

The Right of a Victim to a Review of a Decision not to Prosecute as Set out in Article 11 of Directive 2012/29/EU and an Assessment of its Transposition in Germany, Italy, France and Croatia

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1. Introduction

The legal standing and procedural rights of victims of crime as participants in criminal proceedings have been neglected for a long time and considered to be only a minor issue when it comes to the regulation of contemporary codification of criminal procedural law. The reason for this may be traced back to the period when the state decided to take over detection and prosecution of the culprit along with the protection of the fundamental human rights of the accused and his rights to defence.¹ It resulted, among other things, in the connection of the criminal prosecution function with the person of the public prosecutor, which changed the standing of the victim from being the subject and a party to criminal proceedings into the standing of being the participant in the proceedings² with some procedural rights with the scope and amount³ of these rights being differently regulated in each legal system.⁴

Beside the *ex officio* prosecution as the common denominator of criminal proceedings in continental European countries, some countries have taken a different view as to when a public prosecutor should institute a prosecution. Contemporary criminal proceedings are mainly established on the principle of legality of criminal prosecution according to which a public prosecutor is obliged to (i.e. must) institute prosecution whenever the relevant legal requirements are met and when there are no procedural obstacles (Germany).⁵ On the other hand, there are other systems which are established on the principle of opportunity of criminal prosecution in which a public prosecutor is allowed, in spite of the fact that legal requirements are met, to assess if criminal prosecution is opportune (appropriate) in terms of public interest (France).⁶

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1 A. Esmein, *A History of Continental Criminal Procedure With Special Reference to France* (2000), pp. 528-609.

2 For the status of the victim from a theoretical perspective see: M. Fichera, 'The Status of the Victim in European Union Criminal Law', (2011) *Eu crim*, no. 2, p. 79.

3 In Germany for certain serious offences (§ 395(1) StPO) when the public prosecutor has instituted criminal proceedings, the victim may indirectly intervene as an accessory complainant (*Nebenklage*). In such situations the victim has various procedural rights, i.e. the right to: be present at the hearing, offer evidence, make objections to the judge, question the witnesses, experts and accused. See: S. Barton, 'Nebenklagevertretung im Strafverfahren: empirische Fakten und praktische Konsequenzen', (2011) *Strafverteidiger Forum*, no. 5, pp. 161-168.

4 This motivated some authors to conclude that a victim of a criminal offence is 'the forgotten man' in contemporary justice. W.F. McDonald, 'Towards a Bicentennial Revolution in Criminal Justice: The Return of the Victim', (1976) 13 *American Criminal Law Review*, no. 4, p. 650.

5 R. Juy-Birman, 'The German System', in M. Delmas-Marty & J.R. Spencer (eds.), *European Criminal Procedures* (2002), pp. 308-309.

6 V. Dervieux, 'The French System', in M. Delmas-Marty & J.R. Spencer (eds.), *European Criminal Procedures* (2002), pp. 232-233.

In spite of a state trying to set clear 'rules of conduct' by accepting these undisputed principles of criminal proceedings, there is still a possibility that the public prosecutor can make a mistake and not institute criminal proceedings although the legal requirements for criminal prosecution are fulfilled. In such cases the state turns mostly to the victim of a crime and lays down certain mechanisms to supervise the work of an inactive public prosecutor. Indeed, the most interested party in the outcome of criminal proceedings is usually the victim of a crime who is primarily motivated by private interest and who, by being given incentives to review negative decisions and to the possible continuation of the proceedings, realizes the public interest in prosecuting the perpetrator of a criminal offence.

Therefore, almost all contemporary legal systems have some kind of review of the work of an inactive public prosecutor in order to ensure that criminal proceedings are taken against the perpetrator of a criminal offence even if the public prosecutor refuses to institute criminal proceedings or decides not to prosecute in the course of such proceedings. As for the EU, nearly all Member States guarantee to the victims of crime an effective legal remedy against a decision by the public prosecutor not to prosecute, or to discontinue proceedings. In some Member States victims may file for a review of the decision, in others victims have the right to institute a private prosecution if the prosecutor decides to drop the charges, while at the same time many Member States provide for both models of control of the decision not to prosecute.⁷ Nevertheless, solutions differ from state to state and therefore it could be argued that there is no harmonisation between these systems. So far as a common law regime is concerned, it should be noted that in the USA, at federal level, the victim is not guaranteed either the right to take control where criminal proceedings are not instituted or to take over the prosecution from the public prosecutor.⁸ Only in a few US states is the victim guaranteed the right to act as a private prosecutor.⁹ Again, it was only in 2013 that a victim in England was guaranteed the right to take control where criminal proceedings have not been instituted as instanced by the legal remedy available within the remit of the Crown Prosecution Service. A trigger for stipulating that right of a victim was the *Killick* case¹⁰ in which the Court of Appeal clearly pointed out that, as a decision not to prosecute is in reality a final decision for a victim, there must be a right to seek a review.¹¹

In recent times the question of the standing of victims of crime has gained significance both at international and national levels of legal systems. International instruments passed by the United Nations and by the Council of Europe as well as EU law, have effected substantial changes in improving the procedural standing of victims of crime in criminal proceedings. The European Court of Human Rights has contributed thereto by developing the so-called positive procedural obligations through the right of a victim to effective investigation in criminal cases.¹² The United Nations¹³ and the Council of Europe¹⁴ have passed a number

7 Interestingly, only two Member States (Cyprus and Malta) do not provide any legal remedy against a decision not to prosecute. For comparative data see: <<http://fra.europa.eu/en/publications-and-resources/data-and-maps/comparative-data/victims-support-services/prosecution>> (last visited 15 November 2015).

8 The United States Supreme Court has quashed the right of private prosecution in the federal court. In the case 452 U.S. 83 *Leeke v Timmerman*, [1981], the Court affirmed the precedent in case 410 U.S. 614, *Linda R.S. v. Richard D.*, [1973], which denies the right of private prosecution. However, the United States Supreme Court made an exception in the case 481 U.S. 787, *Young v U.S. ex rel. Vuitton et Fils*, [1987] by allowing the courts to appoint a private attorney to prosecute a criminal contempt action if the state attorney refuses to prosecute.

9 J. Cardenas, 'Crime Victim in the Prosecutorial Process', (1986) 9 *Harvard Journal of Law & Public Policy*, no. 2, p. 375; R.A. Fairfax Jr., 'Delegation of the Criminal Prosecution Function to Private Actors', (2009) 43 *University of California Davis Law Review*, no. 1, pp. 421-424; M. T. McCormack, 'The Need for Private Prosecutors: An Analysis of Massachusetts and New Hampshire Law', (2004) 37 *Suffolk University Law Review* no. 2, pp. 502-504.

10 *R v Christopher Killick*, [2011] EWCA Crim 1608.

11 K. Starmer, 'Human Rights, Victims and the Prosecution of Crime in the 21st Century', (2014) *Criminal Law Review*, no. 11, p. 783.

12 Similar to the right of the accused to the observance and protection of his fundamental rights in the course of criminal proceedings, is the right of victims of criminal offences to effective investigation as a fundamental human right. Z. Đurđević, 'Pravo na učinkovitu istragu u kaznenim predmetima: analiza hrvatske prakse i prava' [Right to Effective Investigation in Criminal Cases: Analysis of Croatian Practice and Law], in D. Krapac (ed.), *Profili hrvatskog kaznenog zakonodavstva* (2014), p. 106.

13 First the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power was passed and adopted on 29 November 1985, by which the first steps were taken in improving the procedural rights of victims. Further efforts were set out in the United Nations Convention against Transnational Organized Crime adopted on 15 November 2000 and the Protocol thereto of 2003 to Prevent, Suppress and Punish Trafficking in Persons Especially in Women and Children, as well as the United Nations Convention against Corruption adopted on 9 December 2003.

14 As regards the instruments passed within the Council of Europe, Recommendations R (85)11, R (87)4, R (87)18, R (87)21 and R (06)8 should be mentioned. These documents stipulate various procedural rights for victims e.g. the right to be informed about the stage of the proceedings and about the outcome of the court proceedings, participation in the decision-making procedure in accordance with

of instruments aimed at protection of victims' interests, by which an additional incentive was given to guarantee a wider scope of their procedural rights. However, a special contribution to the implementation of the procedural rights of victims was made, first of all, by the Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings (2001/220/JHA),¹⁵ and later on by Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 (hereinafter: the Directive)¹⁶ establishing minimum standards on the rights, support and protection of victims of crime.¹⁷

One of the specific rights of victims in the Directive is the victim's right to require review of the decision not to prosecute in criminal proceedings that was laid down in detail in Article 11. For this reason, this paper deals with the compliance with Article 11 of the Directive of certain selected European models of the review of a decision not to prosecute in criminal proceedings, namely in Germany, Italy, France and Croatia. The criteria for the choice of the models were different procedural solutions of review in those countries reflecting both their advantages and disadvantages. For instance, Germany and Italy prescribe a specific solution in which the court orders the public prosecutor to prefer a public charge. While in Germany review of a decision not to prosecute depends on the initiative of the victim, in Italy the court reviews every decision of the public prosecutor not to prosecute, regardless of the wishes of the victim. On the other hand, France provides two methods of challenging the decision not to prosecute. One is the 'true' review by means of a legal remedy within the framework of the public prosecutor's office exercised by lodging an appeal to the general prosecutor, whereas the other is the right of the injured party to initiate a prosecution by a complaint with a civil party petition. Special attention has been paid to the Croatian solution which still applies the custom of subsidiary prosecutor which, in terms of the Directive, has been challenged for not being the appropriate measure for a review of a decision not to prosecute in criminal proceedings because becoming a private prosecutor constitutes an additional burden on the victim in terms of time, costs etc. Contrary to that objection, this paper argues that the right to subsidiary prosecution is not a private prosecution because the state has not waived its right of public punishment by allowing the victim to institute criminal proceedings. Besides, a subsidiary prosecutor does not bear any of the costs of investigation, evidence collecting, or the hearing and has no obligation to furnish in advance the payment of the procedural expenses or for undertaking investigatory actions either at the preliminary procedure or at the hearing.

This paper analyses the rights of the victim in the event of a decision not to prosecute under Article 11 of the Directive and provides a comparative analysis of the review of a decision not to prosecute in Germany, Italy, France and Croatia with the aim of providing some input to the best way to implement Article 11. Against this background, the paper evaluates the degree of compliance of those selected legal systems with Article 11 of Directive 2012/29/EU and points to possible disputes that may arise in the course of implementation of the European provisions in the national laws.

2. Directive of the European Commission and Parliament establishing minimum standards for the rights, support and protection of victims of crimes

2.1. From the Framework Decision to Directive 2012/29/EU

The issue of strengthening victims' rights and protecting victims of crime in criminal proceedings, triggered by a series of instruments adopted at the United Nations and the Council of Europe, gradually became a

the principle of opportunity of criminal prosecution, and the right to review of the decision not to prosecute. In addition, the victim is guaranteed the right to necessary aid and protection aimed at protection from secondary victimisation and protection of the victim's private life.

15 Although this framework decision was a legally binding instrument, while observing the reports of particular states on the effective implementation of the requirements of the Framework Decision, the European Commission deemed that Member States have not adequately complied with their obligations. M.S. Groenhuijsen & A. Pemberton, 'The EU Framework Decision for Victims of Crime: Does Hard Law Make a Difference?', (2009) 17 *European Journal of Crime, Criminal Law and Criminal Justice*, no. 1, p. 48.

16 Directive 2012/29/EU, <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32012L0029>> (last visited 5 August 2015).

17 For the analysis of rights introduced in Directive 2012/29/EU see: S.R. Buczma, 'An Overview of the Law Concerning Protection of Victims of Crime in the View of the Adoption of the Directive 2012/29/EU Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime in the European Union', (2013) 14 *ERA Forum*, no. 2, p. 235-250.

legislative priority at EU level.¹⁸ The first important step in that field was a Council Framework Decision on the standing of victims in criminal proceedings (2001/220/JHA) in which the EU expressed its commitment to foster the rights of victims of crime in a clear and comprehensive manner.¹⁹ Nevertheless, the Framework Decision has not achieved the desired impact²⁰ since it was not directly effective.²¹ For it to become legally binding,²² Member States were supposed to approximate their laws and regulations to the extent necessary to attain the objective of the Framework Decision.²³ However, they have fallen down on this task because none of the Member States has fully complied with its obligations.²⁴

After the entry into force of the Lisbon Treaty, the EU received exclusive competence to legislate and adopt binding Acts in the area of criminal law.²⁵ Namely, Article 82(2) TFEU explicitly prescribes a list of areas within the EU's competence for legislation such as mutual admissibility of evidence between Member States, the rights of individuals in criminal proceedings and the rights of victims of crime.²⁶ The EU has continued to progress legislation in favour of victims through the Lisbon Treaty, bolstered by the positioning of fundamental rights at the forefront of the Treaty on the European Union and the binding status of the EU Charter of Fundamental Rights.²⁷ Further impetus focused on strengthening the procedural rights of victims of crime was made in the Stockholm Programme of EU action in the area of freedom, security and justice from 2009-2014.²⁸ A particular focus on victims of crime was made in paragraph 2.3.4. of the Stockholm Programme where the European Council called on the Commission and the Member States to examine how to improve legislation and practical support measures for the protection of victims and to improve the implementation of existing instruments. The European Council directed special focus on examining the opportunity of making one comprehensive legal instrument on the protection of victims, by joining the Council Directive relating to compensation for crime victims and the Council Framework Decision on the standing of victims in criminal proceedings, based on an evaluation of these two instruments. It should be noted that the CJEU also made an important contribution to the new approach regarding strengthening the position of victims of crime. In the cases of *Gueye* and *Sanchez*²⁹ the Court said that the Framework Decision not only left a large margin of appreciation to Member States in the process of approximating its

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- 18 The 2001 Framework Decision on the standing of victims in criminal proceedings can be considered as a milestone since it is the first international hard law instrument on the position of victims of crime. A. Pemberton & C. Rasquete, 'Victims in Europe – Assessment of the Implementation of the Framework Decision on the Standing of Victims in Criminal Proceedings: Preliminary Results', in J. Hartmann (ed.), *Perspektiven professioneller Opferhilfe* (2010), p. 106.
- 19 R. Letschert & C. Rijken, 'Rights of victims of crime: Tensions between an integrated approach and a limited legal basis for harmonisation', (2013) 4 *New Journal of European Criminal Law*, no. 3, pp. 227-228.
- 20 The CJEU confirmed in several cases that the Framework Decision was limited because it prescribed only minimum requirements (Case C-79/11, *Giovanardi and Others*, [2012] ECR; Joined Cases C-483/09 and C-1/10, *Gueye and Salmerón Sánchez*, [2011] ECR I8263, para. 52) leaving at the same time a large measure of discretion for Member States with regard to the specific means by which they implement the objectives to be attained (Case C404/07, *Katz.*, [2008] ECR I7607, para. 46; Case C205/09, *Eredics and Sági*, [2010] ECR I1023, paras. 37 and 38).
- 21 Regarding the legal effects of Framework Decisions see: A. Hinajeros, 'On the Legal Effects of Framework Decisions and Decisions: Directly Applicable, Directly Effective, Self-Executing, Supreme?', (2008) 14 *European Law Journal*, no. 5, pp. 620-634.
- 22 S. Lorenzmeier, 'The Legal Effect of Framework Decisions – A Case-Note on the Pupino Decision of the European Court of Justice', (2006) 1 *Zeitschrift für Internationale Strafrechtsdogmatik*, no. 12, p. 583.
- 23 For an exhaustive analysis of the various rights of victims of crime in the Council Framework Decision on the standing of victims in criminal proceedings, see: I. Wieczorek, 'A Needed Balance between Security, Liberty and Justice. Positive Signals Arrive From the Field of Victims' Rights', (2012) 2 *European Criminal Law Review*, no. 2, pp. 148-151.
- 24 In the first assessment report in 2004, the Commission stated that none of the Member States had fully complied with its obligations. Five years later in 2009 the Commission issued the next assessment report in which it concluded that the implementation of the Framework Decision is not satisfactory. It stated that the national legislation sent to the Commission contains numerous omissions and that it largely reflects existing practice prior to adoption of the Framework Decision. M. Groenhuijsen, 'The development of international policy in relation to victims of crime', (2014) 20 *International Review of Victimology*, no. 1, p. 36.
- 25 Z. Đurđević, 'Lisabonski ugovor: prekretnica u razvoju kaznenog prava u Europi' [The Lisbon Treaty: turning point in the development of criminal law in Europe], (2008) 15 *Hrvatski ljetopis za kazneno pravo i praksu*, no. 2, pp. 1078-1079; V. Mitsilegas, 'EU Criminal Law Competence after Lisbon: From Securitised to Functional Criminalisation', in D. Acosta Arcazo & C.C. Murphy (eds.), *EU Security and Justice Law: After Lisbon and Stockholm* (2014), pp. 110-129.
- 26 E. Herlin-Karnell, 'EU Competence in Criminal Law after Lisbon', in A. Biondi & P. Eeckhout (eds.), *EU Law after Lisbon* (2012), p. 335.
- 27 J. Blackstock, 'Protecting Victims: EU competences and mechanisms for safeguards, Symposium: Legal Perspectives on the Victim', Nottingham Trent University (2012), p. 2, <<http://2bqk8cdew6192tsu41lay8t.wpengine.netdna-cdn.com/wp-content/uploads/2015/02/Protecting-Victims-EU-Competences-and-mechanisms-for-safeguards.pdf>> (last visited 12 November 2015).
- 28 The Stockholm Programme – An open and secure Europe serving and protecting the citizens, 2010/C 115/01, <[http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52010XG0504\(01\)&from=SL](http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52010XG0504(01)&from=SL)> (last visited 15 November 2015).
- 29 Joined Cases C-483/09 and C-1/10, *Gueye and Salmeron Sanchez*, [2011] ECR I8263.

legislation, but it also failed to impose an obligation on Member States regarding the right of the victim to be treated in a manner equivalent to that of parties in criminal proceedings.³⁰

As a step in responding to the Stockholm Programme, the European Commission has proposed a package of measures on victims of crime including a Directive on the rights, support and protection of victims of crime.³¹ Considering the importance of enhancing the protection of victims, in 2011 the Council of the EU passed a Resolution on a roadmap for strengthening the rights and protection of victims, in particular in criminal proceedings, in which it welcomed the European Commission's proposal for a package of measures on victims of crime.³² Little over a year later, the European Council and the Parliament adopted Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime.³³

2.2. Directive 2012/29/EU and a close examination of Article 11 of the Directive

In order to assess, by means of a close examination, the level of compliance of certain solutions for a review of a decision not to prosecute in criminal proceedings in the relevant legal systems, it is first necessary to analyse the requirements pursuant to Article 11 of the Directive set before the Member States.³⁴ The Directive is a legally binding instrument and the EU Member States were obliged to implement it by 16 November 2015.³⁵ The European Commission issued a Justice Guidance document interpreting the provisions of the Directive that would make it easier for the Member States to achieve the set goals in order to ensure a coherent guarantee of victims' rights at EU level.³⁶

The legal obligatoriness of a directive does not mean that the Member States are obliged to implement it literally.³⁷ In other words, the Member States are allowed a certain freedom³⁸ to bring their legislation into line with the requirements of a directive so that new solutions, at the same time, take into account specific national legal matters in implementing the directive.³⁹ This will, however, result in different solutions which will normatively not be identical with a directive's requirements, but as long as these solutions are within the limits of the goal of the directive, national legislation will be deemed to comply with the set requirements.⁴⁰

30 R. Lamont, 'Joined Cases C-483/09 and C-1/10, Gueye and Salmerón Sánchez, Judgment of the Court of Justice (Fourth Chamber) of 15 September 2011', (2012) 49 *Common Market Law Review*, no. 4, pp. 1443-1455; J. Vedsted-Hansen, 'Article 7 – Respect for Private and Family Life (Private Life, Home and Communications)', in S. Peers, et. al. (eds.), *The EU Charter of Fundamental Rights: A Commentary* (2014), pp.174-176; E. Herlin-Karnell, 'Recent Developments in the Field of Substantive and Procedural EU Criminal Law – Challenges and Opportunities', in M. Bergström & A. Jonsson Cornell (eds.), *European Police and Criminal Law Co-operation* (2014), p. 29.

31 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 of 18 May 2011).

32 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/?uri=uriserv:OJ.C_.2011.187.01.0001.01.ENG> (last visited 13 November 2015).

33 Directive 2012/29/EU is not the only text aimed at protecting and supporting victims of crime. There is also Directive 2011/36/EU of 5 April 2011 on the protection and repression of human trafficking and the protection of victims (see: M. O'Neill, 'The EU Legal Framework on Trafficking in Human Beings: Where to from here – the UK Perspective', (2011) 7 *Journal of Contemporary European Research*, no. 4, pp. 453-457), and Directive 2011/99/EU of 13 December 2011 on the European Protection order (see: T. Jiménez Becerril & C. Romero Lopez, 'The European Protection Order', 2011 *Eu crim*, no. 2, pp. 76-78).

34 Considering that the right of a victim to participate in criminal proceedings (Art. 10-17. Directive 2012/29/EU) significantly varies from one Member State to another, the Directive establishes only common objectives leaving to each Member State the freedom to precisely prescribe mechanisms that will secure effective realization of those rights. S. Allegrezza, 'Victim's statute within directive 2012/29/EU', in L. Lupária (ed.), *Victims and criminal justice* (2015), p. 14.

35 If a directive is unconditional, sufficiently clear and precise and the date on which it was due to have been implemented has passed, it will have a direct effect on the rights of individuals whether or not the Member State has implemented the directive in question (see: Case 148/78, *Pubblico Ministero v Ratti*, [1979] ECR 1629; Case 5/83, *Criminal proceedings against H.G. Rienks*, [1983] ECR 4233). R. France, 'The Influence of European Community Law on the Criminal Law of the Member States', in H.-J. Albrecht & A. Klip, *Crime, Criminal Law and Criminal Justice in Europe: A Collection in Honour of Prof. em. dr. dr. h.c. Cyrille Fijnaut* (2013), p. 142. See also: A. Albers-Llorens, 'Keeping up appearances: the Court of Justice and the effects of EU directives', (2010) 69 *The Cambridge Law Journal*, no. 3, pp. 455-458.

36 Justice Guidance document related to the transposition and implementation of the Directive 2012/29/EU, <http://ec.europa.eu/justice/criminal/files/victims/guidance_victims_rights_directive_en.pdf> (last visited 6 August 2015).

37 The Court of Justice does not allow Member States complete freedom in choosing the form and methods. Member States are expected to transpose the provisions of the directive into binding national provisions. Consequently, achieving the intended result but without drafting binding provisions is not sufficient. M.J. Borgers, 'Implementing framework decisions', (2007) 44 *Common Market Law Review*, no. 5, p. 1363.

38 When a directive requires a Member State to alter its law, this Member State has discretionary powers to do so, within the limits established by the CJEU and those of the relevant directive (see: Case 88/79, *Ministère Public v Grunert*, [1980] ECR 1827). France, *supra* note 35, p. 143.

39 S. Rodin & T. Čapeta, *Učinci direktive Europske unije u nacionalnom pravu* [Effects of EU Directives in National Law] (2008), p. 8.

40 K. Davies, *Understanding European Union Law* (2013), pp. 56-57.

This is exactly the case with Article 11 of the Directive where some EU states have completely different solutions to the review of the decision not to prosecute and at the same time meet the requirements of the Directive.⁴¹ Hence, the requirements set out in Article 11 will be considered further in this paper so as to determine the framework for considering the compliance of the review of the decision not to prosecute in respective legal systems.

Pursuant to Article 11(1) of the Directive, the Member States must 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. It is thereby pointed out that the procedural rules for such a review are to be determined by national law and the implication is that this right and the scope of the powers that the victim thereby acquires in criminal proceedings are exercised exclusively in accordance with national legislation.⁴² As regards the decisions that may be subject to control, it is pointed out that the right to a review of a decision not to prosecute should be understood as referring to decisions taken by prosecutors and investigative judges or law enforcement authorities such as police officers, but not to the decisions taken by courts (recital 43). As for the body that should exercise control on the initiative of the victim, according to the Directive this must be a different person or authority from the one which made the original decision (recital 43). Thus, the Directive does not set down an explicit requirement that control must be carried out by the court, so it may be carried out within the framework of another body guaranteeing impartiality and independence. In fact, impartiality and independence can be guaranteed only by a judicial authority, so that it is expected that Member States will seek to establish the control within the courts. Nevertheless, there are no obstacles for the control of the negative decision to be regulated as a legal remedy within the criminal prosecution authority which issued the disputed decision, as long as the authority deciding on the request of the victim meets the criterion of being an objective and impartial body other than the authority that made the disputed decision.⁴³

The right of a victim to require control over a decision not to prosecute is, as a rule, related to the acquisition of his or her formal procedural standing. However, since in a number of legislations the acquisition of procedural standing of a victim is bound to the decision of instituting criminal proceedings, it can happen that a public prosecutor does not institute criminal proceedings and thus the procedural standing of the victim of crime is not constituted. In view of such cases, Article 11(2) stipulates that where, 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 perpetrator of a criminal offence has been taken, Member States must ensure that the victims of serious crimes have at least the right to a review of a decision not to prosecute. The procedural rules for such a review must be determined by national law. The notion of a 'serious' crime is here at issue since it has not been interpreted in the Directive and its interpretation will depend on an individual state's interpretation.⁴⁴

The existence of appropriate information on the nature of a right and the basis on which to exercise that right is the prerequisite to valid and due exercise of a certain procedural right. Consequently, the Directive sets out the requirement that Member States must ensure that victims are notified without unnecessary delay of their right to receive, and that they receive sufficient information to decide whether to request a review of any decision not to prosecute upon request (Article 11(3)).⁴⁵ It follows from this that only an ordinary notification on the right of the victim to request a review of any decision not to prosecute will not suffice. Prosecution authorities are obliged to take a step further and serve the victim with sufficient

41 The Directive lays down the minimum standards and the Member States may extend the rights set out in the Directive in order to provide a higher level of protection. It must be noted that, in the case of strengthening the rights of victims, a conflict with the right of the accused to a defence may arise. This conflict may be particularly manifested in the model of procedural rights, where the victim may act as a prosecutor (subsidiary or private) or civil plaintiff. C. Kulesza, 'Directive 2012/29/EU of 25 October 2012 Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime', in P. Wiliński & P. Karlik (eds.), *Improving Protection of Victims' Rights: Access to Legal Aid* (2014), pp. 141-142.

42 See Justice Guidance document, supra note 36, p. 30.

43 Allegrezza, supra note 34, p. 15.

44 The Justice Guidance Document points out that existing EU criminal law legislation and international criminal justice standards may be taken into account when interpreting this term at national level. Justice Guidance document, supra note 36, p. 30.

45 The right to information and assistance receives full recognition, so much so that the directive expresses itself in the indicative, almost as if to express the intention of obliging Member States to adopt certain measures. In this sector no local discretion linked to the peculiarities of the system is allowed. Allegrezza, supra note 34, p. 5.

information so as to make a decision whether he or she will actively exercise that right. Hence, the victim is granted not only an indirect insight into the results of the prosecution authorities' work effecting the negative decision and enough time to reconsider the use of this remedy, but also an assessment of the successful outcome of the review of the decision not to prosecute.

It has been mentioned earlier in this paper that the review should be carried out by an independent and impartial authority other than the one that made the decision not to prosecute. However, it can happen that the decision not to prosecute is taken by the highest prosecuting authority against whose decision no review may be carried out under national law. In this case the Directive provides for the possibility that the review may be carried out by the same authority (Article 11(4)). Sensible interpretation of the Directive should ensure that, at least within the framework of the highest prosecuting authority, the review is carried out by a person who has not formerly participated in the making of the disputed decision.

Finally, it is stipulated that provisions on the right of victims to a review of a decision not to prosecute are not to apply to a decision of the prosecutor not to prosecute if such a decision results in an out-of-court settlement (Article 11(5)). This limitation, however, refers only where the settlement imposes a warning or an obligation (recital 45). In addition, the right to a review of a decision not to prosecute does not concern special procedures, such as proceedings against members of parliament or government, in relation to the exercise of their official position (recital 43).

3. A comparative survey of the review of the decision not to prosecute in legal systems of continental Europe

3.1. Germany

3.1.1. Right to review of a decision not to prosecute

The German pattern of control over the decision not to prosecute is known as the 'proceedings to compel public charges' (*Klageerzwingungsverfahren*).⁴⁶ Proceedings to compel public charges open up the possibility for an independent court to control whether the public prosecutor has obeyed the principle of legality of criminal prosecution.⁴⁷ Although pursuant to § 150 of the Court Constitution Act (*Gerichtsverfassungsgesetz*, hereinafter: GVG) the public prosecution office must be independent of the courts in the performance of its official tasks, it can, in this way only, exceptionally be forced to bring charges against his opinion.⁴⁸ It is, however, important to point out that proceedings to compel public charges do not only ensure the indirect exercise of the principle of legality of criminal prosecution pursuant to § 152(2) of the Code of Criminal Procedure (*Strafprozessordnung*, hereinafter: StPO) as an objective law-related principle, but such proceedings are also a procedure aimed at the protection of the subjective public rights of the injured party, since § 19(4) of the Basic Law (*Grundgesetz*, hereinafter: GG) guarantees the right to access the court to those whose rights have been violated by public authorities.⁴⁹

If the public prosecution office does not grant an application for preferring public charges or, after conclusion of the investigation, it orders the proceedings to be terminated, it must notify the applicant, indicating the reasons.⁵⁰ The decision must inform the applicant, if he is at the same time the injured party, of the possibility of contesting the decision and of the time limit provided therefor (§ 171 StPO). Accordingly, the injured party is entitled to lodge a complaint against the notification to the official superior of the public prosecution office within two weeks after receipt of such notification (§ 172(1) StPO). If the chief prosecutor, after reviewing the file, comes to the conclusion that the dismissal was not well-founded, he will order the

46 For more details on this see: J. Kretschmer, '§ 172 Klageerzwingungsverfahren', in H. Radtke & O. Hohmann (eds.), *Strafprozessordnung Kommentar* (2011), pp. 971-983.

47 The contemporary theory points out that in Germany the principle of legality gives way to the principle of opportunity by creating a number of disposition practices that short-circuit the full criminal procedure process. S.M. Boyne, *The German Prosecution Service* (2014), p. 65.

48 Although its organisation is regulated by the Court Constitution Act, it is not a constituent of judicial powers since these relate only to authorities having the power to adjudicate, i.e. pronounce judgments, which power belongs only to the court. Therefore the public prosecutors may not perform judicial functions and may not be assigned responsibility for supervising the work of judges (§ 151 GVG).

49 C. Roxin & B. Schünemann, *Strafverfahrensrecht* (2012), p. 329.

50 G. Gilliéron, *Public Prosecutors in the United States and Europe* (2014), p. 275.

local prosecutor to resume the investigation or to file an indictment.⁵¹ However, if he establishes that the complaint is unfounded, this complaint will be dismissed by the chief prosecutor. Against such a decision the injured party may, within one month of receipt of notification, apply for a court decision in respect of the dismissal of the complaint (§ 172(2) StPO). On this occasion the injured party in the application must indicate the facts which are intended to substantiate the preferment of public charges, as well as the evidence (§172(3) StPO). The application of the injured party is decided by the Higher Regional Court (§172(4) StPO), since the courts of first instance should not be exposed to the danger of being biased, as pointed out by Roxin.⁵² However, if after hearing the accused, the court considers the application to be well-founded, it must order preferment of public charges (§175 StPO).⁵³ This order is to be carried out by the public prosecution office. In this way the principle of accusation is formally observed, but it is materially considerably limited due to the fact that the public prosecution office is bound by the decision of the court.⁵⁴ It is worth noting that the principle of accusation represents the basic principle of the law on criminal procedure which was an indicator for easily solving the problem of harmful concentration of functions within the same official.⁵⁵ This principle was a precondition for separation of the functions in criminal procedure and entrusting the different functions in criminal procedure to different bodies.⁵⁶ Strict adherence to this principle maintains the mutual independence of the judges and the public prosecution office, prohibits the cumulation of judicial functions in one and the same person and prevents a judicial official from intervening successively in the same case as both prosecutor and judge.⁵⁷

3.1.2. Assessing the compliance of the German model of a review of a decision not to prosecute with Directive 2012/29/EU

With the recent major reform aimed at strengthening the rights of victims in criminal proceedings, known as the Second Victims' Rights Reform Act (*2. Opferrechtsreformgesetz*) of 2009, Germany assembled an important unit in the process of victims' procedural rights by the improvement of participation, information and protection rights.⁵⁸ Through the principle of *Klageerzwingungsverfahren*, the victim is guaranteed an effective opportunity to contest the decision not to prosecute. In this context the German law is compliant with Article 11(1) of the Directive since legal means exist to initiate control over the public prosecutor's decision not to prosecute. In addition, the victim is guaranteed sufficient opportunities to acquire valid and due information on the decision not to prosecute so that he can object. The legal basis therefor is provided in § 406 h(1) StPO, which expressly stipulates that the injured party is to be informed of his rights as early as possible, as a rule in writing, and as far as possible in a language they understand. In this way the victim is guaranteed the right to be informed about their procedural rights from the initial contact with the criminal procedure authorities before the commencement of criminal proceedings, which makes the German law compliant with Article 11(2) of the Directive. Also in accordance with the Directive is the provision § 171 StPO stipulating that the public prosecution office must inform the victim of crime about the possibility to contest the decision not to prosecute. However, in order that the victim can successfully contest the decision not to prosecute, it is not sufficient that he or she duly obtains the information about the decision not to prosecute. The basis of the information should be presented in such a manner that

51 T. Weigend, 'Germany', in K. Ligeti, (ed.), *Toward a Prosecutor for the European Union* (2013), p. 292.

52 See Roxin & Schünemann, *supra* note 49, p. 326.

53 The injured party can then join the proceedings as an active participant (*Nebenkläger*). H.H. Kühne, *Strafprozessrecht* (2010), p. 361.

54 See Roxin & Schünemann, *supra* note 49, p. 330; H. Radtke, '§ 151 Anklagegrundsatz', in H. Radtke & O. Hohmann (eds.), *Strafprozessordnung Kommentar* (2011), p. 700; M. Heghmanns, *Strafverfahren* (2014), p. 65; E. Löwe et al., '§ 151' in V. Erb et al. (eds.), *Die Strafprozessordnung und das Gerichtsverfassungsgesetz: Fünfter Band* (2007), p. 4.

55 See K. Ambos, 'Zum heutigen Verständnis von Akkusationsprinzip und -verfahren aus historischer Sicht', (2008) 30 *JURA – Juristische Ausbildung*, no. 8, pp. 586-594.

56 The principle of accusation means that charges must be brought before any criminal court proceedings can be initiated. In other words the court may proceed only with regard to the charges brought by the public prosecutor. Therefore bringing charges is the privilege of the public prosecution office as an institution independent of the court. J. Zekoll, *Introduction to German Law* (2005), p. 433.

57 B. Pesquié, 'The Belgian System', in M. Delmas-Marty & J.R. Spencer (eds.), *European Criminal Procedures* (2002), p. 87.

58 M. Peter, 'Measures to Protect Victims in German Criminal Proceedings, A Summary with Special Focus on the Key Points of the Second Victims' Rights Reform Act', The 144th International Senior Seminar, Resource Material Series no. 81, pp. 125-136, <http://www.unafei.or.jp/english/pdf/RS_No81/No81_13VE_Peter.pdf> (last visited 7 August 2015).

the victim can decide whether to request a review of the decision not to prosecute (Article 11(3) of the Directive). In this sense the provision § 406e StPO regulating the right of the victim to get a look at the case file through the medium of a lawyer is important.⁵⁹ Meyer-Krapp states that in reality proceedings to compel public charges very rarely emerge in practice.⁶⁰ The main cause of this lies in the extremely strict admissibility requirements for filing a request; at the same time the very existence of this procedure is sufficient to motivate the public prosecution office to make a careful investigation.⁶¹ One of the reasons for this is the obligation of the victim to furnish security in advance for the costs incurred due to court proceedings instituted at the victim's request (§ 176(1) StPO), and if the victim does not do so, the court is to deem the request to have been withdrawn. This provision brings into question the sense of guaranteeing victims the right to review a decision not to prosecute if, at the same time, the victim is burdened with the obligation to estimate in his 'cost-benefit analysis' whether he is prepared to 'pay' for the activity of the court to conduct the review of the legality of the public prosecutor's proceedings.

Although the proceedings to compel public charges are a fast and simple way to review a decision not to prosecute, this form of review has certain disadvantages related primarily to the order of the court to the public prosecution office to prefer an indictment and thus give an incentive to the court to adjudicate. There is no doubt that this particular authority of the court undermines the basic requirements deriving from the principle of accusation and proves questionable in practice, since the public prosecutor may, even if he has formally done his duty, if convinced that he acted correctly he can, by his procedural conduct, cause dismissal of the proceedings or acquittal. However, it should be pointed out that the autonomy and independence of the public prosecutor, unlike judicial power, has not been defined by the Constitution. Accordingly, it is frequently emphasized in literature that the Minister of Justice is authorized to provide instructions for the public prosecutor as well as that the public prosecution office is closer to the executive power.⁶² From this standpoint, the model of ordering the compelling of public charges can be deemed justified, but the issue of consistent allocation of procedural functions to different procedural subjects remains open to question. An interesting opinion has been put forward by Beulke that a great number of authors in German legal theory take the view that the public prosecutor in this case is not bound by the decision of the court to assume the discontinued criminal procedure.⁶³ These authors refer to § 150 GVG which stipulates that the public prosecution office is independent from the courts and that the public prosecutor, as a *dominus litis* of the preliminary procedure, freely reviews legal requirements for prosecution and autonomously decides on initiating and discontinuing the procedure as well as on preferring the indictment.⁶⁴ On the other hand, Beulke states, there are other authors according to whom the public prosecutor is, indeed, bound by the decision of the court. In this context § 92 of the GG stipulates that judicial power is exercised by the courts. This shows that the absolute monopoly of the public prosecutor, who, by his unilateral decision, can cause discontinuation of the proceedings although the court has established that the legal requirements for prosecution are met, is in contradiction with this basic rule.⁶⁵ Such a monopoly of the public prosecutor is in contradiction with § 170(1) StPO as well, Beulke states, because sufficient grounds for preferring an indictment require the public prosecutor to act accordingly. Moreover, Beulke points out that the failure of

59 The victim is not able to inspect the files himself and the reason for this provision is mainly due to aspects arising under the law of data protection. S. Frey, 'Victim Protection in Criminal Proceedings, The Victim's Rights to Information, Participation and Protection in Criminal Proceedings', The 123rd International Senior Seminar, Resource Material Series no. 63, p. 59, <http://www.unafei.or.jp/english/pdf/RS_No63/No63_11VE_Frey1.pdf> (last visited 8 August 2015).

60 While researching judicial practice, Meyer-Krapp concluded that the procedure of ordering to compel public charges accounts for less than 1% of all cases deciding not to prosecute and that the successfulness of such proceedings is far below 1%. E. Meyer-Krapp, *Das Klageerzwingungsverfahren* (2008), pp. 101-107, <https://ediss.uni-goettingen.de/bitstream/handle/11858/00-1735-0000-0006-B345-3/meyer_krapp.pdf?sequence=1> (last visited 6 August 2015).

61 Roxin & Schünemann, *supra* note 49, p. 329.

62 The public prosecution office is a hierarchy-driven and monocratic state authority governed by subordination and precedence relations influenced by state executive power, since the general public prosecutor is subordinate to the Minister of Justice, whereas in some federal states the public prosecution office is subordinate to the Ministry of Justice of that federal state. H.J. Albrecht, 'Criminal Prosecution: Developments, Trends and Open Questions in the Federal Republic of Germany', (2000) 8 *European Journal of Crime, Criminal Law and Criminal Justice*, no. 3, p. 251.

63 W. Beulke, *Strafprozessrecht* (2010), p. 59.

64 *Ibid.*

65 *Ibid.*

the public prosecutor to proceed according to the decision of the court is in violation of Article 3(1) GG which stipulates that all citizens are equal before the law, so that he hints at the danger that the public prosecutor could put himself above the decision of the court and misuse his powers.⁶⁶ From all of this, Beulke draws the conclusion that the independence guaranteed in § 150 GVG leaves enough room for the public prosecutor to make an objective assessment of the legal requirements for prosecution and points out that the public prosecutor can, at any time at the hearing before the court, present his different interpretation of the law and even require acquittal if he still holds that there are no grounds on which to prosecute.⁶⁷

3.2. Italy

3.2.1. Right to review of a decision not to prosecute

The basic principle of proceeding of the public prosecutor accepted in Italy is the principle of legality of criminal prosecution. Hence, Article 50 of the Code of Criminal Procedure (*Codice di procedura penale*, hereinafter: CPP) and Article 112 of the Constitution (*Costituzione della Repubblica Italiana*, hereinafter: the Constitution) explicitly stipulate the duty of the public prosecutor to institute a criminal prosecution⁶⁸ whenever legal requirements are met and there are no legal obstacles to criminal prosecution.⁶⁹

If the public prosecutor is not willing to prosecute, there is a special form of judicial review. Unlike other systems in which judicial review is initiated only by an interested party, as a rule by the injured party, the Italian model provides a mandatory judicial review of the prosecutor's decision not to prosecute.⁷⁰ Hence, the public prosecutor cannot unilaterally by his decision decide not to prosecute and is obliged in this situation to lodge a request for filing the criminal complaint, i.e. discontinuing proceedings (*richiesta di archiviazione per infondatezza della notizia di reato*, Article 408 CPP) with the judge of preliminary investigation (*giudice per le indagini preliminari*).⁷¹ The decision not to prosecute will be made only when the judge of preliminary investigation discontinues the proceedings on the basis of the well-founded order after having studied the case file (Article 409(1) CPP).

In this regard, when the public prosecutor deems the criminal complaint to be unfounded, i.e. lacking evidence that the person committed the criminal offence (Article 408(1) CPP) or when, six months after the criminal complaint has been received the perpetrator of a criminal offence is still unknown (Article 415(1) CPP), that official is obliged to submit the so-called request for dismissal due to the unfounded criminal complaint.⁷² The case file comprising the criminal complaint, notes related to the conducted investigation and record of actions taken before the judge of preliminary investigation, must be enclosed with the request (Article 408(1) CPP). The public prosecutor notifies the injured party of the request only if the latter requires this in his criminal complaint or if he expressly requires, after the filing of the criminal complaint, to be notified of a possible dismissal of the case (Article 408(2) CPP). However, in more serious cases including violence against the injured party, the public prosecutor has the duty to notify the injured

66 Ibid.

67 Ibid.

68 Gialuz notes that stipulation of the legality principle in criminal procedure aims at disabling any discretionary powers of public prosecutors when deciding on prosecution after having completed a preliminary investigation. Nevertheless, the author points out that the public prosecutor enjoys a wide scope of discretionary powers in the course of a preliminary investigation. M. Gialuz, 'The Italian Code of Criminal Procedure: A Reading Guide', in M. Gialuz, et al. (eds.), *The Italian Code of Criminal Procedure* (2014), pp. 23-24.

69 For more on the principle of legality of prosecution in Italy see: G. Di Federico, 'Obbligatorietà dell'azione penale, coordinamento delle attività del pubblico ministero e loro rispondenza alle aspettative della comunità', in A. Gaito (ed.), *Accusa penale e ruolo del pubblico ministero* (1991), pp. 170-208.

70 This model of judicial review of the decision not to prosecute was introduced in Italian criminal procedural law by the major criminal procedure law reform of 1988. See for details: E. Amodio & E. Selvaggi, 'Accusatorial System in a Civil Law Country: The 1988 Italian Code of Criminal Procedure', (1989) 62 *Temple Law Review*, no. 4, pp. 1211-1224.

71 Marcolini points out that the basis for normative regulation has been the German *Klageerzwingungsverfahren*, although in the end the Italian model is different from its role model. F. Ruggieri & S. Marcolini, 'Italy', in K. Ligeti (ed.), *Toward a Prosecutor for the European Union* (2013), pp. 392-393.

72 Although Art. 408 CPP provides that a request for dismissal is filed for unfounded criminal complaint (*infondatezza della notizia di reato*), Art. 411 CPP stipulates that a request can be filed in other cases in which procedural obstacles to prosecute exist or in the case of the limitation of criminal prosecution or where the act is not a criminal offence at all. G. Barbuto, *Compendio di diritto processuale penale* (2012), pp. 259-260.

party of the filed request (Article 408(3) CPP).⁷³ The notification determines that the injured party is granted a look at the case file for ten days and can file a complaint with a request, stating the grounds, for continuation of the preliminary investigation.⁷⁴ In serious cases including violence, the injured party is granted a look at the case file for twenty days (Article 408(3) CPP). The complaint is filed with the public prosecutor who must serve it on the judge of preliminary investigation.

Proceeding from the assumption that the injured party, as a rule, has a personal interest in the outcome of the criminal proceedings, the legislator has provided in Article 410(1) CPP the right of the injured party to file a complaint against the request for dismissal of the proceedings (*opposizione alla richiesta di archiviazione*). It is important to mention that it does not suffice that the injured party files just a formal complaint. It is expressly stipulated that the complaint must be well-reasoned, i.e. the injured party's complaint must clearly state which facts should be investigated and which evidence should be collected.⁷⁵ Precise and clear reasoning of the complaint is necessary since the judge of preliminary investigation must dismiss the complaint as inadmissible if it lacks the required content (Article 410(1, 2) CPP). Although it has been mentioned earlier that the complaint does not have a decisive influence on instituting a judicial review of the dismissal of criminal prosecution, it will, indeed, affect the scope of its conduct if the injured party informs the judge about a substantial omission by the public prosecutor. It can be assumed that the judge of preliminary investigation will have the opportunity to consider the case comprehensively only upon establishing the well-reasoned complaint, because the injured party will then also be heard. If this is not the case, the judge must, as a rule, discontinue the proceedings because it is mostly unlikely that the public prosecutor would decide not to prosecute although the legal requirements for prosecution had been met, or that the judge of preliminary investigation should only on the basis of the case files served by the public prosecutor have the chance to doubt the correctness of his judgment and order the continuation of prosecution.⁷⁶ It could therefore be concluded that, although from a legal-technical point of view the complaint is not essential for instituting a judicial review of the decision not to prosecute, it will, in fact, have a significant impact, in particular if the injured party correctly points to the substantial omissions in the proceedings by the public prosecutor which should be corrected by means of an additional investigation or by preferring an indictment.

In a case when the complaint was not filed or when it was in *limine* dismissed as inadmissible on the grounds of lacking appropriate content, the judge of preliminary investigation must, if he accepts the request for dismissal, discontinue the proceedings simply by a reasoned order and return the file to the public prosecutor (Article 409(1) CPP). If, however, he doubts the correctness of the decision of the public prosecutor, the judge is to fix a special hearing to decide upon the need for further prosecution.⁷⁷ In a case when the injured party has filed a complaint against the request for discontinuation of the proceedings, the judge of preliminary investigation must first decide on the admissibility of the complaint. If this requirement is not met and the judge of preliminary investigation deems the complaint inadmissible and the criminal complaint unfounded, then he must, by means of a reasoned order, discontinue the proceedings and return the file to the public prosecutor (Article 410(2) CPP).⁷⁸ On the other hand, if he establishes that the injured party has pointed in his complaint to new substantial circumstances that raise a suspicion about the

73 R. Fonti, 'L'opposizione della persona offesa alla richiesta di archiviazione', (2013) *Archivio Penale*, no. 2, p. 9, <<http://www.archiviopenale.it/apw/wp-content/uploads/2013/06/Fonti.-Lopposizione-della-persona-offesa-alla-richiesta-di-archiviazione.pdf>> (last visited 7 August 2015).

74 T. Bene, 'La persona offesa tra diritto di difesa e diritto alla giurisdizione: le nuove tendenze legislative', (2013) *Archivio Penale*, no. 2, p. 3, <<http://www.archiviopenale.it/apw/wp-content/uploads/2013/06/3.-Bene.pdf>> (last visited 9 August 2015).

75 See Ruggieri & Marcolini, supra note 71, p. 393.

76 Fabri states that judicial control, although mandatory in practice, is reduced to formal agreement with the request of the public prosecutor since public prosecutors in their procedural dispositions easily exceed this control. Moreover, the judges carry out the control in a pattern founding their decision mainly on evidence presented for consideration by the public prosecutor. M. Fabri, 'Criminal Procedure and Public Prosecution Reform in Italy: A Flash Back', (2008) 1 *International Journal for Court Administration*, no. 1, p. 11.

77 This is where the scope of *ex officio* judicial control over the decision not to prosecute is manifested. Regardless of whether or not the complaint has been filed by the injured party, the judge of preliminary investigation can, at any time on his own initiative, set the hearing date for deciding on dismissal of the proceedings under the same conditions and presumptions as if that complaint were expressed. A. Di Amato, *Criminal Law in Italy* (2011), p. 162.

78 See Barbuto, supra note 72, p. 260.

correctness of the public prosecutor's judgment, then the judge of preliminary investigation must fix the hearing where he must decide upon the lawfulness and reasonableness of the public prosecutor's request.⁷⁹

3.2.2. Assessing the compliance of the Italian model of a review of a decision not to prosecute with Directive 2012/29/EU

The Italian model shows that a specific way of review of the decision not to prosecute has been accepted in which the court not only reviews but passes a formal decision to discontinue or to continue the proceedings. Unlike other models where judicial review is optional and depends on the initiative of the person who suffered injury from the criminal offence, in Italy it is regulated like the previous *ex officio* review in which the court reviews every decision of the public prosecutor not to prosecute, regardless of the wish of the injured party, whenever the public prosecutor decides not to prosecute considering that the requirements for initiating a criminal procedure have not been met in accordance with the principle of legality of criminal procedure. In that regard the Italian model exceeds other respective models since the court must review every decision not to prosecute even in the situation where the injured party is unknown, because the public prosecutor can never unilaterally decide not to prosecute but must require the court to set his assessment within the formal decision. Therefore it can be argued that the Italian law, in principle, complies with Article 11(1) of the Directive since it ensures a review of the decision not to prosecute in any case, regardless of the formal initiative of the victim.⁸⁰ In addition, by prescribing the right of the victim to file an objection against the request for discontinuation of the procedure, the victim is given the opportunity to instruct the court about substantial omissions by the State Attorney for which continuation of criminal proceedings should be ordered. Although this indicates that there is always a guarantee that the public prosecutor's decision not to prosecute is controlled by an independent judicial body, this solution is contested by Alvaro and D'Andrea claiming that the Italian legal system has serious shortcomings when it comes to realization of the right of the victim to review of a decision not to prosecute according to Article 11(1) Directive.⁸¹ The reason for this is that the Directive expressly stipulates the obligation of the state to ensure that the victim has the right, in a special procedure initiated at the victim's request, that an independent and impartial body verifies that established procedures and rules have been complied with and that a correct decision has been made to end a prosecution in relation to a suspected person.⁸² Alvaro and D'Andrea point out that in Italy this special procedure has not been provided, which indicates that the victim has no real power to demand a review of a decision not to prosecute in the sense required by the Directive.⁸³ The existing solution enables the victim only to file a complaint against the request, not the decision, to drop proceedings, therefore Alvaro and D'Andrea draw the conclusion that the complaint does not satisfy the right to review required by the Directive or provide preventive protection.⁸⁴ The victim is only given the right to file an appeal to the Supreme Court against the decision of the court to drop prosecution (Article 409(6) CCP). However, it is pointed out in the literature that in this way a subsequent review is ensured which is at the same time limited to aspects of procedural legitimacy and does not fully satisfy the need for review in the full sense of the term.⁸⁵ Further, it can be argued that the Italian regulation does not ensure every victim the right to file a complaint against the decision not to prosecute and the right therewith to be allowed a look at the case file pursuant to Article 11(3) of the Directive. Namely, that right is guaranteed only to the victim who expressly requested to be informed about the decision (Article 408(2) CPP). This provision is directly contrary to Article 11(3) of the Directive which expressly stipulates that Member States in their national legislation are to ensure that victims are notified without unnecessary delay of their right to receive information about

79 See M.G. Coppetta, 'Prethodna istraživanja i prethodno ročište' [Pre-trial Procedure and Preliminary Hearing], in B. Pavišić (ed.), *Talijanski kazneni postupak* (2002), p. 117.

80 See G. Todaro, 'The Italian system for the protection of victims of crime: analysis and prospects', in L. Lupária (ed.), *Victims and criminal justice* (2015), p. 109.

81 G. Alvaro & A. D'Andrea, 'The impact of Directive 2012/29/EU on the Italian System of Protecting Victims of Crime in Criminal Proceedings', in S. Ruggeri (ed.), *Human rights in European Criminal Law* (2015), pp. 313.

82 See: Justice Guidance document, *supra* note 36, p. 30.

83 Alvaro & D'Andrea, *supra* note 81, p. 313.

84 *Ibid.*

85 *Ibid.*, pp. 313-314.

any decision not to prosecute. In Italy this opportunity has been qualified by the duty of the injured person to expressly file a request in the crime report or immediately after filing the crime report, in which case there is a risk that an uneducated or inattentive injured party might omit to file such a request, so that the notification about the decision not to prosecute might also not take place.⁸⁶ In addition, there is the issue of the consequent application of the principle of accusation, since the court, by its decision that permits the decision not to prosecute and in particular the decision ordering the public prosecutor to conduct an additional investigation, i.e. to prefer an indictment, will present the public prosecutor with a *fait accompli*.⁸⁷ In that case preferring an indictment is only formally a way to satisfy the principle of accusation since the court has already made the decision.⁸⁸ Furthermore, as a judge always oversees every negative decision of the public prosecutor, there is a great inflow of cases to the court and consequently a delay in the procedure to the detriment of the person against whom the preliminary investigation is conducted. In these circumstances the judges are compelled, in order to successfully deal with all cases, to be strict formalists, which makes them persons of routine, prone to generalisation and to providing empirical solutions to the cases and it is believed that they would rather agree with the public prosecutor and file away the case than seriously and diligently review every request of this kind.⁸⁹ It can be concluded from all this that the burden of the actual control of the public prosecutor lies on the injured party. Thus, the injured party is, indeed, the essential element in a judicial review since he or she has the responsibility to instruct the court, based on concrete evidence, why prosecution should be continued. If he or she does not fulfil this responsibility and the complaint is rejected, it is unlikely that, taking the previously mentioned flaws into consideration, the judge of preliminary investigation will not eventually agree with the public prosecutor.

3.3. France

3.3.1. Right to review of a decision not to prosecute

The issue of control over the decision not to prosecute has been established in France in a distinctive way not only for the fact that in this legal system the principle of opportunity is emphasized,⁹⁰ but also because of the procedural position of the injured party who plays an important role in exercising control over the

86 Conversely it should be pointed out that in 2004 the Italian Court of Cassation emphasized that the objection can also be presented by the victim of the crime who has not asked to be notified of the request for dismissal, but who became aware of it *aliunde* (Italian Court of Cassation, Plenary Session, 30 June 2004, Apruzzese, in Cass. pen., 2004, p. 3547). Todaro, *supra* note 80, p. 110.

87 For more details on the significance of the strict binding of basic procedural functions to different procedural subjects and organisation of that standard in Italian criminal procedure law see: G. Illuminati, 'The Accusatorial Process from the Italian Point of View', (2010) 35 *North Carolina Journal of International Law & Commercial Regulation* no. 2, pp. 311-313.

88 Public prosecutors in Italy enjoy a high level of independence and autonomy in their work particularly in relation to executive power. That is to say, public prosecutors and judges make up the so-called 'magistratura' – a single judicial authority entirely independent from executive power. They have been granted this position by means of the Supreme Judicial Council (*Consiglio superiore della magistratura*) which is a separate body with the authority to decide on appointment and removal as well as on disciplinary responsibility of the judges and public prosecutors (Art. 105 of the Constitution, *La Costituzione della Repubblica Italiana*). Moreover, pursuant to Art. 107 of the Constitution, the public prosecutor is guaranteed consistency and non-transferability in the performance of his duty. On the other hand, it should be pointed out that the public prosecutor's office is not a strictly hierarchy-driven authority so that lower public prosecutors are neither subordinate to senior public prosecutors nor are senior public prosecutors subordinate to the general public prosecutor. The substantial disadvantage of this independence is manifested in the personalisation of prosecuting duties since public prosecutors are free from any external influence in their work and they are not subject to instructions either by the executive power or senior public prosecutors. In that sense the only logical choice for the review of their work is judicial power because otherwise public prosecutors disposing of the principle of legality of prosecution could, without control, tilt the balance in favour of an arbitrary and discriminatory decision not to prosecute. C. Scaccianoce, 'The Principle of Mandatory Criminal Prosecution and the Independence of Public Prosecutors in the Italian Criminal Justice System', 2010 *ReAIDP / e-RIAPL*, A, pp. 7-8; G. Di Federico, 'Recruitment, Professional Evaluation, Career and Discipline of Judges and Prosecutors in Italy', in G. Di Federico, (ed.), *Recruitment, Professional Evaluation, Career and Discipline of Judges and Prosecutors in Europe, Austria, Germany, Netherlands and Spain* (2005), pp. 127-159.

89 The contribution thereto is the practice of public prosecutors in Italy. Namely, the public prosecutor is formally obliged to record every criminal charge in the register and conduct a preliminary enquiry in order to decide whether to compel public charges or decide not to prosecute. In practice, according to Caianiello, a great number of criminal charges are not recorded in the register by public prosecutors and in the cases that they commence to investigate they, as a rule, wait for the expiry of the maximum deadline for investigation and then they lodge a request not to prosecute. The gravity of this issue is supported by an incidental discovery of the 'ignored' notifications of crimes in 2000 which the officers of the Ministry of Justice uncovered during an inquiry involving the Office of the Prosecutor of the Tribunal of Bologna. M. Caianiello, 'The Italian Public Prosecutor: An Inquisitorial Figure in Adversarial Proceedings?', in E. Luna & M. Wade (eds.), *The Prosecutor in Transnational Perspective* (2012), pp. 255-256.

90 For more on the opportunity principle of criminal prosecution see: P. Verrest, 'The French Public Prosecution Service', (2000) 8 *European Journal of Crime, Criminal Law and Criminal Justice*, no. 3, pp. 240-243.

decision of the public prosecutor not to prosecute. Article 1(1) of the Code of Criminal Procedure (*Code de procédure pénale*, hereinafter: CPP) provides that criminal prosecution (*l'action publique*), with the purpose of imposing a sentence, is conducted on the initiative of civil servants authorized thereto by law. However, Article 1(2) CPP stipulates that criminal proceedings can also be conducted on the initiative of the person having suffered damage caused by the criminal offence under conditions prescribed by law. This means that the injured party can individually institute criminal proceedings by lodging a request for damages and can additionally join the procedure in which the public prosecutor conducts the criminal prosecution and can seek compensation.⁹¹ Accordingly, by filing the request for compensation, the injured party becomes a civil party (*partie civile*), so that along with criminal proceedings the civil proceedings for compensation are conducted (*l'action civile*).⁹² It follows from this that the injured party can file a request for compensation regardless of the fact as to whether the public prosecutor has initiated criminal proceedings. In other words, the acquisition of procedural standing of a civil party does not depend on whether the public prosecutor appears as an authorized prosecutor in criminal proceedings.⁹³ The injured party, therefore, in cases where the public prosecutor has not instituted criminal proceedings, can, by submitting the request for compensation to the court, institute criminal proceedings even in cases where the public prosecutor has omitted to institute criminal proceedings although he was aware that criminal proceedings would be in the public interest.⁹⁴ This is in accordance with the prevailing opinion that a criminal court can only make a decision about a request of the injured party under the condition that criminal proceedings are conducted before that court, so that both theory and practice have taken the view that the injured party has instituted a criminal prosecution by merely lodging a request for compensation and has thus given the court an incentive to institute criminal proceedings. In this way the injured party receives a means of indirectly instituting criminal proceedings which the public prosecutor had unjustifiably dismissed.⁹⁵ As a result of all this, the way that the injured party can establish the position of a civil party is twofold. One is by means of a summons (*citation directe*), and the other is to file the criminal complaint and the compensation request to an investigating judge (*plainte avec constitution de partie civile*).

It should be pointed out that the public prosecutor will only institute criminal proceedings after establishing that the legal requirements for criminal procedure are met and that it is reasonable to institute a criminal prosecution from the standpoint of public interest.⁹⁶ The minimum level of suspicion for instituting criminal proceedings has not been expressly defined by the CCP since the public prosecutor must always judge the expediency of criminal proceedings according to the guidelines of the Ministry of Justice (*Garde des Sceaux*).⁹⁷

If the public prosecutor decides not to prosecute, he is obliged to notify the person who filed a criminal complaint, i.e. the injured party, of this, stating the factual and legal grounds for making this decision (Article 40-2 CPP). When the injured party and every other person filing a criminal complaint receives the notification, they are granted the right to request a review of the decision not to prosecute. There are two types of reviews. One is the review by the means of a legal remedy within the framework of the public prosecutor's office exercised by lodging an appeal to the general prosecutor (*recours auprès du procureur général*), whereas the other is the right of the injured party to initiate a prosecution by a complaint with a civil party petition.

91 P. Bonfils, 'L'action pénale de la victime; Une action en justice innommée au régime juridique clairement défini', Institut pour la Justice, (2012) *Études & Analyses*, no. 17, pp. 9-11.

92 D. Krapac & D. Lončarić, *Oštećenik kao tužitelj u krivičnom postupku* [Injured Party as Subsidiary Prosecutor in Criminal Procedure] (1985), p. 5.

93 M. Chiavario, 'Private Parties: The Rights of the Defendant and the Victim', in M. Delmas-Marty & J.R. Spencer (eds.), *European Criminal Procedures* (2002), p. 543.

94 Pursuant to Art. 3 CPP the suit for compensation can be brought along with the criminal proceedings and can refer to all kinds of damage caused by criminal offences for which criminal prosecution is instituted. See: Krapac & Lončarić, supra note 92, p. 6.

95 Ibid.

96 However, in theory it is often criticized that public prosecutors are not free in proceedings according to the principle of opportunity of criminal prosecution because they are subordinate to the Minister of Justice. Thus, the Minister of Justice is authorized to give mandatory instructions to proceed in a criminal prosecution. In addition, the prosecutor is obliged to proceed in a criminal prosecution if ordered to do so by the Minister of Justice. However, although the Minister of Justice is authorized to order the instigation of criminal prosecution he cannot influence the public prosecutor to decide not to prosecute. J.S. Hodgson, 'The French Prosecutor in Question', (2010) 67 *Washington and Lee Law Review*, no. 4, pp. 1366-1370.

97 For details on the role of public prosecutor in pre-trial proceedings see: B. Aubusson de Cavarlay, 'The Prosecution Service Function within the French Criminal Justice System', in J.M. Jehle & M. Wade (eds.), *Coping with Overloaded Criminal Justice Systems* (2006), pp. 201-203.

In this regard, Article 40-3 CPP provides the right of the injured party and other persons filing a criminal complaint to lodge a complaint against the public prosecutor's decision not to prosecute (*procureur de la République*) with the general prosecutor (*procureur général*).⁹⁸ If the general prosecutor responds to the complaint he must issue a written procedure instruction to the public prosecutor in which he may order instituting the proceedings that have been dismissed as well as taking certain investigatory actions that he deems expedient (Article 40-3 in relation to Article 36 CCP).⁹⁹ If, on the other hand, he does not agree to the request raised in the complaint, he must dismiss it as unfounded and notify this fact to the person filing it. In that case the legal means for the person filing a complaint who is not at the same time the injured party are exhausted; there is no other additional possibility of review.

Another type of review is the specific right of the injured party to independently institute a criminal prosecution and institute criminal proceedings before a court. In this context the injured party may, depending on how serious the criminal offence is, act as an authorised prosecutor by summons (*citation directe*) or by filing a criminal complaint with a compensation request to an investigating judge (*plainte avec constitution de partie civile*).¹⁰⁰

In the first case, if it concerns a misdemeanour (*délit*) or petty offence (*contravention*), the injured party can prefer a direct indictment with the court if the facts of the case have been sufficiently investigated and if, on the basis of the collected evidence, the accused can be proved guilty.¹⁰¹ This form of review is a quick and efficient way for the injured party to carry out the procedure since he or she addresses the court directly and the trial is conducted within a relatively short time.¹⁰² Nevertheless, in order to prevent the injured party from taking this opportunity lightly and instituting a malicious prosecution which would unnecessarily burden the criminal justice system, the legislation provides for the duty of the injured party to make, by the decision of the court and according to his financial capacity, an advance payment (*cautionnement*) as security for a procedural fine if, during the procedure, malicious prosecution by the injured party is established, or if by his procedural disposition the proceedings (Article 392-1(3) CCP) are delayed. In addition, by undertaking a prosecution, the injured party takes the risk that the accused who has been acquitted institutes criminal proceedings against him for bringing false criminal charges (Article 226-10 *Code pénal*, hereinafter: CP).

In the second case, the injured party may set in motion a criminal prosecution by filing a crime report with a compensation claim with an investigating judge. Such a method of prosecution is obligatory in the case of felony (*crime*), and optional in case of misdemeanour (*délit*).¹⁰³ The basic presumption prior to going ahead with a prosecution in this case is that the injured party has filed a crime report and that the public prosecutor has dismissed it and decided not to prosecute, or that the public prosecutor has not made a decision on the crime report within three months from the date when it was filed (Article 85(2) CCP). Before allowing the injured party to institute criminal proceedings, an investigating judge must serve the injured party's claim on the public prosecutor to respond (Article 86(1) CCP).¹⁰⁴ If the public prosecutor deems the claim to be unfounded, before responding he may request that the investigating judge examines and summons the injured party to uncover information and evidence justifying the initiation of criminal proceedings (Article 86(3) CCP). Additionally, in his response the public prosecutor can suggest that the investigating judge should dismiss the claim if he considers that the legal requirements for prosecution are

98 J. Tricot, 'France', in K. Ligeti (ed.), *Toward a Prosecutor for the European Union* (2013), p. 250.

99 T.P. Marguery, *Unity and Diversity of the Public Prosecution Services in Europe: A Study of the Czech, Dutch, French and Polish Systems* (2008), p. 81.

100 In this way the injured party will ensure a criminal prosecution against the perpetrator of a criminal offence in the public interest. In other words, it is pointed out in theory that the right to instigate prosecution in the public interest (*action publique*) is related to society and not to an individual public prosecutor as a public officer who is only formally authorized to represent criminal prosecution on behalf of the community. For that reason the injured party exercises the interest of the public punishment of the perpetrator of a criminal offence by exercising his private interest. *Ibid.*, p. 79.

101 Before instituting the proceedings the injured party must request the court having jurisdiction to set the hearing date and then file a request for the court to summon the accused in written form for trial.

102 See: Bonfils, *supra* note 91, p. 10.

103 There are two aims of bringing charges with a compensation claim. Firstly, it aims at pronouncing the accused guilty of a crime, i.e. to pass a judgment of conviction, and secondly, to award damages for the injury that the victim suffered caused by criminal offence. See: Dervieux, *supra* note 6, p. 226.

104 *Ibid.*, p. 241.

not met, i.e. that the act with which the accused is charged is not a criminal offence (Article 86(4) CCP).¹⁰⁵ Finally, by taking the opinion of the public prosecutor and the injured party's claim into consideration, the judge may make a decision on the matter of prosecution i.e. if the prosecution that the injured party initiated is lawfully founded. In this connection he may dismiss the claim (*ordonnance de refus d'informer*) if the legal requirements for prosecution are not met or he can accept the claim and formally commence the investigation.¹⁰⁶ In the case of a decision not to prosecute, the injured party may file a complaint to the so-called investigating chamber (*chambre de l'instruction*) which must reconsider whether the legal requirements for prosecution exist; the decision of that chamber is final (Article 87(3) CPP). In that case, again, the injured party is obliged to make an advance payment as security for a procedural fine if during the procedure malicious prosecution by the injured party is established, or if due to his procedural disposition the proceedings (Article 88-1 related to 177-2, CCP) are delayed. After the injured party has made the advance payment the investigating judge must open the investigation and undertake the collection of evidence with the purpose of clarifying the facts of the case to the extent that a decision can be made whether to prefer an indictment or to discontinue the procedure. If in the course of the investigation the investigating judge comes to the conclusion that there is not enough evidence that a particular person committed a criminal offence, he may issue an order to discontinue the procedure (*ordonnance de non-lieu*). In the case of a discontinued procedure the injured party takes a risk that a compensation procedure is instituted against him for false criminal charges (Article 91 CCP).

3.3.2. Assessing the compliance of the French model of a review of a decision not to prosecute with Directive 2012/29/EU

The effective review of the public prosecutor's decision not to prosecute is ensured in France through a legal remedy within the framework of the public prosecutor's office that can be filed by the person filing a crime report and not only by the injured party, as well as by the specific right of the injured party to institute criminal proceedings by filing the request for compensation before the court if the public prosecutor has omitted to do so.¹⁰⁷ Establishing the procedural standing of the victim is not related to the formal decision instituting criminal proceedings since the injured party acquires the standing of victim at the moment of filing the crime report. Therefore, the right to a review stated in the Directive is real for victims and does not depend on their special status: it involves all victims, at least after their identification as such.¹⁰⁸ It follows from this that French law is compliant with Article 11(1) and (2) of the Directive. From then on the victim has the right to be notified of actions and measures that the public prosecutor takes in relation to the crime report that has been filed (Article 40-2(1) CPP). Accordingly, the victim must also be notified of a possible decision not to prosecute (Article 40-2(2) CPP) against which he can lodge an appeal to the general prosecutor (Article 40-3 CPP). In this context, the obligation pursuant to Article 11(3) of the Directive has been fulfilled although it should be noted that it would be necessary to prescribe the right of the victim to be granted a look at the case file in order to be able to make a decision on whether he wishes to lodge an appeal to review a decision not to prosecute. Consistent application of the principle of accusation has been facilitated by setting the norms for the previously mentioned forms of review, since empowering the injured party to lodge an appeal, i.e. to instigate a prosecution, has ensured the prosecution of the perpetrator without unnecessary intervention by the court into the conduct of the public prosecutor. In the case of the *ordonnance de non-lieu* issued by the investigative judge during the pre-trial procedure only the civil party – i.e. the victim with a certain status – is granted the power to obtain a review of that decision.¹⁰⁹ In that particular situation the right to a review exists to the extent to which a civil party victim may challenge

105 A Motion of the public prosecutor to an investigating judge for dismissing the request of the injured party cannot be based on the principle of opportunity of prosecution. See: Marguery, supra note 99, p. 81.

106 Tricot, supra note 98, p. 250.

107 M. Jacquelin, 'Victims Participation in French Criminal Proceedings: Current Status and Future Perspectives in View of Directive 2012/29/EU', in L. Lupária (ed.), *Victims and criminal justice* (2015), pp. 92-93.

108 Ibid., p. 93.

109 Jacquelin, supra note 107, p. 93.

any 'orders not to institute proceedings, of non-lieu and damaging his/her civil rights'.¹¹⁰ However, the legislature is aware that widely set norms for the opportunity for an injured party to institute criminal proceedings with the purpose of correcting the wrong assessment of the public prosecutor, could lead to an unwanted phenomenon that the injured party could misuse this authority as a form of private revenge against an innocent citizen. For this reason there is the obligation of the injured party to make an advance payment of a certain sum as a security for payment of a procedural fine, if in the course of procedure it is established that the prosecution is malicious or that the injured party has caused a delay in the procedure by his conduct in the procedure.¹¹¹

3.4. Croatia

3.4.1. Right to review of a decision not to prosecute

The Croatian model of the review of the decision not to prosecute in criminal proceedings is based on the doctrine of the injured party as a prosecutor (subsidiary prosecutor).¹¹² A subsidiary prosecutor is a person injured by a criminal offence which is subject to public prosecution and who assumes as well as conducts the criminal prosecution due to the fact that the public prosecutor is either not willing to prosecute or in the course of the proceedings he decides not to prosecute although the legal requirements for prosecution are met.¹¹³ This traditional doctrine was introduced into the Croatian Code on Criminal Procedure (*Zakon o kaznenom postupku*, hereinafter: ZKP) back in 1875¹¹⁴ and has been kept with a few amendments until today.¹¹⁵

The basic principle of proceeding by the public prosecutor in Croatia is the principle of legality of prosecution. In accordance therewith, the public prosecutor is bound to institute criminal proceedings when there is reasonable suspicion that a certain person committed an offence which is subject to public prosecution and when there are no legal obstacles to the prosecution of that person (Article 2(3) ZKP).¹¹⁶ The purpose of that principle is that the public prosecutor, when instituting criminal proceedings against any perpetrator, proceeds impartially, i.e. without discrimination motivated by the perpetrator's social status, external influences etc.¹¹⁷

In order to meet the public prosecutor's basic legal obligations it is necessary that he is guaranteed all necessary conditions for the objective and impartial assessment of the existence of legal presumptions to institute criminal proceedings. Such assessment can only be achieved if the public prosecutor acts independently and autonomously. Therefore, the Constitution of the Republic of Croatia (hereinafter: Constitution) provides that the public prosecutor is an independent and autonomous judicial body empowered and duty-bound to instigate the prosecution of perpetrators of criminal and other penal offences, to initiate legal measures to protect the property of the Republic of Croatia and to apply legal remedies to protect the Constitution and the law (Article 125(1) Constitution).¹¹⁸

Although an objective assessment of the legal requirements for prosecution is ensured by the independence and autonomy guaranteed by the Constitution, there is still a possibility that the public prosecutor may in his assessment make a mistake about the existence of the requirements and dismiss the criminal complaint or in the course of the procedure decide not to prosecute, in spite of the fact that the legal requirements for prosecution are met. In that case the Croatian law on criminal procedure provides a

110 Ibid.

111 See: Gilliéron, supra note 50, pp. 297-298.

112 G. Tomašević & M. Pajčić, 'Subjekti u kaznenom postupku: pravni položaj žrtve i oštećenika u novom hrvatskom kaznenom postupku' [Subjects in the Criminal Procedure: The Legal Position of Victim and Injured Person in the New Croatian Criminal Procedure] (2008) 15 *Hrvatski ljetopis za kazneno pravo i praksu*, no. 2, p. 835.

113 V. Ljubanović, *Kazneno procesno pravo – izabrana poglavlja* [Criminal procedure law – selected chapters] (2002), p. 65.

114 V. Bayer, 'Stogodišnjica donošenja hrvatskog Zakonika o krivičnom postupku iz 1875. godine' [The 100th Anniversary of the Croatian Code on Criminal Procedure of 1875] (1976) 36 *Zbornik Pravnog fakulteta u Zagrebu*, no. 1, pp. 5-44.

115 On the detailed historical development of the subsidiary prosecutor in Croatia see: Krapac & Lončarić, supra note 92, pp. 22-35.

116 D. Krapac, *Kazneno procesno pravo, Prva knjiga: Institucije* [Criminal Procedure Law, Volume one: Institutions] (2014), p. 99.

117 Ibid.

118 V. Ljubanović, 'Novo hrvatsko pravo državnog odvjetništva' [The New Croatian Law on the State Attorney's Office] (2001) 8 *Hrvatski ljetopis za kazneno pravo i praksu*, no. 2, pp. 4-9.

review mechanism in the role of the subsidiary prosecutor.¹¹⁹ For that reason it is often pointed out that, in theory, the subsidiary prosecutor is a counter-balance and a correction to the public prosecutor's monopoly on the prosecution of criminal offences prosecuted by virtue of that office.¹²⁰ The Code of Criminal Procedure expressly stipulates that if the public prosecutor finds that there are no grounds for initiating or continuing criminal proceedings, his role may be assumed by the injured party acting as a subsidiary prosecutor (Article 2(4) ZKP).¹²¹ The public prosecutor is obliged to notify the injured party within eight days of the dismissal of the criminal prosecution, or of the decision not to prosecute where he determines that there are no grounds to institute the prosecution for an offence which is subject to public prosecution, or where he determines that there are no grounds to institute prosecution against one of the accessories reported to the authorities (Article 55(1) ZKP).¹²² Additionally, the public prosecutor must inform the injured party about undertaking procedural actions in order to realize that right and must allow him a look at the case file (Article 55(5) ZKP). Thereafter the injured person is to be entitled, within eight days from the receipt of the notice, to decide whether he will institute or continue the prosecution.

The right of the injured party to institute or to continue prosecution exists in the course of the preliminary proceedings, process of accusation and judicial review of the indictment as well as in the course of the hearing. Thus the formal ways to assume prosecution differ according to the stage of the criminal proceedings. So, in preliminary proceedings the injured party takes the initiative to assume prosecution by filing a motion for conducting inquiries (Article 213c(1) ZKP),¹²³ or a motion for conducting an investigation (Article 225(1) ZKP) with the judge of investigation.¹²⁴ Indeed, if the injured party takes over the prosecution from the Public prosecutor who withdraws the indictment, that injured party can adhere to the charge raised. If he does not adhere to it but brings a new charge, this new indictment is subject to review by the indictment panel (Article 55(3) ZKP). When the public prosecutor dismisses the case at the hearing, the injured party is obliged to immediately declare whether he intends to assume the prosecution (Article 56(1) ZKP). Nevertheless, a formally expressed initiative to institute or assume prosecution does not necessarily mean that the injured party has gained the standing of subsidiary prosecutor. In other words, the injured party gains that standing only from the judicial decision by which he is allowed to assume prosecution and becomes an authorized prosecutor in the criminal proceedings. Consequently, it should be noted that assuming prosecution is subject to an obligatory judicial review. Since the function of the subsidiary prosecutor has been established as a control over the application of the principle of legality in criminal proceedings by the public prosecutor, the court must, at the request of the injured party, decide whether there are grounds for reasonable suspicion that a person has committed a criminal offence as well as whether there are procedural obstacles to instituting and conducting criminal proceedings.¹²⁵ In this way malicious prosecution and private revenge

119 The judgment of conviction guarantees satisfaction and additionally, which is more important, an incontestable basis of the claims for indemnification in civil proceedings. G. Tomašević, *Kazneno procesno pravo, OPĆI DIO: Temeljni pojmovi* [Criminal Procedure Law, General Part: Basic Terms] (2011), p. 125.

120 Krapac, supra note 116, p. 226.

121 A subsidiary prosecutor cannot assume prosecution in the following cases: 1) for an offence other than that which has been prosecuted by the public prosecutor; 2) for an offence for which has not been prosecuted by the public prosecutor; and 3) for an offence for which the public prosecutor assumes prosecution with changes of the factual aspects of the act which constitute the elements of the legal definition of the offence and the statutory name of the offence. A subsidiary prosecutor may change the content of the charges but not the act itself (*idem factum*). B. Pavišić, *Komentar Zakona o kaznenom postupku* [Commentary to Code of Criminal Procedure] (2011), p. 179.

122 Restrictions to assuming prosecution on behalf of the subsidiary prosecutor are provided in cases when the public prosecutor decides not to prosecute applying the principle of opportunity of prosecution (Art. 206c, 206d and 206e ZKP) and in proceedings against young perpetrators of criminal offences (minors and young adults) (Art. 50(1) ZSM).

123 'Inquiries' is a stage in the preliminary proceedings conducted in a case of less serious criminal offences punishable by imprisonment of up to five years. It is instituted by conducting evidence-collecting actions and commences by the serving of the notice on conducting evidence-collecting actions on the accused. Z. Đurđević, 'Rekonstrukcija, judicijalizacija, konstitucionalizacija, europeizacija hrvatskog kaznenog postupka V. novelom ZKP/08: prvi dio?' [Reconstruction, Judicialisation, Constitutionalisation, and Europeanisation of the Croatian Criminal Procedure with the 5th Amendment of the Code of Criminal Procedure/08: Part One?], (2013) 20 *Hrvatski ljetopis za kazneno pravo i praksu*, no. 2, p. 323.

124 'Investigation' is a stage in the preliminary proceedings conducted in a case of criminal offences punishable by imprisonment of more than five years. Unlike inquiries the investigation commences by passing a written ruling on the conducting of the investigation. M. Pajčić: 'Istraga prema Noveli Zakona o kaznenom postupku' [Investigation Pursuant to the Amendments to the Code of Criminal Procedure], 2013 (20) *Hrvatski ljetopis za kazneno pravo i praksu*, no. 2, pp. 637-641.

125 See: Krapac & Lončarić, supra note 92, p. 48.

are prevented to which an innocent person could be exposed by an excessive wish of the injured party that the perpetrator is to be punished at all costs.

3.4.2. On the legal nature of the right to a subsidiary charge

By assuming prosecution from the public prosecutor, the injured party becomes an authorized prosecutor and a party to criminal proceedings and guarantees, by his procedural activity, that perpetrators are prosecuted. However, it is not about the private prosecution on behalf of the injured party or his personal right to punish, but the situation where the state, due to the wrong assessment of a civil servant, out of necessity turns to the injured party as an ally and as the person who eventually is the most motivated by the outcome of the criminal proceedings. By realising his right to bring a subsidiary charge, the injured party acting as the prosecutor helps the state to realise its right to punish (*ius puniendi*).¹²⁶ Also, by allowing the injured party to assume criminal proceedings, the state has not waived its *ius puniendi*. Therefore, in contrast to the private charge, the right of subsidiary prosecution cannot be considered as realising the private right to punish.¹²⁷ This is derived from a number of important circumstances. It means that after having assumed criminal proceedings the injured party cannot be guided only by his private interests since legislation provides certain limitations to subsidiary criminal proceedings.¹²⁸ These limitations comprise the conduct of the obligatory judicial review of the assumed criminal proceedings so that the court is to allow the injured party to assume prosecution only where conditions exist for a ‘public action’ which was not brought due to a wrong assessment by the public prosecutor.¹²⁹ Thus, judicial review of the assumed criminal prosecution ‘streams’ the enforcement of the injured party’s private interest in the direction of exercising the public interest, i.e. that the accused is pronounced guilty and punished only if the relevant legal requirements are met.¹³⁰

Moreover, the indication that it is not about a private right but rather a public right to punish is supported by the possibility that a public prosecutor who previously decided not to prosecute can change his decision and assume the prosecution from a subsidiary prosecutor (Article 58(2) ZKP).¹³¹ The purpose of providing obligatory judicial control of assuming prosecution is not only to protect innocent citizens from unlawful prosecution, but also, by allowing the injured party to assume prosecution, to indirectly send the message to the public prosecutor to reconsider his decision and if he deems that his assessment has been wrong he can change it and reassume the prosecution from the subsidiary prosecutor. It follows from this that the right to a subsidiary charge does not mean that the state has absolutely waived the right to institute a criminal prosecution in favour of a private prosecutor, or that it has waived its right of punishing perpetrators in the public interest. This is evident from the fact that the injured party only acquires the standing of an authorized (subsidiary) prosecutor on the decision of the court allowing him to assume prosecution and that in fact the public prosecutor is given a chance at any time to reassume the prosecution from the subsidiary prosecutor and proceed with the prosecution. Furthermore, the subsidiary prosecutor is bound by relatively short deadlines for taking over the prosecution and by the impossibility of changing the facts constituting the offence which have already been set out by the public prosecutor, so the subsidiary prosecutor is limited in his taking over of the case.

3.4.3. Assessing the compliance of the Croatian model of a review of a decision not to prosecute with Directive 2012/29/EU

When it comes to the compliance of Croatian law with Directive 2012/29/EU, certain specific features of the Croatian Code of Criminal Procedure concerning victims of criminal offences should be noted. Namely, when the new Code of Criminal Procedure entered into force in 2008, Croatia abandoned the

¹²⁶ Ibid, p. 83.

¹²⁷ Ibid.

¹²⁸ Ibid., p. 38.

¹²⁹ Ibid.

¹³⁰ Ibid.

¹³¹ The public prosecutor disposes of the right until the completion of the hearing.

130 years old traditional model of judicial investigation and adopted a new model of investigation led by the public prosecutor.¹³² In addition to the general reform of preliminary criminal procedure, the notion of the victim of a criminal offence as a separate party to criminal proceedings with special procedural rights was introduced for the first time into the Croatian law of criminal procedure.¹³³ Until 2008 Croatian law recognized only the notion of the injured party which comprised the victim of criminal offences. Now, however, formal notions of the victim¹³⁴ differ from the injured party¹³⁵ with respective procedural rights and authorities in criminal procedure. This distinction is of the utmost importance when it comes to the right of the victim to review a decision not to prosecute. To be more specific, in Croatia a victim is guaranteed the right to participate in criminal proceedings as the injured party (Article 43(2) ZKP), and the court, the public prosecutor, investigator and police, when undertaking the first action in which the victim is involved, are obliged to notify the victim about his rights as the injured party (Article 43(4) ss. 2 ZKP), and put on record the notification and statement of the victim if he is willing to participate in the proceedings in the capacity of the injured party (Article 3(5) ZKP). It follows from this that not every victim of a criminal offence can appear in a criminal procedure as a subsidiary prosecutor since this right is granted only to the injured party (Article 47(11, 12) ZKP). Consequently, after the public prosecutor has dismissed the crime report, the victim cannot appear as a subsidiary prosecutor if he is not at the same time the injured party, since the public prosecutor notifies only the injured party about the dismissal of the crime report, and the reasons for that, with a direction that he can instigate prosecution (Article 206(5), ss. 3 related to Article 55(1) ZKP). On the other hand, the victim must be notified of the dismissal of a crime report pursuant to Article 206(5), ss. 3 ZKP, but he is not to be instructed to assume prosecution in the capacity of a subsidiary prosecutor since that right is reserved only for the injured party (Article 55 ZKP). This solution is not contrary to the Directive because Article 11(1) stipulates that victims have the right to review of the decision not to prosecute in accordance with their role in the relevant criminal justice system. The victim is ensured sufficient opportunities to establish his situation and participate in criminal proceedings as the injured party (Article 3(2) ZKP). This is ensured, firstly, by the obligation on the court, the public prosecutor, the investigator or the police authority to notify him about that right when undertaking the first action in which the victim is involved (Article 43(4), ss. 2 ZKP/13), and secondly by the right of the victim to personally apply as the injured party to the police or the public prosecutor's office up until the preferment of the indictment, and to the court up until the completion of the hearing (Article 46(1) ZKP/13),¹³⁶ and in that sense Croatian law satisfies the requirements set out in Article 11(1) of the Directive. Since the victim can respond in advance about his position in criminal proceedings as the injured party (e.g. along with the filing of the crime report), then every injured party acquires the right to review not only the decision of the public prosecutor not to prosecute during the criminal proceedings (e.g. the ruling by which an investigation is discontinued), but also the decision by which the public prosecutor states that he is not willing to institute criminal proceedings at all (the ruling dismissing the crime report); thus Croatian legislation is compliant with Article 11(2) of the Directive. In order that the injured party exercises his right to assume criminal proceedings, the obligation has been placed on the public prosecutor to notify the injured party within eight days of the decision not to prosecute, and also to notify him as to whether he can proceed with the prosecution himself (Article 55(1) ZKP). However, in order that the injured party duly exercises his procedural right and to be able to successfully assess whether or not there is a possibility of assuming criminal proceedings, the obligation of the public prosecutor is to serve on him instructions concerning which actions to undertake to exercise that right and to grant him a look at the case file (Article 55(5) ZKP).

132 B. Pavišić, 'Novi hrvatski Zakon o kaznenom postupku' [The New Croatian Code of Criminal Procedure], (2008) 15 *Hrvatski ljetopis za kazneno pravo i praksu*, no. 2, pp. 489-602.

133 Tomašević & Pajičić, *supra* note 112, pp. 838-846.

134 The victim of the criminal offence means the person who, due to the criminal offence committed, suffers physical and mental consequences, property damage or substantial violation of basic rights and liberties (Art. 202(2), ss. 11 ZKP).

135 The injured party means, in addition to the victim, any other person whose personal or property right is violated or endangered by a criminal offence, and who participates in the status of the injured party in criminal proceedings (Art. 202(2), ss. 12 ZKP).

136 See further, Z. Burić, 'Položaj žrtve u hrvatskom i makedonskom kaznenom procesnom pravu kroz prizmu Okvirne odluke o položaju žrtava u kaznenom postupku' [The Standing of Victims in Croatian and Macedonian Law on Criminal Procedure with Regard to the Framework Decision on the Standing of Victims in Criminal Proceedings], (2011) 61 *Zbornik Pravnog fakulteta u Zagrebu*, no. 2, pp. 496-497.

In this way Croatian legislation fulfils the requirements pursuant to Article 11(3) of the Directive, stipulating not only the right to assume prosecution in the short term, but also to guarantee the injured party a look at the case file of the public prosecutor in order to gather information about actions and measures that have been taken. This ensures that the injured party's knowledge of the facts of the case, on the basis of which he can make a proper decision on whether the public prosecutor's decision not to prosecute was correct, is complete, and will eventually enable him to justify the decision to assume the prosecution in the capacity of the subsidiary prosecutor.

Compared with other relevant systems of review of the decision not to prosecute, the Croatian solution involving the role of subsidiary prosecutor has certain advantages. One of these is that, in the case of a subsidiary prosecutor, the court does not intervene in the proceedings of the public prosecutor. By its nature and the role that it has in the procedure the court is undoubtedly the most objective authority.¹³⁷ However, judicial review of the work of the public prosecutor would make the court less objective and would require the court to autonomously decide, without the public prosecutor who has decided not to conduct a criminal prosecution, on the initiation and continuation of criminal proceedings.¹³⁸ Consequently, it would lead to a concentration on the functions of the prosecution since the court would have the functions of both prosecution and adjudication, which would narrow its objectivity; it can be argued that judicial review in this situation would be unacceptable.¹³⁹ On the other hand, it can be argued that the institute of subsidiary prosecutor can give rise to a risk that the injured party would misuse it as a form of private revenge against an innocent person.¹⁴⁰ However, this issue can be easily solved by providing an obligatory judicial review of the assumption of prosecution. In that situation the court remains an independent and impartial authority since it does not interfere with the issue of the conducting of the prosecution which in this case is assumed by the injured party. The court appears only as a corrective to the excessive wish of the injured party that the perpetrator be punished at all costs, and by possibly allowing the injured party to assume prosecution, the court indirectly sends a message to the public prosecutor that he has made a wrong assessment concerning the establishment of legal requirements for prosecution so that the purpose of the institute of subsidiary prosecutor is also to avoid harmful consequences which might have emerged as a result of the public prosecutor's negligence. Nevertheless, since the institute of subsidiary prosecutor does not constitute an individual personal prosecution but exclusively prosecution in the public interest, the public prosecutor may reconsider and re-assume prosecution from a subsidiary prosecutor. Thus the principle of accusation as the basis of contemporary criminal proceedings is protected from the encroachment of one procedural function into other procedural functions and the subject related to a particular function enjoys at the same time the highest possible degree of objectivity while proceeding, which is equally necessary both to the court and to the public prosecutor. The function of the prosecution concerning criminal offences prosecuted by virtue of that office is not only to be strictly bound to the public prosecutor but also to be objective while assessing the legal requirements for prosecution. This would not be possible if any authority, even judicial, interfered with its work and imposed the duty to prosecute upon it. This is the case in particular in Croatian law, due to the fact that the court and the public prosecutor's office are constitutionally guaranteed autonomy and independence in the scope of their functions.

In the Justice Guidance document on the implementation of the Directive in national legislation, a serious objection against the institute of subsidiary prosecutor has been raised. It has been pointed out that the concept is not qualitatively – from the perspective of victims' interests – the same as a review set out in Article 11.¹⁴¹ Becoming a private prosecutor may have its advantages, but it also constitutes an additional burden on the victim in terms of time, costs etc.¹⁴² Therefore it is doubtful if this burden may be mitigated by the provision of free legal aid and other assistance.¹⁴³ The objection that becoming a subsidiary prosecutor

137 See: Tomašević, *supra* note 119, p. 125.

138 *Ibid.*

139 *Ibid.*

140 See: Krapac, *supra* note 116, p. 226.

141 See: Justice Guidance document, *supra* note 36, p. 31.

142 *Ibid.*

143 *Ibid.*

entails the financial burden of the criminal prosecution cannot be accepted. A subsidiary prosecutor does not bear any costs of investigation, evidence collecting, or the hearing. Moreover, a subsidiary prosecutor has no obligation to furnish in advance the payment of the procedure expenses or of undertaking investigatory actions either at the preliminary procedure or at the hearing. The only obligation of the injured party is to duly give an incentive to initiate or to assume the proceedings. Thus the judge of investigation must, if he accepts the motion of the injured party, in his ruling on conducting inquiries (Article 213c(1) ZKP) or investigation (Article 225(2) ZKP), order those evidence collecting actions that he deems to be appropriate to conduct. In both cases the evidence collecting actions and investigation are carried out by an investigator on the order of the judge of investigation (Article 213c(2) ZKP and Article 225(4) ZKP). After having completed the evidence collecting actions (Article 213c(4) ZKP), i.e. when the judge of investigation establishes that the investigation is complete, he must, in a notification, inform the subsidiary prosecutor of the location where the documentation and other files are stored and the time when he can inspect them, as well as about the right to prefer an indictment within eight days and to inform the judge of investigation thereof (Article 225(5) ZKP). At the hearing the situation is similar since a subsidiary prosecutor may point out the facts and suggest evidence, be present at the hearing, participate in evidentiary proceedings and make a closing statement (Article 47(4, 6) ZKP).

Nevertheless, the Croatian solution to the review of the decision not to prosecute has a substantial disadvantage introduced by the reform in 2008. It is the obligation of the subsidiary prosecutor to bear the costs of any procedure ending in acquittal, or a judgment rejecting the charge, or a ruling discontinuing the proceedings (Article 149(3) ZKP). This solution is in direct opposition to the reasons and the purpose of a right to a subsidiary charge and the concept of the subsidiary prosecutor as a counterbalance to the monopoly of the public prosecutor related to the prosecution, by virtue of that office, of perpetrators of crimes. This solution not only discourages the injured party from assuming the prosecution, but it also opens the door to legal uncertainty since the absence of a review of the work of the public prosecutor endangers the realisation of the principle of the legality of criminal prosecution, i.e. that the public prosecutor treats every perpetrator equally without discrimination of any kind. It is absolutely unacceptable that the subsidiary prosecutor, whom the state considers to be an ally, is punished by having to bear the costs in the case of an acquittal or in the case of a ruling discontinuing the proceedings whilst at the same time the state has made it possible, by mandatory judicial review of the assumption of prosecution, for the subsidiary prosecutor to prosecute the perpetrator.

4. Conclusion

Directive 2012/29/EU has contributed a great deal to the improvement in the development of the procedural rights of the victim of crimes at EU level. A substantial feature of the Directive regarding Article 11 is that it allows Member States the freedom to find their own way to amend their national legislation as long as the content and purpose of the rights aimed at by the Directive are guaranteed. As has already been explained, Germany, Italy, France and Croatia have adopted completely different models of review of the decision not to prosecute although, eventually, they all mostly comply with the requirements set in the Directive. Thus, no general conclusion can be drawn saying that 'one review system is better than the other' as being faster, simpler or more efficient. It is necessary to see a wider context of respective procedural law, its procedural idea, culture and tradition as well as the harmonisation of new solutions with some basic principles governing any criminal proceedings without which contemporary criminal procedural law could not exist.

When it comes to the extent of the effective protection of the victims' right to review of a decision not to prosecute, it should be noted that national procedural systems duly prescribe that right. However, Germany, France and Croatia impose an additional burden on the victim that may endanger the practical realization of the right of the victim to the review of a decision not to prosecute. This burden is reflected in Germany in the obligation of the victim to furnish security for the costs which are likely to be incurred by the Treasury and the accused in respect of the proceedings concerning the application (§ 176 StPO); in

France in the obligation to deposit a sum of money with the court office for the payment of any civil fine imposed on the civil party by the judge after the decision to discontinue the proceedings where the judge feels that the constitution of the victim as a civil party was excessive or dilatory (Article 88 CPP); in Croatia in the obligation of a subsidiary prosecutor to bear the costs of the procedure ending with an acquittal, or a judgment rejecting the charge, or a ruling discontinuing the proceedings (Article 149(3) ZKP). In turn, the Directive emphasizes that victims should be provided with sufficient access to justice (recital 9), and that victims should not be expected to incur expenses in relation to their participation in criminal proceedings (recital 47). Therefore, the strict duty of the victim of crime to bear the costs of the proceedings discourages and deters him from asking for a review of a decision not to prosecute and brings into question the practical effectuation of that right. For that, it would be beneficial if the process were to be clear, transparent, not overly bureaucratic and at the same time free from any financial burdens in order to ensure that victims can request the review in a proper way. It is therefore not appropriate unilaterally to prescribe particular procedural rights and only formally meet the requirements of the Directive if the solution is at the same time not applicable in practice because of additional burdens that discourage victims from exercising their rights. It is important that national legal systems ensure an effective possibility for the victim to challenge the negative decision of the public prosecutor. It makes no sense to pass law that would be a dead letter in order to fulfil a positive obligation, or such that it would divert the victim from an intention to challenge the decision not to prosecute by excessive standardization of the review procedure or by imposing additional duties upon the victim that would discourage him. Thus, every national criminal law has the obligation to establish a review system that would be in accordance with the basic requirements of the Directive and at the same time practical, effective and in accordance with the procedural guarantees and human rights that have been recognized by the EU Charter and by the CJEU as general principles of EU law. ■