Reports of Cases

OPINION OF ADVOCATE GENERAL
BOT
delivered on 14 March 2019[1]

Case C-38/18

Massimo Gambino,
Shpetim Hyka
v
Procura della Repubblica presso il Tribunale di Bari,
Ernesto Lappostato,
Banca Carige SpA – Cassa di Risparmio di Genova e Imperia

(Request for a preliminary ruling
from the Tribunale di Bari (District Court, Bari, Italy))

(Reference for a preliminary ruling – Judicial cooperation in criminal matters – Directive 2012/29/EU – Protection of victims of crime – Article 16 – Right to obtain a decision on compensation within a reasonable time – Article 18 – Protection measures during questioning – Change in the composition of the panel of judges before which the victim was questioned as a witness – National legislation allowing a defendant to object to a reading of the written record of the oral evidence and to require the evidence to be given again before the new panel of judges – Compatibility – Charter of Fundamental Rights of the European Union – Articles 47 and 48 – Convention for the Protection of Human Rights and Fundamental Freedoms – Article 6(1) and (3)(d) – Rules for applying the right to a fair trial in the event of alteration of the composition of the panel of judges – Principles of orality and the immutability of the court – Principle of immediacy)

I. Introduction

1. In adversarial criminal proceedings, does Directive 2012/29/EU[2] preclude national legislation which, in the event of a change in the composition of the panel of judges before which the victim gave evidence, provides for a procedural arrangement whereby the defendant may object to a reading of the written record of that victim's oral evidence, thus requiring that evidence to be given again before the new panel of judges?

2. That, in essence, is the subject matter of the question referred for a preliminary ruling by the Tribunale di Bari (District Court, Bari, Italy).

1 Language of the case: French.

2 Directive of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA (OJ 2012 L 315, p. 57).

3. That question is raised in the context of criminal proceedings brought against Mr Massimo Gambino and Mr Shpetim Hyka relating to offences of fraud and money laundering, the victim of which gave evidence against them at a public hearing held before the court making the present reference. Since, after that evidence was given, one of the three judges comprising that first-instance court was replaced, the defence, on the basis of the relevant provisions of the codice di procedura penale (Code of Criminal Procedure), raised an objection to a reading of the written record of that evidence before the new panel of judges, thus requiring that evidence to be given again.

4. This is not the first time that the Court has been questioned on the compatibility of the provisions of that code of criminal procedure in relation to protection measures for victims under EU law. In the cases giving rise to the judgments of 16 June 2005, *Pupino*,[3] and of 21 December 2011, *X*,[4] the Court was asked to interpret the provisions of Framework Decision 2001/220 in the context of the special measures procedure for the early taking of evidence, provided for in the Italian criminal justice system to benefit the most vulnerable victims.

5. In the present case, the Court is this time being asked about the scope of the protection measures laid down by Directive 2012/29 – which replaced Framework Decision 2001/220 – where, under the national legislation in question, the defendant is allowed, in the event of a change in the composition of the panel of judges, to object to the use of the written record of the victim's oral evidence.

6. The Court will, inter alia, need to determine the scope of the measures provided for in Chapter 4 of that directive, taking into account the fundamental rights of the defendant under Articles 47 and 48 of the Charter of Fundamental Rights of the European Union[5] and Article 6(1) and (3)(d) of the Convention on the Protection of Human Rights and Fundamental Freedoms.[6]

7. Although that directive requires Member States to provide victims of crime with a high level of protection by adopting appropriate measures for their questioning during court proceedings, I shall demonstrate in this Opinion that the EU legislature did not intend to limit the number of times the victim could be questioned at a public hearing, except where the victim is a child.

8. I shall explain that, in a legal system such as that at issue in the main proceedings, respect for the right to a fair trial and respect for the rights of the defence require that the court responsible for deciding whether the defendant is guilty should in principle be the court before which the questioning of the witness took place, in particular where he is a decisive witness, whose evidence is likely to determine the innocence or guilt of the defendant. This follows from the principles of orality and the immutability of the court, meaning the one with direct and immediate knowledge of the case, and from the case-law of the European Court of Human Rights. In that context, where hearing the evidence of the witness is decisive as regards whether the defendant is guilty or not, a change in the composition of the court after that witness has given evidence, means in principle that the witness must give evidence again.

9. In those circumstances, I propose that the Court should rule that, with the exception of measures laid down for the benefit of child victims, none of the provisions of Directive 2012/29 precludes national legislation such as that at issue, which allows the defendant to object to a reading of the written record of the victim's oral evidence, thus requiring that evidence to be given again before the new panel of judges.

3 C-105/03, EU:C:2005:386.

4 C-507/10, EU:C:2011:873. In that judgment, the Court was asked whether the provisions laid down in the Code of Criminal Procedure relating to special measures procedure for the early taking of evidence, or 'incidente probatorio', were compatible with Articles 2, 3 and 8 of Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings (OJ 2001 L 82, p. 1).

5 'The Charter'.

6 Signed at Rome on 4 November 1950, 'the ECHR'.

10. I shall, however, make clear that where the defendant calls for the victim to give evidence again the competent national authorities must, according to the requirements of Directive 2012/29, carry out an individualised assessment in order to determine the specific needs of that victim and, where appropriate, to what extent the latter would benefit from the special protection measures provided for in Articles 23 and 24 of that directive. In that context, I think it is for the national courts to ensure that those measures do not prejudice the fairness of the proceedings for the purpose of the second paragraph of Article 47 of the Charter or the rights of the defence for the purposes of Article 48(2) of the Charter.

11. Lastly, I shall explain that Directive 2012/29 does not preclude a Member State adopting more protective measures with regard to the hearing of victims during criminal proceedings, provided those measures do not prejudice the procedural rights of the defendant.

II. Legal context

A. The ECHR

12. Article 6(1) and (3)(d) of the ECHR, entitled 'Right to a fair trial', provides:

'1. In the determination … of any criminal charge against him, everyone is entitled to a fair … hearing within a reasonable time by [a] … tribunal. …

…

3. Everyone charged with a criminal offence has the following minimum rights:

…

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.'

B. European Union law

1. The Charter

13. The second paragraph of Article 47 of the Charter provides that 'everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law'.

14. Article 48(2) of the Charter states that 'respect for the rights of the defence of anyone who has been charged shall be guaranteed'.

2. Directive 2012/29

15. Directive 2012/29 is intended to revise and supplement the principles set out in Framework Decision 2001/220 and to increase the level of protection of victims, in particular within the framework of criminal proceedings.[7]

7 See recital 4 of that directive.

16. The purpose of that directive is to ensure that victims of crime receive appropriate information, support and protection and are able to participate in criminal proceedings. [8]

17. Recitals 11, 12, 20, 53, 55, 58 and 66 of that directive are worded as follows:

‘(11) This Directive lays down minimum rules. …

(12) The rights set out in this Directive are without prejudice to the rights of the offender. …

…

(20) The role of victims in the criminal justice system and whether they can participate actively in criminal proceedings vary across Member States, depending on the national system, and is determined by one or more of the following criteria: … whether the victim is under a legal requirement or is requested to participate actively in criminal proceedings, for example as a witness … Member States should determine which of those criteria apply to determine the scope of rights set out in this Directive where there are references to the role of the victim in the relevant criminal justice system.

…

(53) The risk of secondary and repeat victimisation, of intimidation and of retaliation by the offender or as a result of participation in criminal proceedings should be limited by carrying out proceedings in a coordinated and respectful manner, enabling victims to establish trust in authorities. Interaction with competent authorities should be as easy as possible whilst limiting the number of unnecessary interactions the victim has with them through, for example, video recording of interviews and allowing its use in court proceedings. …

…

(55) Some victims are particularly at risk of secondary and repeat victimisation, of intimidation and of retaliation by the offender during criminal proceedings. It is possible that such a risk derives from the personal characteristics of the victim or the type, nature or circumstances of the crime. Only through individual assessments, carried out at the earliest opportunity, can such a risk be effectively identified. Such assessments should be carried out for all victims to determine whether they are at risk of secondary and repeat victimisation, of intimidation and of retaliation and what special protection measures they require.

…

(58) Victims who have been identified as vulnerable to secondary and repeat victimisation, to intimidation and to retaliation should be offered appropriate measures to protect them during criminal proceedings. The exact nature of such measures should be determined through the individual assessment, taking into account the wish of the victim. The extent of any such measure should be determined without prejudice to the rights of the defence and in accordance with rules of judicial discretion. The victims’ concerns and fears in relation to proceedings should be a key factor in determining whether they need any particular measure.

…

8 See the first subparagraph of Article 1(1) of Directive 2012/29.

(66) This Directive respects fundamental rights and observes the principles recognised by the [Charter]. In particular, it seeks to promote … the right to a fair trial.'

18. Chapter 3 of Directive 2012/29 concerns the victim's 'participation in criminal proceedings'. Article 16(1) of that chapter is worded as follows:

'Member States shall ensure that, in the course of criminal proceedings, victims are entitled to obtain a decision on compensation by the offender, within a reasonable time, except where national law provides for such a decision to be made in other legal proceedings.'

19. Chapter 4 of that directive, concerning 'protection of victims and recognition of victims with specific protection needs', contains Articles 18 to 24.

20. Article 18 of that directive, entitled 'Right to protection', provides:

'Without prejudice to the rights of the defence, Member States shall ensure that measures are available to protect victims and their family members from secondary and repeat victimisation, from intimidation and from retaliation, including against the risk of emotional or psychological harm, and to protect the dignity of victims during questioning and when testifying. When necessary, such measures shall also include procedures established under national law for the physical protection of victims and their family members.'

21. Articles 19 to 21 of Directive 2012/29 concern general protection measures for victims during their questioning or when testifying.

22. Article 20 of that directive, entitled 'Right to protection of victims during criminal investigations', to which the referring court makes express reference, provides:

'Without prejudice to the rights of the defence and in accordance with rules of judicial discretion, Member States shall ensure that during criminal investigations:

…

(b) the number of interviews of victims is kept to a minimum and interviews are carried out only where strictly necessary for the purposes of the criminal investigation;

…'

23. Article 22 of that directive concerns the individual assessments victims must receive in order to determine their specific protection needs.

24. Articles 23 and 24 of Directive 2012/29 concern the special protection measures which the most vulnerable victims may receive.

C. Italian law

25. Article 111 of the Costituzione (Italian Constitution) concerns the safeguards applicable to criminal proceedings and refers, among other matters, to the importance of the adversarial principle and the oral nature of Italian criminal proceedings, and to the derogations from that principle in procedures for obtaining evidence. It provides: [9]

9 French translation published by the Secretariat of the Secretary General of the Presidency of the Italian Republic on the website: https://www.quirinale.it/allegati_statici/costituzione/costituzione_francese.pdf

‘Jurisdiction must be exercised in the context of a fair trial governed by law.

All proceedings must observe the rule that both parties should be heard in conditions of equality, and all proceedings must take place before an impartial judge. The reasonable duration of proceedings shall be ensured by law.

In criminal proceedings, the law provides that a person charged with a criminal offence … shall have the right to examine or to have examined before a judge the persons testifying against him …

Criminal proceedings shall be governed by the adversarial principle for the purposes of obtaining evidence. …

The law shall govern cases where evidence is not obtained in adversarial proceedings at the wish of the accused, or because there is proof that it is objectively impossible, or as a result of proven unlawful conduct.

…’

26. Paragraphs (1) and (2) of Article 511of the Code of Criminal Procedure, entitled ‘Authorised readings’, provides:

‘1. The court shall decide, where appropriate of its own motion, that the documents in the case file may be read, in full or in part, for the purposes of the hearing.

2. Written records of statements may be read only after the person giving them has been examined, unless no examination takes place.’

27. Paragraphs (1) and (2) of Article 525 of the Code of Criminal Procedure, entitled ‘Immediacy of the decision’, provides:

‘1. The judges’ deliberations shall take place immediately after the closure of the oral procedure.

2. The same judges who took part in the oral procedure shall take part in the deliberations, failing which their decision shall be null and void. …’

III. Facts of the main proceedings and the question referred for a preliminary ruling

28. Mr Gambino and Mr Hyka are being tried in criminal proceedings for the offences of money laundering and fraud before the (District Court, Bari), ruling at first instance. One of the victims has brought a civil action and has sought compensation for the harm caused by the fraud perpetrated by Mr Gambino.

29. The victims of those offences gave evidence as witnesses at a hearing on 14 April 2015.

30. Following the alteration of the composition of the panel of judges because one of the judges had been replaced, Mr Gambino, as a defendant, requested at the hearing on 21 February 2017, on the basis of Articles 511 and 525 of the Code of Criminal Procedure, that the victims should give evidence again. It is apparent from the order for reference that that party did not specify the precise points on which it was absolutely necessary to hear those victims’ testimonies again.

31. As stated by the referring court, in the event of a change in the composition of the panel of judges, the Italian legislation provides for the oral procedure to be reopened, which entails following the normal sequence of proceedings once again and, consequently, a new hearing of witnesses.[10] Where the court admits the new oral evidence, the written record of statements previously given may not be read without the consent of all parties to the proceedings.

32. The Corte suprema di cassazione (Supreme Court of Cassation, Italy) has thus ruled that 'where it is necessary for the oral procedure to be conducted a second time because there is a different single judge or the composition of the bench has changed, the evidence heard by the original court cannot be used for the purpose of making the decision simply by virtue of the fact that that evidence has been read. The person who testified must be examined again, where this is possible and has been requested by one of the parties'.[11]

33. The defence repeated its request for the victims to be questioned again at the hearing on 10 October 2017, and it was then that the Pubblico Ministero (Public Prosecutor, Italy) asked for the matter to be referred for a preliminary ruling. One of the sources of evidence requested by the Public Prosecutor in order to establish the guilt of the defendants is the testimony of the victims of the fraud, and whether or not that testimony can be used.

34. The referring court shares the doubts expressed by the Public Prosecutor as to whether the provisions of Article 511(2) and Article 525(2) of the Code of Criminal Procedure are compatible with Directive 2012/29.

35. Whilst that directive states that victims of crime must be given appropriate protection during criminal proceedings, the Italian provisions at issue, in so far as they permit the defence to object to the use of written records of statements and thus require testimony to be given again, lead not only to imposing additional psychological suffering on victims, which conflicts with the purpose of Directive 2012/29, but also permit defendants to exploit the right to a fair trial in order to extend the duration of the proceedings, thus thwarting the right to receive compensation within a reasonable time. In the view of the referring court, the requirement for oral evidence to be given again is thus contrary to the principles set out by the Court in the judgment of 16 June 2005, *Pupino*.[12]

36. The referring court considers that, once the victims have given their oral evidence in public, in accordance with the *audi alteram partem* rule before an impartial court, the right of defendants to a fair trial is not sacrificed in any way by the reading of the written record of that evidence. It points out that, in any event, it is necessary for the principle of proportionality to be applied and thus for a balance to be struck between the need to respect the dignity of the victim, in accordance with Directive 2012/29, and the need to respect the right to a fair trial laid down in Article 47 of the Charter and Article 6 of the ECHR.

37. Accordingly, the Tribunale di Bari (District Court, Bari) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Must Articles 16, 18 and 20(b) of Directive 2012/29 be interpreted as precluding the victim of a crime from having to give evidence again before the court sitting in a new composition when one of the parties to the proceedings, in accordance with Articles 511(2) and 525(2) of the Code of Criminal Procedure (as consistently interpreted by the case-law of the Supreme Court of Cassation), does not consent to that court reading the written record of the oral evidence previously given by that victim, in accordance with the *audi alteram partem* rule, before a different bench in the same proceedings?'

10 The referring court's reference is to Articles 492 to 495 of the Code of Criminal Procedure.

11 Judgment No 2 of the Corte suprema di cassazione (Supreme Court of Cassation), chambers for criminal matters sitting in plenary session, of 15 January 1999.

12 C-105/03, EU:C:2005:386.

IV. Preliminary observations

38. Consideration of the question referred calls for several preliminary observations.

39. In the first place, it is clear from the order for reference that, in the case in the main proceedings, the victim is required to take part in the criminal proceedings brought against Mr Gambino and Mr Hyka in order to give evidence against them. However, the Tribunale di Bari (District Court, Bari) does not state whether the statement of that witness is decisive as to whether the defendants are guilty or not. Similarly, it does not state whether that witness is particularly vulnerable. We can rule out the victim of that fraud being a child, however.

40. Secondly, it should be pointed out that the criminal proceedings at issue are taking place before a court of first instance. My Opinion will therefore concern only the rules and principles governing the questioning of witnesses in proceedings at first instance, since, where a public hearing has already taken place at first instance, the absence of public appeal proceedings may be justified by the particular characteristics of the proceedings in question, in the light of the nature of the domestic appeal system, the scope of the powers of the appeal court under the national legal system and the nature of the issues it had to settle.

41. Thirdly and lastly, the question referred to the Court by the Tribunal di Bari (District Court, Bari) calls for a reminder of the nature of Italian criminal proceedings [13] and the principles governing them. Traditionally there have been two different procedural and institutional models for understanding the organisation of the criminal courts and the place they assign to the various players on the law enforcement and judicial scene: the adversarial model and the inquisitorial model.

42. Article 111 of the Italian Constitution sets out the basic principles of adversarial proceedings, which include the principle of 'orality'. That provision states accordingly that, 'in criminal proceedings, the law provides that a person charged with a criminal offence … shall have the right to examine or have examined before a judge the persons testifying against him', since criminal proceedings are 'governed by the adversarial principle for the purposes of obtaining evidence'.

43. Within the Italian criminal justice system, Article 525 of the Code of Criminal Procedure lays down, as the referring court explains in its order, the principle of immediacy, both in the temporal sense and in the physical sense.

44. The principle of immediacy, in so far as it means the principle of direct and immediate knowledge of the case, follows from the principles of orality and the immutability of the court.

45. The Court has not yet ruled on those principles. Only Advocate General Philippe Léger in his Opinion in *Baustahlgewebe* v *Commission* touched on their edges. [14] Those principles, as recognised in the legal systems of the Member States, appear to have a number of different aspects.

46. In the wider sense, the principles of orality and immutability comprise the immediacy of the proceedings, which means that the court must have direct and personal contact with all those taking part in the criminal proceedings, that is to say, the parties, the witnesses, the experts, the lawyers for the parties and the Public Prosecutor. [15]

13 See points 19 to 29 of the Opinion of Advocate-General Cruz Villalón in *X* (C-507/10, EU:C:2011:682), which consider in depth the nature of Italian criminal proceedings and to which I refer.

14 C-185/95 P, EU:C:1998:37. Reference is made in particular to points 80 to 83 of that Opinion.

15 In the strict sense, those principles mean that a party has the right to state his case in the course of a hearing during which he or his representative has an opportunity to speak and to reply to the court's questions. The courts and tribunals of the Member States have rules which combine written and oral procedural elements in varying proportions, but the principle of orality is common to all of them.

47. In French criminal law, those principles mean that trial courts must, in principle, form their view on the evidence produced before them, both orally and directly, that is to say, they must decide by reference to what they hear (or see) during the hearing, and not by reference to written documents in the police or preliminary investigation files. [16]

48. The principle of orality implies that the court will not reach a decision only by reference to a file, but after obtaining a personal, human impression of the perpetrators of and the witnesses to the offence, which means inter alia that witnesses, whether or not they have testified during the investigation, should give evidence orally. [17] With regard to testimony, the giving of evidence does not appear to be necessary solely as regards the content of that testimony, but also, where the decision depends decisively on the demeanour of the witness, as regards the way in which the latter testifies and the impression he creates.

49. That principle is related to the adversarial principle, which requires that it should have been possible for the evidence produced before the panel of judges to be discussed by the parties at a public hearing. Where the charge is based in whole or in part on a testimony, the exchange of arguments cannot be fully informed unless it enables the degree of credibility of the witness, and therefore the soundness of his testimony, to be assessed. [18] Accordingly, where the composition of the panel of judges is altered it is necessary, in order to ensure that those principles are observed, for the witness to be questioned again by the panel of judges in its different composition, in particular where the testimony constitutes essential and conclusive evidence and its probative value depends on the impression created.

50. The principle of immediacy takes full account of the requirements of the principle of orality. The former principle has two aspects, one temporal the other physical, which are reflected in the present case in Article 525 of the Code of Criminal Procedure.

51. Immediacy in time relates more closely to the issue of 'reasonable time'. It requires the courts to take a decision within a reasonable time in order to prevent memories fading in the minds of the judges, due to the amount of time that has elapsed between the date of the hearing and the delivery of the judgment. [19] A breach of that principle does not affect the decision.

52. Immediacy in physical terms means that the court cannot interpose an intermediary between itself and the party or his representative and presupposes that a judge who was not present at the hearing cannot contribute to the decision in the case. [20] A judgment delivered in breach of that principle may overlook essential aspects of the case. According to Article 32(2) of the Rules of Procedure of the Court, 'when a hearing has taken place, only those Judges who participated in that hearing … shall take part in the deliberations'. In the case in the main proceedings, that principle is reflected in Article 525(2) of the Code of Criminal Procedure, which states that 'the same judges who took part in the oral procedure shall take part in the deliberations'. In its order for reference, the Tribunale di Bari (District Court, Bari) states that, under that provision, the same judges who were present when the evidence was given in court must decide on the criminal liability of the defendant.

53. The question referred for a preliminary ruling seeks an answer on that point.

16 Bouzat, P., and Pinatel, J., *Traité de droit pénal et de criminology*, Volume II, 2nd ed., Dalloz, Paris, 1970, paragraph 1336.

17 Bouzat, P., and Pinatel, J., op.cit., paragraph 1336.

18 Desportes, F., and Lazergues-Cousquer, L., *Traité de procédure pénale*, 3rd Ed., Economica, Paris, 2013, paragraphs 609 to 611.

19 In its order for reference, the Tribunale di Bari (District Court, Bari) accordingly states expressly that Article 525(1) of the Code of Criminal Procedure constitutes the basis of the principle of immediacy in the temporal sense ('deliberations [must] take place immediately after the closure of the oral procedure').

20 See Opinion of Advocate-General Léger in *Baustahlgewebe* v *Commission* (C-185/95 P, EU:C:1998:37, point 83).

V. My assessment

54. By its question, the Tribunale di Bari (District Court, Bari) asks, in essence, whether, in the event of a change in the composition of the first-instance court before which the victim of a criminal offence has given evidence as a prosecution witness, Articles 16, 18 and Article 20(b) of Directive 2012/29 preclude national legislation which, in a legal system such as that at issue in the main proceedings, provides for a procedural arrangement whereby the defendant may object to a reading of the written record of the oral evidence previously given by the victim before the differently composed panel of judges, thus requiring the victim to give evidence again.

55. In a situation such as that in the present case, the answer to that question is clearly in the negative.

56. Since the victim of the criminal offence in question is not a child, it is immediately apparent from an examination of the wording and scheme of Directive 2012/29 that none of the general or special protection measures it provides for requires Member States to excuse the victim from giving evidence again in the event of a change in the composition of the panel of judges before which he originally testified. It is clear from the principles of orality and the immutability of the court – meaning the one having direct and immediate knowledge of the case – that the court responsible for deciding whether the defendant is guilty in criminal proceedings should in principle be the court before which the questioning of the witness took place. That would ensure respect for the right to a fair trial for the purposes of the second paragraph of Article 47 of the Charter and respect for the rights of the defence for the purposes of Article 48(2) of the Charter.

57. Although the Court of Justice has not so far had occasion to rule on the scope of the principles of orality and the immutability of the court, the European Court of Human Rights has developed a rich body of case-law, in which it has held that a change in the composition of a court after the examination of a decisive witness should in principle lead to the witness being called to give evidence again.

58. I shall now expand on each of those arguments, in the first part of my reasoning. The second part will contain an examination of the rules governing compensation for the victim of a criminal offence and will be briefer, since that is not the central issue in the present case.

A. The rules concerning protection of the victim while he is being questioned during criminal proceedings

1. The provisions of Chapter 4 of Directive 2012/29

59. Chapter 4 of Directive 2012/29 is entitled ‘Protection of victims and recognition of victims with specific protection needs’.

60. Within that chapter, Article 18 of Directive 2012/29 – the interpretation of which is requested in the present case – is an introductory article establishing the general principle that, during questioning and when testifying, the victim of a criminal offence must be given protection, provided the rights of defence of the alleged offender are respected.

61. According to that provision, Member States are required to adopt measures to protect the victim, during questioning and when testifying, from any attack on his dignity, secondary and repeat victimisation or acts of intimidation or retaliation that might arise as a result either of the conduct of the offender or of the victim’s participation in the criminal proceedings.

62. That right means the adoption of a range of measures, which the EU legislature states should be 'as wide as possible'.[21] However, with the exception of protection measures for child victims, none of the general or special measures introduced by Directive 2012/29 requires Member States to excuse the victim from being questioned again as a witness during criminal proceedings in the event of a change in the composition of the panel of judges.

(a) The nature of the protection measures for victims during their questioning

63. The protection measures for victims of a criminal offence are covered in Articles 19 to 24 of Directive 2012/29.

64. The protection measures provided for in Articles 19 to 22 of that directive are general measures.[22] As the Court held in the judgment of 15 September 2011, *Gueye and Salmerón Sánchez*,[23] those measures are preventive and practical and are intended to ensure that the ability of victims adequately to take part in the criminal proceedings is not jeopardised by the possibility that their safety and privacy is placed at risk.[24] Accordingly, they comprise measures applicable to the criminal proceedings as a whole, ensuring both avoidance of contact between the victim and the offender within premises where criminal proceedings are conducted (Article 19) and protection of the victim's privacy (Article 21).

65. Those measures also include measures specifically applicable to the criminal investigation stage. Accordingly, under Article 20(b) of Directive 2012/29, interviews are to be carried out only where strictly necessary for the purposes of the criminal investigation and their number is to be kept to a minimum. Although, in its request for a preliminary ruling the court making the present reference refers expressly to that article in order to contest the legality of the Italian legislation in question, that provision is not relevant in view of its scope of application. Although the EU legislature repeated here the measure introduced in the former Article 3(2) of Framework Decision 2001/220 in regulating the number of times the victim can be interviewed, it nevertheless chose to limit the application of that measure expressly to the criminal investigation stage, to the exclusion of the court proceedings (which was not formerly the case), and to make it conditional on respect for the rights of defence of the defendant.

66. Lastly, under Article 22 of Directive 2012/29, those general protection measures require Member States to carry out individual assessments of victims in order to identify their specific protection needs. It is only in respect of victims who, following such assessments, are identified as being particularly vulnerable, such as children, or victims of terrorism or domestic violence, that the EU legislature provides special protection measures for hearing them, as referred to in Article 23 of that directive and, in the case of children, in Article 24 of that directive, those measures being in addition to the general protection measures.

21 See recital 53 of Directive 2012/29.

22 The purpose of those measures is clearly set out in recitals 53 and 54 of Directive 2012/29.

23 C-483/09 and C-1/10, EU:C:2011:583.

24 Paragraph 64 of that judgment, concerning interpretation of Article 8(2) to (4) of Framework Decision 2001/220.

67. In the case of the provisions laid down in Article 23 of that directive, in particular, the EU legislature distinguishes between the special measures applicable to the hearing of victims during a criminal investigation and those applicable during the course of the court proceedings. Although the former are not relevant given the context of the main proceedings,[25] the latter illustrate particularly well the intention of the EU legislature not to interfere with the conduct of the criminal proceedings and, in particular, not to reduce the significance of the stage during which the victim is questioned.

68. Although the EU legislature allows the victim, inter alia, to be heard in the courtroom without being present through the use of appropriate means of communication, or at a hearing without the presence of the public, the fact remains that, except where the victim is a child,[26] it makes no provision for limiting the number of times the victim would be questioned during that stage of the criminal proceedings, even where that victim has a special need for protection because of his vulnerability, and 'failure to do so could harm the victim or another person or could prejudice the course of the proceedings'.[27]

69. Examination of the wording of Article 18 of Directive 2012/29, and of the scheme of Chapter 4 in which that provision appears, clearly shows that the EU legislature did not intend to limit the number of times the victim could be questioned during the court proceedings, either in the context of general protection measures or in the context of special protection measures for the most vulnerable victims, with the exception of measures for child victims.

(b) The scope of protection measures for victims during their questioning

70. The protection measures I have just referred to may be limited in scope.

71. First, it is clear from recitals 11 and 67 of Directive 2012/29 that the rules applicable to the protection of victims here are minimum rules, thus leaving Member States broad discretion with regard to the detailed procedure for implementing the measures. Such a reservation enables differences existing between the national legal systems to be taken into account, in particular, those in respect of the oral or written nature of criminal proceedings and the place of the victim in a criminal trial.

72. Secondly, the EU legislature took care from the start to explain, in recital 12 of Directive 2012/29, that is to say immediately after recalling its historical context, that 'the rights set out in [that] Directive are without prejudice to the rights of the offender'. It also made clear in recital 66 of that directive that the latter respects fundamental rights and observes the principles recognised by the Charter, inter alia, it seeks to promote the right to a fair trial.

73. The EU legislature thus affords victims rights, the exercise of which does not undermine the right to a fair trial or the rights of defence of the defendant as recognised by the second paragraph of Article 47 and Article 48(2), respectively, of the Charter.

25 Under Article 23(2) of Directive 2012/29, the measures provided for during criminal investigations consist in giving the victim the right to be interviewed in premises designed for that purpose, by professionals who are trained and who, 'unless this is contrary to the good administration of justice' are always the same, and, lastly, 'provided that the course of the criminal proceedings will not be prejudiced', are of the same sex as the victim. Those measures are not relevant in the context of the main proceedings, since they relate only to the stage of the court proceedings.

26 According to Article 24(1)(a) of Directive 2012/29, Member States must ensure that, 'in criminal investigations, all interviews with the child victim may be audiovisually recorded and such recorded interviews may be used as evidence in criminal proceedings'. That provision is in line with the case-law developed by the Court in the context of proceedings concerning the custody of a child, according to which, 'while remaining a right of the child, hearing the child cannot constitute an absolute obligation, but must be assessed having regard to what is required in the best interests of the child in each individual case, in accordance with Article 24(2) of the [Charter]' (judgment of 22 December 2010, *Aguirre Zarraga* (C-491/10 PPU, EU:C:2010:828, paragraph 64)).

27 Article 23(1) of Directive 2012/29.

74. It is very clear, moreover, not only from the wording of Article 18 of Directive 2012/29 but from the wording of all the provisions in Chapter 4 of that directive, that Member States can adopt protection measures concerning the questioning of victims only on condition that the procedural rights of the defendant in criminal proceedings are duly protected.

75. The EU legislature made that reservation when it laid down the right to protection during questioning in Article 18 of that directive. It made the same reservation in the subsequent articles. Accordingly, in Article 19 of that directive, the measures to ensure the absence of contact between the victim and the offender during criminal proceedings are applicable 'unless the criminal proceedings require such contact'; in Article 20 of Directive 2012/29, the measures to limit the number of interviews of victims are applicable 'without prejudice to the rights of the defence and in accordance with rules of judicial discretion', and are moreover provided only in respect of the criminal investigation stage; in Article 21 of that directive, the measures to protect the victim's privacy must always be 'consistent with the right to a fair trial';[28] and, lastly, in Article 23 of the directive, the measures concerning the hearing of the most vulnerable victims are applicable 'without prejudice to the rights of the defence and in accordance with rules of judicial discretion'.[29]

76. Although Directive 2012/29 requires Member States to ensure victims have a high level of protection when giving evidence, and even offers them the opportunity to extend the rights set out in that directive in order to offer a higher level of protection, they are still required not to undermine the procedural rights of defendants.

77. In the judgments of 16 June 2005, *Pupino*,[30] and of 9 October 2008, *Katz*,[31] the Court noted moreover, regarding the interpretation of Articles 2 ('respect' for the personal dignity of the victim and 'recognition' of the latter's rights and legitimate interests), 3 ('hearings, and provision of evidence') and 8 ('right to protection') of Framework Decision 2001/220, the latter must be interpreted in such a way that fundamental rights, including in particular the right to a fair trial as set out in Article 6 of the ECHR, are respected.[32] According to the Court, it is therefore for the national courts 'to ensure in particular that the way in which the evidence is taken in the criminal proceedings, viewed as whole, does not prejudice the fairness of the proceedings for the purposes of Article 6 of the ECHR, as interpreted by the European Court of Human Rights'.[33]

78. That case-law is clearly applicable in the context of the implementation of Directive 2012/29.

79. Thirdly, the scope of that reservation concerning respect for the rights of the defence has all the more significance where the victim occupies a decisive place in the context of the criminal proceedings, as a witness, for example.

80. The EU legislature recognises expressly in recital 20 of Directive 2012/29 that the scope of the rights set out in that directive varies according to the role assigned to victims in the criminal justice system of each of the Member States and depends inter alia on whether the victim is under a legal requirement, or is requested, to participate actively in criminal proceedings, for example as a witness.

28 See recital 54 of Directive 2012/29.

29 According to recital 58 of Directive 2012/29, 'the extent of any such measure should be determined without prejudice to the rights of the defence'. That principle appeared previously in Article 2(2) of Framework Decision 2001/220.

30 C-105/03, EU:C:2005:386.

31 C-404/07, EU:C:2008:553.

32 See judgment of 9 October 2008, *Katz* (C-404/07, EU:C:2008:553, paragraph 48 and the case-law cited).

33 Judgment of 9 October 2008, *Katz* (C-404/07, EU:C:2008:553, paragraph 49 and the case-law cited). The Court of Justice adopted in that case the settled case-law of the European Court of Human Rights, according to which 'the task entrusted to the Court by the [ECHR] is not to give a ruling on whether the statements of witnesses were rightly admitted in evidence [which is a matter to be assessed by the national courts], but to ascertain whether the proceedings taken as a whole, including the way in which the evidence was presented, was fair' (see ECtHR, 10 February 2005, *Graviano v. Italy*, CE:ECHR:2005:0210JUD001007502, § 36 and the case-law cited).

81. Examination of the wording and scheme of Directive 2012/29 enables us to draw the following conclusions.

82. Except where the victim is a child, no provision of Directive 2012/29 requires Member States to excuse even the most vulnerable victim from being questioned again during criminal proceedings in the event of the composition of the panel of judges being altered.

83. In those circumstances, national legislation which, in a legal system such as that at issue in the main proceedings, provides, in the event of a change in the composition of the panel of judges, for a procedural arrangement whereby the defendant may object to a reading of the written record of the victim's oral evidence, thus requiring that evidence to be given again, does not conflict with the provisions of Directive 2012/29 and comes within the discretion of the Member State.

84. That legislation appears appropriate in order to ensure respect for the rights of the defence and fairness of the proceedings, both of which mean that, in an adversarial legal system, the court responsible for deciding whether the defendant is innocent or guilty should in principle be the court before which the questioning of the witness took place. That stems from the principles of orality and the immutability of the court, the scope of which I described above. Accordingly, in a legal system such as that at issue, where the single judge has changed or the composition of the panel of judges has been altered before the deliberations take place, respect for the rights and principles referred to above means in principle that the witness must give evidence again.

85. That conclusion must, however, be qualified.

86. First, as we have seen, that legislation does not absolve Member States from carrying out, under Article 22 of Directive 2012/29, an individual assessment in order to determine the specific needs of the victim and, where appropriate, to what extent the latter would benefit from the special protection measures provided for in Articles 23 and 24 of that directive. [34]

87. In that regard, it is apparent from the judgment of 21 December 2011, *X*, [35] that, in the context of the Italian legal system and subject to legislative amendments that may have been made since, the protection of the victim of a criminal offence is ensured by various provisions of the Code of Criminal Procedure, which make provision for, inter alia, *in camera* hearings and the possibility of using the arrangements provided for in Article 398(5a) of that code. [36]

88. Secondly, it should be noted that Directive 2012/29 lays down minimum rules. That means, as the EU legislature states expressly in recital 11 of that directive, that 'Member States may extend the rights set out in [that] Directive in order to provide a higher level of protection [for the victim]'.

89. None of the provisions of Directive 2012/29 therefore precludes a Member State adopting more protective measures with regard to the hearing of victims during criminal proceedings, provided those measures do not prejudice the fairness of the trial for the purposes of the second paragraph of Article 47 of the Charter or the rights of defence of the defendant for the purposes of Article 48(2) of the Charter.

90. Although the Court of Justice has not so far had occasion to rule on the principles governing compliance with those provisions and, in particular, the rules relating to the questioning of witnesses in criminal proceedings, the European Court of Human Rights, on the other hand, has dealt with a considerable number of cases, the principles of which are summarised below.

34 See point 66 of this Opinion.

35 C-507/10, EU:C:2011:873.

36 See paragraph 40 of that judgment.

91. As is clear from the Explanations relating to the Charter,[37] the right to a fair trial guaranteed by the second paragraph of Article 47 of the Charter and the right of defence recognised by Article 48(2) of the Charter correspond to Article 6(1) and (3) of the ECHR, respectively. According to Article 52(3) of the Charter, the meaning and scope of those rights are the same as those afforded them by the ECHR.

2. The case-law of the European Court of Human Rights relating to the questioning of victims in criminal proceedings

92. Article 6(1) of the ECHR recognises the right to a fair trial. That right means in particular, under Article 6(3)(d), the right for everyone charged with a criminal offence 'to examine or have examined witnesses against him'.

93. On the basis of those provisions, the European Court of Human Rights examines whether the criminal proceedings considered as a whole, and in particular the way in which the evidence was presented, was fair.[38] In its examination, that Court takes into account the nature of the issues to be resolved and the national legal system and, in particular, the specific aspects of the proceedings and the nature and extent of the powers of national courts. Accordingly, it holds that in the criminal context, there must generally be a court of first instance which fully meets the requirements of Article 6 of the ECHR, before which the defendant has an entitlement to hear witnesses' evidence against him.[39]

94. According to the European Court of Human Rights, compliance with Article 6(1) and (3) of the ECHR means that all the evidence must be produced at a public hearing, in the presence of the defendant, with a view to adversarial argument before he can be found guilty.[40] A fair trial therefore means that those who have responsibility for deciding on a defendant's guilt or innocence ought, in principle, to hear witnesses in person.[41] That would enable the defendant to face the person giving evidence against him and challenge his testimony in the presence of the judges who will ultimately give their decision. That reflects the principle of immediacy. According to the European Court of Human Rights, that principle is a significant safeguard for criminal proceedings, since it enables the judges who will ultimately decide the case to assess the credibility and reliability of the evidence given by the prosecution witnesses and, hence, the merits of the charges, which may have decisive consequences for the defendant.[42] That Court points out that it is a complex task which requires the court to make a direct assessment of the evidence,[43] which cannot be carried out merely by reading the statements recorded in the hearing transcripts.[44]

37 OJ 2007 C 303, p. 17.

38 See ECtHR, 10 February 2005, *Graviano v. Italy*, (CE:ECHR:2005:0210JUD001007502, § 36).

39 ECtHR, 23 November 2006, *Jussila v. Finland* (CE:ECHR:2006:1123JUD007305301, § 40 and the case-law cited).

40 See ECtHR, 5 December 2002, *Craxi v. Italy* (CE:ECHR:2002:1205JUD003489697, § 85 and the case-law cited), and 14 June 2005, *Mayali v. France* (CE:ECHR:2005:0614JUD006911601, § 31).

41 See ECtHR, 29 June 2017, *Lorefice v. Italy* (CE:ECHR:2017:0629JUD006344613, § 43 and the case-law cited); 10 October 2017, *Daştan v. Turkey* (CE:ECHR:2017:1010JUD003727208, § 33 and the case-law cited); and 9 January 2018, *Ghincea v. Romania* (CE:ECHR:2018:0109JUD003667606, § 40 and the case-law cited).

42 See ECtHR, 10 February 2005, *Graviano v. Italy*, (CE:ECHR:2005:0210JUD001007502, § 38 and the case-law cited), and 5 March 2013, *Manolachi v. Romania* (CE:ECHR:2013:0305JUD003660504, §§ 48 and 49).

43 See ECtHR 29 June 2017, *Lorefice v. Italy* (CE:ECHR:2017:0629JUD006344613, § 36 and the case-law cited).

44 See ECtHR, 29 June 2017, *Lorefice v. Italy* (CE:ECHR:2017:0629JUD006344613, § 43 and the case-law cited), and 9 January 2018, *Ghincea v. Romania* (CE:ECHR:2018:0109JUD003667606, § 40 and the case-law cited).

95. In those circumstances, the European Court of Human Rights holds that the principle of immediacy means that the decision should be delivered by the judges who heard the case throughout the proceedings and who were present when all the evidence was given. Consequently, according to that Court, 'a change in the composition of a court after the examination of a *decisive* witness normally leads to the witness being called to give evidence again'. [45]

96. However, the European Court of Human Rights allows exceptions to the principle of immediacy, provided the measures adopted by the trial judges make it possible to ensure that overall the criminal proceedings are fair and that the rights guaranteed by Article 6 of the ECHR are respected. [46]

97. In the first place, the European Court of Human Rights considers that, in view of the administrative or procedural reasons which sometimes make the continued participation of a judge impossible in a particular case, the principle of immediacy does not preclude a change in the composition of a panel of judges during criminal proceedings, provided the defendant is given an 'adequate and proper' opportunity to challenge the testimony against him and question witnesses against him, either when they make their statements or at a later stage. [47]

98. In order to carry out that examination, that Court considers whether hearing the testimony of the witness has raised doubts as to the latter's credibility, in which case the use of the written records of the testimony is not adequate for ensuring that Article 6 of the ECHR is respected, or whether hearing that testimony may provide decisive evidence for purposes of the trial of the person concerned, in which case it holds that the testimony should be given again.

99. Accordingly, where it is apparent that a conviction is based, solely or to a decisive extent, on the depositions of a witness whom the defendant has not had an opportunity to examine or have examined either at the investigation stage or during the hearing, that Court will find that exception to the principle of immediacy incompatible with the rights guaranteed by Article 6 of the ECHR.

100. In the case that gave rise to the judgment of 2 December 2014, *Cutean v. Romania*, [48] the European Court of Human Rights thus found that Article 6(1) and (3) of the ECHR had been infringed since the use of the written records of the witnesses' statements could not compensate for the lack of immediacy in the proceedings. Despite the objective procedural factors justifying the transfer to a new panel of judges, that Court found that the new panel of judges hearing the case was not composed of any of the judges on the original panel, who had heard the applicant and the witnesses, that the credibility of the witnesses had been expressly challenged by the applicant and that the witnesses' statements had been decisive evidence in the latter's conviction. [49]

101. The European Court of Human Rights made a similar finding in the case that gave rise to the judgment of 7 March 2017, *Cerovšek and Božičnik v. Slovenia*. [50] It had also been asked about the fairness of the criminal proceedings brought against the applicants, since the judge sitting as a single judge had retired after giving her verdict and finding the latter guilty of theft but without providing grounds for the conviction, a written judgment having been given three years later by two judges who had not participated in the trials, on the basis of the written documents in the case file. The applicants' convictions were upheld on appeal without any of the witnesses being heard again.

45 ECtHR, 10 February 2005, *Graviano v. Italy*, (CE:ECHR:2005:0210JUD001007502, § 38), my italics.

46 ECtHR, 19 December 2013, *Rosin v. Estonia* (CE:ECHR:2013:1219JUD002654008, §§ 59 and 62 and the case-law cited).

47 ECtHR, 10 February 2005, *Graviano v. Italy*, (CE:ECHR:2005:0210JUD001007502, § 37).

48 CE:ECHR:2014:1202JUD005315012. In that case, the European Court of Human Rights was asked about the fairness of the criminal proceedings brought against the applicant, since the original panel of judges examining his case at first instance had been changed and none of the judges on the panel who eventually convicted him had heard either the applicant or the witnesses directly, and that was not rectified on appeal.

49 §§ 60 to 73 of that judgment.

50 CE:ECHR:2017:0307JUD006893912 (§§ 37 to 48).

102. In that case, the European Court of Human Rights also found that Article 6(1) and (3) of the ECHR had been infringed, since, according to the principle of immediacy in criminal proceedings, observation by the judge of the demeanour of the witnesses and the applicants and her assessment of their credibility must have constituted an important, if not decisive, element in the establishment of the facts on which the convictions were based. As regards the reason for the change in the composition of the panel of judges, that Court pointed out that the retirement of the judge who conducted the trial could not be regarded as being an exceptional circumstance which justified a departure from the standard domestic procedure, since the judge must have known the date of her retirement in advance. The European Court of Human Rights held that it would therefore have been possible for the competent national authorities to take measures either for that judge to finish the case in question alone or for another judge to be involved at an earlier stage in the proceedings. In any event, that Court held that the only way to compensate for the judge's inability to produce reasons justifying the applicants' conviction would have been to order a retrial, by, for instance, the second-instance court remitting the case to the first-instance court for a new hearing.

103. On the other hand, in the case that gave rise to the judgment of 10 February 2005, *Graviano v. Italy*,[51] the European Court of Human Rights found that the refusal of the defendant's requests for the witnesses to be examined again had not infringed his rights of defence to the extent that Article 6(1) and (3)(d) of the ECHR was infringed. In that case, that Court was called upon to assess whether the criminal proceedings brought against the applicant for murder and membership of a Mafia-type organisation had been fair for the purposes of those provisions on account of the replacement of one of the eight judges on the panel of the Assize Court and the refusal of his requests for the witnesses – including former Mafia-members turned informers – to be summoned again.

104. In its examination, the European Court of Human Rights noted, first, that the applicant's conviction was based on statements made by more than one witness, secondly, that the replacement of one of the eight judges comprising the panel had not deprived the applicant of his right to question the witnesses concerned, who had given evidence at public hearings in the presence of the applicant and his lawyer, who had had the opportunity to ask them the questions they considered most helpful to the defence case, thirdly, that the applicant had not indicated how conducting the examinations again might have provided new, relevant evidence, and fourthly and lastly, that the seven other judges had been present when all the evidence was produced. In those circumstances, the European Court of Human Rights held that the fact that the substitute judge had been able to read the reports on the hearings at which the witnesses had been examined made up for his absence from the hearings at which the examinations had taken place.[52]

105. Secondly, the European Court of Human Rights allows exceptions to the principle of immediacy where, owing to the vulnerability of the victim, the latter has not appeared at the trial and the panel of judges has based its decision on the evidence contained in the records of its earlier statements.

106. That Court then proceeds to weigh in the balance the competing interests of the defence, the victim, and witnesses, and the public interest in the effective administration of justice,[53] and, in the context of that exercise, it directs its attention not only to the necessary respect for the rights of the defence, but also to the necessary respect for the rights of victims and witnesses.[54]

51 CE:ECHR:2005:0210JUD001007502.

52 See ECtHR, 10 February 2005, *Graviano v. Italy*, (CE:ECHR:2005:0210JUD001007502, § 39).

53 See ECtHR, 15 December 2011, *Al-Khawaja and Tahery v. United Kingdom* (CE:ECHR:2011:1215JUD002676605, § 146).

54 See ECtHR, 15 December 2011, *Al-Khawaja and Tahery v. United Kingdom* (CE:ECHR:2011:1215JUD002676605, § 120 et seq.), and 15 December 2015, *Schatschaschwili v. Germany* (CE:ECHR:2015:1215JUD000915410, § 101 and the case-law cited).

107. In order to ensure that the defendant has been given an 'adequate and proper' opportunity to challenge the testimony against him and to question the witnesses against him,[55] the European Court of Human Rights looks at three criteria.[56]

108. First, it examines whether there are serious and sufficient grounds for the lack of an examination of the witness, such as the witness's death,[57] his state of health, his particular vulnerability or his fears.[58]

109. Secondly, it considers whether the witness's testimony is the sole or decisive evidence on which the defendant's conviction is based. Even if the grounds for the lack of appearance of a witness are considered serious, they may nevertheless prove to be insufficient as regards the weight and decisiveness attaching to the examination of the witness for determining the guilt of the defendant and the interests at stake for the latter.[59]

110. Accordingly, in the case that gave rise to the judgment of 18 July 2013, *Vronchenko v. Estonia*,[60] the European Court of Human Rights held that, although the panel of judges had acted in the best interests of the child in declining to summon her to a court hearing and although playing the video recording of her statements at the court hearing allowed the judges, as well as the defendant, to observe the demeanour and assess the credibility of the victim, those were insufficient measures to ensure respect for the rights of the defence, given the importance of that testimony.[61]

111. Thirdly and lastly, that Court considers whether there are sufficient counterbalancing factors and, in particular strong procedural safeguards, to offset the difficulties caused to the defence as a result of the admission of the statements of an absent witness.

112. In that context, the European Court of Human Rights examines, in particular, whether other evidence was produced in order to corroborate the deposition of the witness, such as expert opinions on a victim's credibility. It also examines whether the defence had an opportunity to question the witness during the investigation stage, and whether showing, at the trial hearing, a video-recording of the witness's questioning would allow the court, the prosecution and the defence to form their own impression of his or her reliability. It also takes into account the way in which the trial judges approached the examination of the statements of an absent witness and the reasons why they considered that evidence to be reliable, while having regard to other evidence available.[62]

113. That examination of the case-law of the European Court of Human Rights provides the following clarifications.

55 ECtHR, 10 February 2005, *Graviano v. Italy*, (CE:ECHR:2005:0210JUD001007502, § 37).

56 See ECtHR, 15 December 2015, *Schatschaschwili v. Germany* (CE:ECHR:2015:1215JUD000915410, § 107 and the case-law cited)

57 See ECtHR, 8 June 2006, *Bonev v. Bulgaria* (CE:ECHR:2006:0608JUD006001800, § 44).

58 See ECtHR, 15 December 2011, *Al-Khawaja and Tahery v. United Kingdom* (CE:ECHR:2011:1215JUD002676605, §§ 121 and 122).

59 See, in that regard, ECtHR, 5 July 2011, *Dan v. Moldavia* (CE:ECHR:2011:0705JUD000899907, § 31); 15 December 2011, *Al-Khawaja and Tahery v. United Kingdom* (ECLI:CE:ECHR:2011:1215JUD002676605, § 126 et seq.); and 29 June 2017, *Lorefice v. Italy* (CE:ECHR:2017:0629JUD006344613, § 41).

60 CE:ECHR:2013:0718JUD005963209. Judgment concerning the absence from the trial of a minor who was the victim of a sexual offence in order to protect the well-being of the child. See, also, ECtHR, 19 December 2013, *Rosin v. Estonia* (CE:ECHR:2013:1219JUD002654008, §§ 57 and 60).

61 § 65 of that judgment. In its judgment of 15 December 2011, *Al-Khawaja and Tahery v. United Kingdom* (CE:ECHR:2011:1215JUD002676605,§ 125), the European Court of Human Rights had previously held that, 'given the extent to which the absence of a witness adversely affects the rights of the defence, … before a witness can be excused from testifying on grounds of fear, the trial court must be satisfied that all available alternatives, such as witness anonymity and other special measures, would be inappropriate or impracticable'.

62 See ECtHR, 15 December 2015, *Schatschaschwili v. Germany* (CE:ECHR:2015:1215JUD000915410, § 125 et seq.).

114. We find that that Court starts from the principle that questioning, before the panel of judges called upon to decide the case, of a victim taking part in criminal proceedings as a witness, is the rule. That is also the principle adopted by the EU legislature in Directive 2012/29, since none of its provisions, apart from the one dealing with child victims, excuses even the most vulnerable victim from questioning during criminal proceedings, or limits the number of times that person can be questioned.

115. The European Court of Human Rights nevertheless allows exceptions to that principle by assessing, on a case-by-case basis, the overall fairness of the proceedings. In that regard, it takes into account not only the vulnerability of the victim but also his role and the importance of his testimony in the context of the criminal proceedings. Those are also the circumstances that the Member States must take into consideration when implementing Directive 2012/29. Although the ECHR may appear to be more protective towards victims when it accepts that the latter may legitimately be excused from appearing at a public hearing, I would point out that Directive 2012/29 lays down only the minimum rules. It does not therefore preclude Member States from extending the rights it provides for in order to offer a higher level of protection to particularly vulnerable victims, by allowing the written records of their statements to be used in evidence for example.

116. Taking the case-law of the European Court of Human Rights into account, all the interests at stake should be weighed up before such a measure is adopted. In that context, Member States should, in particular, take care to examine whether hearing the testimony of the victim is likely to be decisive for purposes of the defendant's trial or to reveal doubts as to his credibility, and to ensure by means of strong procedural safeguards that the taking of evidence in the context of criminal proceedings does not prejudice the fairness of the proceedings for the purposes of the second paragraph of Article 47 of the Charter or the rights of the defence for the purposes of Article 48(2) of the Charter.

117. It is in the light of all those considerations that I propose that the Court should rule that Article 18 of Directive 2012/29 does not preclude national legislation which, in a legal system such as that at issue in the main proceedings, provides, in the event of a change in the composition of the first-instance court before which the victim has been questioned as a witness, for a procedural arrangement whereby the defendant may object to a reading of the written record of the victim's oral evidence, thus requiring that evidence to be given again, in particular where the victim is a decisive witness, whose testimony is likely to determine the innocence or guilt of the defendant.

118. Furthermore, I consider that, where, on the basis of that national legislation, the defendant calls for the victim to give evidence again, the competent national authorities must, in accordance with the requirements of Article 22 of Directive 2012/29, carry out an individualised assessment in order to determine the specific needs of that victim and, where appropriate, to what extent the latter would benefit from the special protection measures provided for in Articles 23 and 24 of that directive. In that context, I think it is for the national courts to ensure that those measures do not affect the fairness of the proceedings for the purposes of the second paragraph of Article 47 of the Charter or the rights of the defence for the purposes of Article 48(2) of the Charter.

119. Lastly, I also call on the Court to find that Directive 2012/29 does not preclude a Member State adopting more protective measures with regard to the hearing of victims during criminal proceedings, provided, however, those measures do not prejudice those fundamental rights.

B. The scope of the right to obtain a decision on compensation for the victim within a reasonable time

120. Under Article 16 of Directive 2012/29, Member States must ensure that victims of a criminal offence are entitled to obtain a decision on their compensation within a reasonable time, in the criminal proceedings or in other legal proceedings

121. In view of the wording of that provision, the Tribunale di Bari (District Court, Bari) asserts, in its order for reference, that the defendant might use the national legislation at issue to extend the duration of the proceedings, thereby thwarting the requirement, laid down in Article 16 of Directive 2012/29, for compensation for the damage to be paid within a reasonable time. The referring court even puts forward the idea that it could be a manoeuvre that might become systematic and, due to the extension of time limits, could result in proceedings becoming time-barred.

122. I am not persuaded by that argument.

123. Under the second paragraph of Article 47 of the Charter, everyone is entitled to a hearing within a reasonable time. As I stated above, according to Article 52(3) of the Charter, the meaning and scope of that right are the same as those given it by Article 6(1) of the ECHR.

124. It is apparent from the case-law of the European Court of Human Rights that Article 6(1) of the ECHR means, in principle, that all stages of legal proceedings, whether civil or criminal, must be resolved within a reasonable time, which includes stages subsequent to judgment on the merits,[63] such as proceedings relating to legal costs or the effective recovery of a debt.

125. Although the national courts may have regard to the demands of efficiency and economy, finding, for example, that the systematic holding of hearings could be an obstacle to the particular diligence required and prevent compliance with the reasonable-time requirement,[64] the European Court of Human Rights notes, however, that the requirement that proceedings should be expeditious is only one aspect of the more general principle of the proper administration of justice[65] and that 'Article 6[(1) of the ECHR] is intended above all to secure the interests of the defence and those of the proper administration of justice'[66]

126. In the case in the main proceedings, the requirement that a decision on compensation for the victim should be given within a reasonable time cannot therefore affect the scope of the principles of orality and of direct and immediate knowledge of the case by the court, which is essential for the latter in order for it to be able to form its own view.

127. The approach adopted by the EU legislature is fully in accordance with the principles laid down by the European Court of Human Rights. As we have seen, it is clear from recitals 12 and 66 of Directive 2012/29 that the rights it sets out, which include the right to obtain a decision on compensation within a reasonable time, are without prejudice to the procedural rights of the offender and, in particular, his rights of defence and the right to a fair trial.[67]

128. Consequently, the right granted to the victim in Article 16 of Directive 2012/29 cannot alter the effective enjoyment of the procedural rights granted to the defendant, in particular in a situation such as that at issue, where the composition of the panel of judges before which the victim gave evidence has been changed due to the transfer of one of the judges, in other words, due to the occurrence in the course of the court proceedings of a circumstance that cannot be attributed to him. In such a situation, the defendant cannot be required to forfeit the effective enjoyment of his procedural rights on the pretext that it is necessary to speed up the course of justice in order to give a decision within a reasonable time on the compensation due to the victim.

63 ECtHR, 23 September 1997, *Robins v. United Kingdom* (CE:ECHR:1997:0923JUD002241093, § 28), and 21 April 1998, *Estima Jorge v. Portugal* (CE:ECHR:1998:0421JUD002455094, § 45).

64 ECtHR, 23 November 2006, *Jussila v. Finland* (CE:ECHR:2006:1123JUD007305301, § 42).

65 ECtHR, 12 October 1992, *Boddaert v. Belgium* (CE:ECHR:1992:1012JUD001291987, § 39).

66 ECtHR, 21 November 1995, *Acquaviva v. France* (CE:ECHR:1995:1121JUD001924891, § 66).

67 See point 72 of this Opinion.

129. In the present case, the referring court puts forward the idea that the defendant's objection to use of the written records of the oral evidence may constitute a deliberate obstruction to the smooth running of the criminal proceedings. Clearly, that risk cannot be excluded. It should be pointed out, however, that nearly two years elapsed between the first trial hearing, at which the victim gave evidence for the first time, on 14 April 2015, and the second hearing, on 21 February 2017, when the defence called for the victim to give evidence again following the change in the composition of the referring court. Nor is it possible, therefore, to exclude the fact that, owing to the length of time that elapsed between the two trial hearings, memories may have faded in the minds of the two judges before whom evidence was given originally. In the light of those circumstances and taking into account also the fact that one of the three judges comprising the referring court has been replaced, I think that the referring court is required above all to uphold the principle of immediacy, both in terms of time and in physical terms, and to ensure that the fundamental rights of the defendant are respected, by enabling the latter to challenge, in accordance with the adversarial principle and in the presence of all the members of the panel of judges called upon to take a decision, the statements on which his conviction may be based.

130. In the light of that information, I therefore propose that the Court should rule that Article 16 of Directive 2012/29 does not preclude national legislation which, in a legal system such as that at issue in the main proceedings, provides, in the event of a change in the composition of the first-instance court before which the victim was questioned as a witness, for a procedural arrangement whereby the defendant may object to a reading of the written record of the victim's oral evidence, thus requiring that evidence to be given again, in particular where the victim is a decisive witness, whose testimony is likely to determine the innocence or guilt of the defendant.

VI. Conclusion

131. In the light of all the above considerations, I propose that the Court should answer the question referred for a preliminary ruling by the Tribunale di Bari (District Court, Bari, Italy) as follows:

(1) Articles 16 and 18 of Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA must be interpreted as not precluding national legislation which, in a legal system such as that at issue in the main proceedings, provides, in the event of a change in the composition of the first-instance court before which the victim was questioned as a witness, for a procedural arrangement whereby the defendant may object to a reading of the written record of the victim's oral evidence, thus requiring that evidence to be given again, in particular where the victim is a decisive witness, whose testimony is likely to determine the innocence or guilt of the defendant.

    Where, on the basis of that national legislation, the defendant calls for the victim to give evidence again, the competent national authorities are required, under Article 22 of Directive 2012/29, to carry out an individual assessment in order to determine the specific needs of the victim and, where appropriate, to what extent the latter would benefit from the special protection measures provided for in Articles 23 and 24 of that directive. In those circumstances, it is for the national courts to ensure that those measures do not prejudice the fairness of the proceedings within the meaning of the second paragraph of Article 47 of the Charter of Fundamental Rights of the European Union or the rights of the defence within the meaning of Article 48(2) of that Charter.

(2) Directive 2012/29 does not preclude a Member State adopting more protective measures with regard to the hearing of victims during criminal proceedings, provided those measures do not prejudice those fundamental rights.