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Guidelines on consideration of victims and how they are affected throughout transfer processes of offenders under FD 909

STEPS2 Resettlement: Support for Transfer of European Prison Sentences towards Resettlement

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INTRODUCTION

These guidelines are realised within the framework of the project: *'Support for Transfer of European Prison Sentences towards Resettlement 'STEPS 2 Resettlement'*

In order to identify some aspects regarding the direct or indirect connection between the Framework Decision 909/2008 and Victims Directive 29/2012 and the impact that the Framework Decision 909/2008 has on victims of crime, ICED organised a focus group with nine judges from the criminal sections of the court of Ploiesti-Romania, who wished that their names remain confidential.

The guide aims to link the Framework Decision 909/2008 and the Directive 29/2012 which replaced the Framework Decision 2001/220/JHA of the EU Council and the impact that the Framework Decision 909/2008 has on victims of crime. Starting from the idea that the transfer of detainees under the Framework Decision 909/2008, should not pose a threat to the community in which they are returning, in general, and the victims in particular. This Decision also concerns the social rehabilitation of offenders in terms of public protection, it is important to identify some aspects regarding the direct or indirect connection between the two Framework Decision.

In this context, the following points were taken into consideration:

1. The purpose of these regulations, namely, providing social rehabilitation of the sentenced person, respectively, the protection, support and respect to be granted to the victim of the crime;
2. The right to a fair trial to be provided not only to the sentenced person, but also to the victim throughout the criminal trial and after it finishes;
3. A brief analysis of the state of transposition of Directive 29/2012 on EU Member States (both of those of consolidated democracy as, for example, Germany, France and others, as well as of other countries, like Romania, being on the path of democracy consolidation after communism);
4. To identify issues concerning the relationship between the Framework Decision 909/2008 and Directive 29/2012 there must be considered some provisions in the preamble of the Framework Decision 909/2008, as well as some of its provisions such as art. 4, presented and analysed beyond their point, in their spirit. This is necessary because the text of Decision 909 does not refer directly to the victims of crime and how they may be affected by criminals [NB: Framework Decision 909/2008 contains mostly procedural provisions, such as the recognition of a criminal court decision, execution of sentences etc. for EU Member States]. However, for example, from the content of point nine in the preamble of the Framework Decision it states that the sentence execution in the executing state should increase the chances of social rehabilitation of the sentenced person. Moreover, the European legislator considers that the competent authorities of the executing state shall have the certainty that social rehabilitation of the sentenced person will also be recognised (by taking into account elements such as, for example, attachment of the convicted person to the executing state, family ties, etc.) Interpreting this text in the spirit of the decision, we consider that the competent authority must take into account also the protection of victims of crime if they are in the territory of the executing state, if there is a serious risk of retaliation or serious disturbance indices and intention to invade their privacy from the sentenced person, as described in Directive 29/2012. When such elements exist, this can be a grounds for refusal from the executing state, meaning that the sentence execution in the executing state would not serve the purpose of the decision [see art. 4 paragraph (4) of

the Framework Decision]. In these cases, we consider it necessary that the authority of the executing state (before issuing the notice provided in art. 4 of the Framework Decision 909) to hear the victim of the crime and take the views of the community representatives where the sentenced person will be transferred. Also, similar problems arise when the sentence is ordered for crimes of human trafficking, domestic violence, etc., their victims being usually of increased vulnerability.

5. Emphasising if in the Member States there was developed a document or normative act in the sense of the above and how the partner countries faced with the particular aspects related to the implementation of the Framework Decision 909 in relation to the Framework Decision 29 / 2012.

Preamble

1. Taking into consideration the work and results produced in the project 'Support for Transfer of European Prison Sentences towards Resettlement 'STEPS 2 Resettlement' ;
2. Acknowledging that the responses to victims protection should be multidisciplinary and multi-agency in their approach and should be so designed as to tackle the range of factors that play a role at different levels of society: individual, family, school and community;
3. Considering that victims protection systems are characterised by a large degree of flexibility and diversity of approaches ;
4. Considering that criminal offences may cause great harm to the victims, by inflicting physical, mental or emotional harm and/or economic loss;
5. Recognising the legitimate interest of victims to have a stronger voice in dealing with the consequences of their victimisation and acknowledging that victims should have their status as a victim of crime recognised and should be treated in a respectful, sensitive, tailored, professional and non-discriminatory manner, in all contacts with criminal justice system;
6. Fully aware of the 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;

Discussions

FD 909 and Directive 2012/29 don't specifically establish that the decision on the transfer should be conditioned by the right to protection of the victim, so there isn't any legal basis to integrate "victimological reasons".

The reference to the social rehabilitation as the guiding principle of the decision in these decisions seems to rule out "victimological considerations": at this moment, both paradigms (social rehabilitation and "victimological criteria") are considered contradictory.

Concerned with thorough care and resettlement, the guidelines underline the importance of working to increase victim protection. The states shall be trying to find out how the executing state gets information about risk and what steps it then takes to manage it – both during the period of detention and afterwards. This is part of the wider question about the transfer of relevant information when FD 909 is used.

In accordance with the Framework Decision 909/2008, it is not possible to investigate the victims opinion given that the object of this normative act aims at applying the principle of mutual

recognition to court rulings in criminal matters imposing sentences to be executed in the European Union. Hearing the victim of the crime is excluded in connection to the mutual recognition of judicial decisions, in criminal matters, in order to serve the sentence execution or any other custodial measure in another EU country because the procedure established by the Framework Decision 909/2008 does not provide such activity. Based on the intended purpose, namely the recognition of a judicial ruling and enforcing the sentence in a Member State, the Framework Decision does not provide particulars on the recovery of damages by the victim of crime nor the possibility of hearing / finding their opinion, with respect to the possibility of punishment execution by the convicted person in another Member State.

The issue of victims has long been a heavily discussed subject within the criminal justice arena. During the STEPS2 Resettlement project this issue needed to be considered as it is mentioned in FD 90. Therefore it was considered in terms of finding out what each member state did in terms of victims during judgement, through the sentence and upon release. As these three stages are all quite important and relevant for victims it is something that needs to be understood during the transfer process.

Research was undertaken in the general issues affecting victims and how these might vary by country as well as the current policies in each member state. As this guide is very short and within the timeline and resources available during the project this is a guide to follow on research only and should not be taken as a single resource for victim's guidance during the transfer process.

One focus group was held in Bucharest with experts in victim's issues to give a perspective from those who are involved with victims on a first-hand basis. The victim subject was also discussed at all project board meetings in the terms of all work streams to find the similarities and differences in the individual research elements concerning victims.

The most important element of this research and focus group was to include the Victims Directive 29 which is an essential piece of legislation that should be in place in each Member State. The directive sets out the minimum standards on the rights, support and protection of victims of crime and these should be included in the sentence process in terms of asking their opinion and in some countries this goes further. In England and Wales for example there are victim liaison officers who specifically communicate with victims about the offender and any changes in their sentence or movements and when and where they will be released into the community, they are also considered in some cases during parole boards. Restorative justice is an initiative in England and Wales where the victim chooses to meet with the offender to reconcile and help both parties find a sense of understanding and rehabilitation, this has been a successful initiative in most cases but as always there are times when it only helps one party or neither. In Spain, offenders must pay a settlement to the victims while they are imprisoned and the victim's opinion holds more weight in certain courts.

Recommendations

- The victim or victims can be in several different countries so when transferring it may be an issue for both those in the issuing state and the executing state to consider especially when considering exactly where to place the sentenced person after transfer and the community that they will be released into.
- Both issuing and executing states must maintain communication after the transfer and more specifically prior to release of the sentenced person.

- The type of victim is highly important when placing a sentenced person as this could enhance the chance of reoffending if they are returned to an area that contains a high level or easy access to their previous type of victim (for example, if a paedophile then placing in an area highly populated in schools would not be suitable)
- Ready access to information for the victim about the offender must mean enhanced cooperation between Member States and a European information management system that is kept up to date.
- Any victim issues should be made known to the executing state to further enhance rehabilitation and protect the victim
- Depending on the country the level of involvement of the victim can vary but in all Member States they should be considered at least with their opinion during the judgement stage.
- The awareness rising regarding the benefits of restorative justice and victim-offender mediation should to be an important issue for Member States in order to improve cooperation between the judicial institutions and mediation services
- Research on this topic is recommended to continue in order to fundament explicitly correlation between the two Directives.
- Interpreting the texts in the spirit of the two decisions, we consider that the competent authority must take into account also the protection of crime victims if they are in the territory of the executing state, if there is a serious risk of retaliation or serious disturbance indices and intentionally to their privacy from the convicted person, as described in Directive 29/2012. The safety of particular victims and of the general public / other people should be among the criteria used in the decision process.

Conclusion

It is difficult to balance the two Directives as FD909 does not explicitly set out the status of victims. As the transfer paperwork is public and therefore available for prisoner to access, victim's details are not disclosed, but reference may be made.

Victims can vary in circumstances and can sometimes also be the family or previous support. Discussion around the Victims Directive (VD) and how far actions under FD909 have an impact upon VD and vice-versa as no clear link has been established. Several MS are only just implementing VD and have never previously collated data on victims of crime.

Some MS have specific Victim Liaison Officers who are responsible for notifying victims of key events in criminal proceedings. In cases where victims are known, the liaison officer notifies them of the transfer. However, in high profile cases (media attention), victims are invited to make representation to the Minister relating to transfer, who then seeks to balance view on social rehabilitation vs victims concerns. Does not equate to a victims veto, but definite consideration is given. Taking into consideration all these perspectives, a deep research must be realised over whether prisoners are aware of victim's rights. As long as the situation of victims of crime is not followed after a judgment becomes final sentencing, it is necessary and important to undertake a study on the profile of offenders and the possible negative effects on the victims, transfer of convicts to their country of origin if the victim is in place.

Even if the minimum standards set out in the Framework Decision 29/2012, are entered in the national laws of the Member States, it cannot be realised a connection with the Framework

Decision 909/2008 (which has no impact on victims of crime). It is necessary to amend or supplement the provisions of this Decision within the meaning of the above.

The main recommendation for Member States is communication, this is essential in order to make sure the victim is not forgotten in the transfer process and is sufficiently protected. It is also important for the sentenced person to be able to be rehabilitated and integrated back into society with the most chance of not reoffending.