



PEOPIL's RESPONSE TO THE GREEN PAPER BY THE EUROPEAN COMMISSION ON COMPENSATION TO CRIME VICTIMS

1. PEOPIL's approach to harmonisation/unification issues concerning redress and protection of victims: preliminary remarks

PEOPIL (*Pan-European Organisation of Personal Injury Lawyers*) was founded in 1998 by European lawyers to improve and promote co-operation and communication between European jurisdictions in the field of *personal injury law*. Thus, one of PEOPIL's primary objectives is to contribute to a better knowledge of European personal injury compensation systems. Furthermore, the objectives of the organisation are also to promote access to the Member State's redress systems for European citizens suffering personal injury and to promote proper and fair compensation for all personal injury cases.

Because of these objectives PEOPIL is also heavily involved in the debate on harmonisation of personal injury compensation throughout Europe. The organisation is currently undertaking a research project financially supported by *Grotius Programme* on the redress protection of personal injury victims in EU Member States. The main scope of this research is to provide lawyers with guidelines on national compensation systems and to research the possibility for a common European compensation system. Therefore PEOPIL is highly interested in the *Green paper on Compensation of Crime Victims* and the future perspectives of state compensation for damages arising out of crimes: such an issue is directly related to PEOPIL's objective to promote a better protection of

personal injury victims at a European level. In particular, there is a direct link to the organisation's aim to facilitate access to compensation for personal injury victims in cross-border situations. Furthermore, the *Green Paper* is directly related to the future European developments of the redress protection of personal injury victims and it is closely linked with the debate of harmonising personal injury compensation systems throughout Europe.

2. The right of personal injury victims to protection by means of compensation: European sources of law and constitutional approach

PEOPIL strongly believes that all personal injury victims have a fundamental right to be fully and fairly compensated for all damages suffered as a consequence of a tort or a crime. European Union legislation does not have specific rules stating the principle of full and fair compensation, but such a principle belongs to the European legal framework and can be found in the human rights recognised by the EEC Treaty, such as the right to life and to health. This view derives directly from the approach followed by National systems, such as Germany, Italy and Spain. These legal systems base the protection of personal injury victims by means of compensation on rules concerning liability and also on fundamental rights recognised by their Constitutions and the European Convention of Human Rights. Moreover, Resolution no. 775 of the Committee of Ministers of the Council of Europe stated as a fundamental principle that personal injury victims are entitled to receive full compensation (principle of *restitutio in integrum*”).

3. The right of crime victims to protection by means of compensation

PEOPIL strongly believes that the legal background outlined above should direct all national systems with regard to all victims of crime and state compensation of such victims. Thus, the principle that should be put as a basic guideline is that, if a Member State awards state compensation to a victim of crime with sums of money which are not enough to provide full and fair compensation, the victim still

has the right to sue the offender for damages suffered. In other words, state compensation shall not limit in any way the victims' right to receive full and fair compensation. Furthermore, deductions from damages obtained by the victims from the offender shall not benefit the offender but the Member State that provided compensation for the victim.

4. The background of state compensation scheme for crime victims

We strongly believe that it is within the duties of each Member State to contribute to the enforcement of the victims' right to be compensated for damages suffered, including, in cross-border situations, when the victim is resident in another Member State. This is even more true with regard to crimes because of the social importance of the protection of victims of crimes, in particular when victims can't get compensation from the offender. This may be the case when the offender remains unknown or cannot be successfully prosecuted or where the offender lacks the means to compensate the victim.

5. A European dimension for state compensation of victims of crime?

PEOPIL believes that there are proper grounds for rules by the European legislator on the issue of state compensation for crime victims. The European Union has the objective of creating a common area of freedom, security and justice, thus a step such as the creation of common rules concerning crime victims is certainly within the scope of the Union. The real problem of legislation at a Community level addressing state compensation is that European Union jurisdictions have different social security schemes from one country to another. Furthermore, there are States that do not have compensation schemes for crime victims in general, but only compensation schemes for special kinds of crimes or torts. It should also be taken into consideration that unification (which is a different concept from harmonisation) could lead certain State members to deteriorate their current systems.

Thus, the right approach at this stage should be to develop only basic principles and harmonised procedures and forms, in order to facilitate access to state compensation in cross-border situations.

At the same time eligibility requirements for access to state compensation should only be outlined in terms of minimum standards, leaving each Member state free to add more classes of victims eligible for state compensation. Moreover, the unification of compensation levels should be avoided, especially with regard to non-pecuniary losses.

In particular, PEOPIIL agrees that compensation levels expressed in pecuniary terms cannot be made uniform. The principles underlying compensation levels, in terms of what losses are covered, are on the other hand possible to address at Community level, but only in terms of minimum criteria.

6. Eligibility criteria

Access to State compensation must be awarded to all EU nationals on the same terms that it is awarded to nationals of the Member State where the crime was committed. This is the only approach, which is possible within European legislation, since the primary objective is to avoid discrimination between EU citizens. We also agree that it would be appropriate to extend this possibility to all legal residents (by virtue of Community law or national law) of a Member State of the EU, thus including those who have the nationality of a third country and who become victims of crime on the territory of any Member State.

A crucial issue is the protection by means of state compensation of secondary victims. The use of terms such as “dependants” or “relatives” can lead to restrictions of current approaches in various Member States, thus it would be better to leave open to each Member State the definition of “secondary victim”. Anyway, we agree that secondary victims should be included. We also agree that, provided the primary victim was a legal resident of a Member State, the secondary victims should be eligible for state compensation also, that is, regardless of the state of residence of the secondary victims themselves.

We think that the protection of crime victims by means of state compensation should be limited only to persons, excluding companies associations, organisations, etc.

Concerning *criteria related to types of crime* we think overlapping of state compensation for crime victims with other types of state compensation already existing for certain types of crimes within the Member State in which the crime was committed or the Member state in which the victim has his residence should be avoided. This objective can be reached by giving the victim the choice of applying for state compensation through one scheme of state compensation instead of another. Alternatively, by excluding the possibility of receiving state compensation through the crime victim's scheme when other schemes are available (principle of subsidiarity).

Furthermore, also with regard to *criteria related to the types of injury*, we think that the European legislator should leave Member States free to cover all crimes and injuries, and to limit eligibility by introducing various specific restrictions. The only statutory limits that the European legislator should put to National legislators are:

- 1) The Member State has to provide state compensation for crime victims regardless the type of crime or the type of injury in cases where the victim cannot attain compensation from the offender. Such cases would be where the offender remains unknown or cannot be successfully prosecuted or where the offender lacks the means to compensate the victim. In such cases, the degree of proof required should be left to Member States) or from other schemes of state compensation.
- 2) The Member State is obliged to provide state compensation when the victim sustained personal injury, including psychiatric illness, or the loss of a relative.

7. Pecuniary and non-pecuniary losses: tariffs or full compensation?

7.1. Pecuniary losses and advance payments

We agree that, in general, loss of earnings (including future losses), and, in the case of secondary victims, loss of maintenance should be covered by a minimum standard. However, we believe that such losses should be fully compensated when the offender remains unknown or cannot be successfully prosecuted or where the offender lacks the means to compensate the victim, or the victim can't obtain such compensation from other systems of state compensation. Medical and hospitalisation expenses, including mental health counselling, psychiatric therapy or similar that may be needed as a result of the crime, funeral expenses, should always be fully compensated, unless provided by other social security systems.

For loss of earnings, loss of maintenance, medical and hospitalisation expenses there should be the possibility of applying for *advance payments* through fast tracks.

7.2. Non-pecuniary losses

The choice of awarding state compensation for *immaterial damages* (or, *non-pecuniary losses*) should be left entirely to each Member State. The only obligation that the European legislator should put to national legislators is to award state compensation for "immaterial damages", when the offender remains unknown or cannot be successfully prosecuted or where the offender lacks the means to compensate the victim. But in doing so the European legislator should not enter into the issue of the definition of immaterial damages and the definition of natural losses covered by such category of damages: definitions in the field of non-economic damages are quite dangerous within harmonising statutory provisions. As well as European legislator should leave the choice of levels of compensation to National legislators. The reason to leave these issues to National legislators is quite obvious: there are too many differences in Europe regarding non-pecuniary damages (and their awards) and PEOPIL strongly believes that it is not yet the time for creating a common system of compensation for non-pecuniary losses. The price of introducing common rules concerning

definitions of recoverable non-pecuniary losses or common rules for their assessment would be too high for various Member states: it would lead to under-compensation, and in some Member states it would mean “reinventing the wheel” of compensation system. What indeed the European legislator should clarify is whether state compensation, in such cases, should consist in an indemnisation (with fixed tariffs) or in a full and fair compensation (awarded with the same rules of the tort system). The ideal solution – and what PEOPIIL recommends - would be that, if the offender remains unknown or cannot be successfully prosecuted or where the offender lacks the means to compensate the victim, the victim should be entitled to receive from the state full and fair compensation for non pecuniary losses in the same way non-pecuniary losses would be awarded under the tort system of the Member state that has to award state compensation.

8. The financial position of the victim

We believe that state compensation of crime victims should be fully independent of considerations regarding financial position of the victim, both on the side of the eligibility criteria and on the side of the assessment criteria of state compensation. In particular we agree that introducing requirements or limits connected with financial position of the victim would lead to unfair effects in cross-border cases.

9. Deductions

As we already pointed out at §6, if the victim has the possibility of receiving state compensation from two or more social security systems, there are two solutions that can be taken into consideration: 1) the victim can make the choice to get state compensation through the crime victim’s scheme or from another public scheme: the case the victim chooses one scheme, all other schemes are not applicable, provided that they compensate same heads of damages with same assessments; 2) state compensation of crime victims scheme is subsidiary to the

compensation the victim can obtain from other social security sources. We think that solutions are both acceptable.

Moreover we think that the possibility of the victim to claim compensation from the offender through the tort system or through criminal proceedings should not limit or even prevent the victim to apply for state compensation. Tort actions and criminal proceedings can involve lot of time and money, especially in cross-border situations. It is better to put the victim in a better position in a very short time. Compensation paid out under compulsory state insurance; social benefits and similar sources should be deducted. In such case, if the victim succeeds, deductions can be operated only in favour of the State. We don't think compensation from private insurance should be deducted too. Deducting compensation paid under private insurance would mean that the individual has taken out a private insurance policy for nothing.

10. Reporting the crime to the police

We don't think that the requirement that the crime victim must have reported the crime to the police should be included in a common minimum standard, since there are crimes in which the victim is able to report only after several time from the date on which the crime was committed (for example, crimes connected with blood transfusion or with certain types of illness at workplace). Moreover there are countries in which the victim can report the crime to other bodies different from police, such as public prosecutors.

11. Time limits of application for state compensation

Victims should make the application within a time limit indicated by European legislator (at least 3 years): the indication of such period of time would be necessary to the creation of transparent and simple rules on procedures for state compensation, specially to facilitate cross-border victims.

In the same time it should be stated that the time limit could run from the date of the crime, from the end of court proceedings, or from the closure of police investigations if court proceedings are not initiated. We don't think it would be a good approach to choose only one of those cases. Moreover we think that it should be added that in crimes involving personal injury the time limit runs from the date of knowledge of the injury or the illness. With regard to this proposal it should be noted that there are several personal injury cases in which the victim becomes conscious of the injuries caused by the crime only after a long time from the date in which the crime was committed: only from this moment the victim is aware of the crime and can make application or report to authorities or start proceedings. Moreover there should be an exception also for person who were disabled or minors at the time of the crime.

12. Contents and form of the application

We strongly think that it is important to get to unified forms, available in all Community languages. Those forms should facilitate the victim in choosing documentation that need to be included, with clear lists of documents.

13. Network for the compensation of cross-border crime victims

At this stage it is not possible to create compensation schemes which are uniform in all European countries, even if some minimum standards can be developed. Nevertheless, it is possible to create the right background for future developments in the direction of harmonised systems and, in particular, to improve the access in cross-border situations.

Thus, it is absolutely important that provisions are made in order that each Member State has a *special board or authority for foreign crime victims and national victims involved in crimes outside the Member State*. This board or authority should give appropriate information in all Community languages and handles applications from victims resident in another Member State, without

imposing the translation of applications or documentation required to obtain state compensation; moreover, this board or authority should support cross-border applicants to get information needed about investigations and court proceedings, or to obtain copy of the decision or judgment resulting from court proceedings against the offender. The same board should assist and support national claimants who were involved abroad as victims. The objective should be that crime victims deal only with their national board, also with regard to the medical evaluation of personal injuries sustained.

Moreover we think that the national authority of the cross-border victim should have an active role in the calculation of the following losses: - loss of earnings, apart from losses of this kind sustained in the Member state in which the crime was committed; - future loss of earnings; - loss of maintenance; - medical and hospitalisation expenses, including mental health counselling, psychiatric therapy or similar that may be needed as a cause of the crime, apart from those which were or will be sustained in the country in which the crime occurred; - funeral expenses. We agree that for the victim, receiving state compensation for pecuniary losses from his or her Member State of residence may therefore result in a more accurate compensation for the actual losses caused by the crime.

On the other side we think that only the Member state, in which the crime was committed, should be responsible for the payments of state compensation, thus the quantum of non-pecuniary losses should follow national rules of the Member states in which the crime was committed. The reason that Member State in which the crime was committed should be responsible for the payment is that in such way Member states, in which more crimes take place, should be encouraged in the prevention of such crimes.

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On behalf of PEOPIL