victim can jeopardize the establishment of the truth.

It is a fundamental prerequisite of the administration of justice in all of the Member States that an independent prosecuting authority decides as to whether a case should be prosecuted. Any consultation on the decision to prosecute with a purported victim (and it is to be noted that all such persons are purported victims of the alleged offender concerned until the alleged offender is proven guilty at trial) is wholly unacceptable. Although it is accepted that decisions not to proceed with a case should also be explained to the complainant, this perhaps ought to be confined to the most serious category of violent offences rather than applied in a universal fashion. Finally it is unacceptable that victims should be allowed to seek the review of a decision not to prosecute by way of a Court process or through an ombudsman. The role of the Courts is not to decide that there is a prima facie basis for a prosecution to proceed based on an application by a complainant.

#### COMPENSATION AND RESTORATION

16. **How do you think victims should be assisted when making compensation claims and when seeking to enforce compensation orders (e.g. State assistance in recovery, State payment in advance, simplification of forms)?**

Member States should have a body responsible for providing clear information about how victims can apply for compensation, and what support is available in filing applications. The State should be responsible for paying compensation to the victim but only in situations where the offender is not in a position to compensate the victim himself or herself.

17. **Should restorative justice practices such as mediation be available to all victims? Should minimum standards be applied to organisations providing such services?**

Restorative justice may be a very useful addition to existing court remedies.