

Victim Support Europe Contribution

EFFECTIVE JUSTICE – COMMON CONDITIONS FOR
TRANSFERRING CRIMINAL PROCEEDINGS BETWEEN
EU COUNTRIES



About Victim Support Europe

Victim Support Europe (VSE) is the leading European umbrella organisation advocating on behalf of all victims of crime, no matter what the crime, no matter who the victim. VSE represents 63 member organisations, providing support and information to more than 2 million people affected by crime every year in 31 countries. Since its foundation in 1990, VSE has worked on behalf of European – and global – victims of crime and terrorism, to ensure their rights are upheld and that they have access to support services, whether they report a crime or not. We work towards this mission through advocacy to improve European and International laws, through research and knowledge development, and through capacity building at the national and local levels.

Summary of VSE's Position

Cross-border crimes remain noteworthy with certain forms, such as cybercrime, rapidly increasing. Coupled with mobility within the EU, the level of cross border victimisation is likely to increase in the future, making decisions on jurisdiction ever more important for victims.

Where no system for a transfer of proceedings exists, as reflected in the Commission's paper, there can be significant and harmful repercussions on victims. Equally, any system of transfer can result in victims being severely disadvantaged, losing rights they would have otherwise had, losing protection, support and, perhaps, the genuine possibility of reasonable compensation. The potential impact – to help or harm victims – of an EU system of transfer should not be underestimated.

Victim Support Europe, therefore, broadly welcomes the initiative of the European Commission to improve judicial cooperation in criminal matters with the transfer of proceedings between Member States but emphasises this must be achieved in a manner that addresses the risks to victims.

In moving forward with this initiative, VSE believes there should be a balance of decisions in the transfer of proceedings; effectiveness, efficiency, prosecution consideration, victims and defence should all be considered equally when developing a transfer system, and in the decision of individual transfers.

- Victims should be ensured safe justice: the needs of victims, and the trauma and harm that might result from a transfer decision should be considered and addressed.
- Victims' criteria for a transfer of proceedings are of equal importance as all other criteria: EU victims' rights should be properly reflected in any transfer process.
- Victims' access to justice can be affected by definitions of crime in national law: victims must be ensured their right to access to justice across Member States.
- Victims should be involved in discussions on a transfer of proceedings: to avoid further traumatisation, and to encourage further participation in the criminal justice process, victims should be heard in decisions relating to their rights.
- Victims should not lose any rights or protection from a transfer of proceedings: the loss of victims' rights must be considered, and measures established to mitigate such loss.
- The state of the implementation of EU victims' rights should factor in a transfer of proceedings decision.
- Additional minimum EU rights for cross-border victims should be considered.

- Measures to mitigate any potential harm, resulting from a transfer of proceedings, should be considered.

VSE strongly encourages the European Commission to consider the needs of victims – for respect and recognition, for support; for provision of information; for access to justice; and for compensation or restitution – when developing this legislation. Organisations representing victims of all types of crime as well as individual victims should be consulted to allow the voice of victims to be heard and included in the development process.

EU legislation establishing a system for transfer of proceedings should include rules to mitigate any harm encountered by victims and to maximise their ability to actively participate in proceedings: it should provide coherence between the EU Victims' Rights Directive and Member State legislation. Victims must be able to trust in the justice system, so amendments will be required to the Victims' Rights Directive to enhance these rights and victims' trust in the authorities.

1. Introduction

Decades of increasing cross border travel, services, working and tourism have brought major benefits for our citizens. Yet those same benefits have facilitated cross border crimes, and resulted in investigations and prosecutions in Member States other than that in which victims reside.

Of the 75 million people, who fall victim to crime across the EU annually¹, some 2 million tourists² are 5 -10 times more likely to be a victim of crime in their two first weeks of holiday, than in any other two weeks³. Many crimes having a cross border dimension such as international terrorism, the commercial sexual exploitation of children, and human trafficking, appear to be on the rise⁴, whilst other crimes such as cybercrime and fraud are equally on the rise.

The resulting jurisdictional issues, raised by the Commission, impact on the ability of victims to see justice done, to access their rights as victims, and can cause further trauma and secondary victimisation.

Where there is a lack of clear rules for determining jurisdiction, which firmly incorporates victims' issues within the decision making process, there is clearly a higher risk of harm to victims and of failures in the justice system. As such, **VSE supports the European Commission's aim to create a legal framework, which would consider the legitimate interests of suspects, accused persons, and victims, to ensure the effective, efficient, and legal certainty of prosecutions.**

¹ Analysis carried out in "The Burden of Crime in the EU", p. 70, on results of EU International Crime Survey (EUICS) 2005 (www.europeansafetyobservatory.eu). The study indicates that around 50% of five types of crime are reported to the police but does not consider sexual assault due to the generally low reporting rates– between 15 and 28% in the EUICS. A slightly higher figure for non-reporting has therefore been assumed of 60%.

² Impact Assessment from the Commission to the EU Parliament on Directive 2012/29/EU and Regulation (EU) No 606/2013 of 18.05.2011

³ Van Dijk et al, 2002

⁴ EUROSTAT (2015). Trafficking in Human Beings. Publications Office of the European Union: Luxembourg. https://ec.europa.eu/antittrafficking/sites/antittrafficking/files/eurostat_report_on_trafficking_in_human_beings_-_2015_edition.pdf; European Police Office (2015). European Terrorism Situation and Trend Report. Retrieved 12 December, 2015, from <https://www.europol.europa.eu/content/european-union-terrorism-situation-and-trend-report-2015>

Yet, we also emphasise that to focus solely on effectiveness, efficiency and legal certainty is insufficient, out of touch with current legal norms, and fails to achieve full coherence with a range of EU victims' laws.

To be fully in line with the EU's commitment to victims of crime, including with the objectives of the EU Victims' Strategy, the objectives of any system should be extended to minimising the harm to participants, in particular, to victims. This should be achieved through:

- the criteria for determining jurisdiction; and
- through additional measures of EU law to mitigate risks of harm.

In considering necessary accompanying measures, the Commission should consider whether amendments to the EU Victims' Directive could help mitigate any negative effects of transfer of jurisdiction.

2. Framework for transferring criminal proceedings

As the Commission has reflected, a range of problems arise where conflict of jurisdiction issues exists. These include inefficient use of resources, additional burdens for concerned persons, risks of conflicting or counterproductive decisions (e.g. on taking evidence and investigation strategies), or problems regarding the fundamental right of the person concerned not to be tried or punished twice for the same offence (the *ne bis in idem* principle, Article 50 of the Charter of Fundamental Rights).

In support of an EU system of transfer, it is worth mentioning how jurisdictional issues can negatively impact on victims and can often be contrary to the core principles and rights established in the EU Victims' Directive

- **Parallel Criminal proceedings taking place in two or more Member States**

Victims affected by parallel criminal proceedings will be involved in multiple time-consuming legal investigations, perhaps in different languages. Victims must provide statements to multiple sets of police officers and court officials, interacting with several legal specialists to understand their roles in each proceeding. Not only can retelling their story lead to increased secondary victimisation, but this also prevents victims from actively – and safely – participating in the justice process. Victims must take time off work, arrange childcare, make travel (and perhaps overnight) arrangements, ensure their documents are in the correct languages, etc.; costs may be incurred, adding to losses associated with the crime. Cross-border compensation and restitution claims are complex; the offender may not be able to comply if prosecuted in two (or more) countries.

- **Criminal proceedings take place in one Member State, while another may be better placed to host them.**

Victims may be impacted as above; however, in this instance, there is the additional possibility that – if the less 'better placed' Member State hosts the judicial proceedings – the overall legal outcomes for the victims may be less advantageous. Not only have the victims been involved in a lengthy, and possibly costly, judicial investigation but the trial may not provide the closure they need.

- **No pending criminal proceedings.**

If there are no criminal proceedings to provide closure for victims, they will be left out of pocket and will remain traumatised by the crime. Their right to access to justice will not be met, nor will their right compensation or restitution.

The objectives of a transfer regime must include minimising harm to victims – safe justice

In its consultation paper, the Commission repeatedly refers to objectives such as identifying the Member State best placed to prosecute or the most efficient jurisdiction in the interest of justice. Whilst the examples of ‘efficiency’ are wide ranging and cover clearly legitimate issues, efficiency must not be seen as the primary driver or determinant for decisions on transfers. Rather it must be one aspect among a number of equally important factors.

As the EU has reflected, an effective justice system is ‘crucial for the implementation of all EU law’.⁵ Effective justice practices look at the management of caseloads, and associated backlogs, with the aim of delivering judicial decisions in a timely fashion. According to the EU Justice Scoreboard ‘the main indicators used to monitor the efficiency of justice systems are the length of proceedings, the clearance rate and the number of pending cases’⁶.

However, managing caseloads and delivering judicial decisions in a timely fashion only address the mechanics of a justice system. While effective systems may mitigate secondary victimisation by speeding up the justice process, they do not consider the effect of the crime, the investigation, or the prosecution on the victims nor the way victims are treated, interviewed, or given active roles during the judicial process. **VSE believes that effective justice systems must address how the victim is treated, and the potential trauma, harm, and secondary victimisation they may experience. They must promote a victim-centric approach from the time the crime is reported to its prosecution, trial, and post-trial proceedings.**

From a victim’s perspective the key factors to consider when developing criteria are:

- The needs of victims: respect and recognition, protection from further harm including secondary victimisation, support including information, access to justice and compensation/restoration.
- European rights’ of victims - as reflected by the above needs
- National victims’ rights and the status of victims
- The trauma and harm that a victim may experience during, and as a result of any, a transfer decision .

Victims’ criteria for transfer of equal importance

In terms of respect and recognition, the starting point is to ensure that any decision on transfer recognises the importance of victim’s criteria as being of equal importance to all other criteria. Victims’ rights are established in European law and directly linked to a number of fundamental rights and their importance should be properly reflected in any transfer process.

⁵ https://ec.europa.eu/info/sites/default/files/european-semester_thematic-factsheet_effective-justice-systems_en.pdf

⁶ https://ec.europa.eu/info/sites/default/files/eu_justice_scoreboard_2021.pdf

Definition of crime in national law can affect victims' access to justice

In relation to recognition, it should not be ignored that definitions of crimes are largely determined by national law. This can significantly impact the victim. For example, a crime such as rape is defined differently in different countries. Depending on the jurisdiction chosen e.g. between Sweden and Spain, the likelihood of victims getting justice could be dramatically affected. For some crimes such as stalking, not all Member States even recognise the act as a crime in of itself. Again, this can severely affect a victim's access to justice. How a crime is defined, evidential standards and any other procedural factors, which can negatively impact a victim's likelihood of getting justice, must be considered from both the victims' and suspects' perspective, and not just the suspects.

Victims should be involved in decisions on transfer

In line with the EU Victims Directive, as a matter of respect and recognition, victims should have the right to be heard and to be involved in decisions relating to their rights. Failure to provide victims with an opportunity to be heard can cause further trauma and frustration, which can ultimately affect the success of any criminal proceedings. It is worth recalling here that proceedings are often highly dependent on the victims' co-operation and continued participation. These actions, which minimise drop out of victims and maximise their ability to provide best evidence, are therefore as important for effective and efficient justice as they are for victim satisfaction and the minimisation of harm.

Victims should not lose rights or protection as a result of a transfer

With respect to victims' rights, whilst a range of EU harmonising laws do exist, Member State justice systems vary widely, significant variations and exemptions to EU law are permitted and the level of implementation between Member States is also wide ranging.

In making a decision to transfer, victims could find themselves in a disadvantageous position in terms of their ability to access their rights, and in terms of the very rights that exist. In some Member States, victims are recognised as parties to proceedings whilst in others, they are considered as mere witnesses with a highly limited role. A decision to transfer in these circumstances could dramatically decrease a victim's rights. This could for example result in victims no longer having access to legal aid, legal representation, a right to direct the investigation in some way, and no longer having many other rights.

Not only may victims lose rights, but they may find themselves under very different protection regimes since protection orders are not currently harmonised. A transfer of proceedings should not result in victims receiving a reduced level of protection. **To minimise such risks the EU Commission should consider whether minimum standards on protection measures as part of an amendment to the EU Victims Directive could facilitate the safe transfer of proceedings.**

The loss of the rights of a victim must be a fundamental consideration when determining best jurisdiction. In addition, the EU Commission should consider what measures can be established to mitigate any loss of rights resulting from transfer. For example, where a victim has a right to legal aid in one Member State, it could be required that this is maintained in the Member State which proceeds with the case.

Beyond victims' rights within criminal proceedings, their rights to state and offender compensation must also be taken into account and addressed in a manner which, at the least, does not put victims into a disadvantageous position.

The state of implementation of EU victims' rights should be factored into a transfer decision

Even where the standing of the victim is not affected, the state of implementation of the Victims' Directive means that a victim's experience of justice, including the way they are treated, can be much worse in some countries than others. This may be reflected in e.g. a lack of protection measures, information provision, individual needs assessment, support services, and more.

Just as the enforcement of defence rights affects trust in systems and can influence decisions on transfer or e.g. extradition, the state of implementation of victims' rights in any given Member State cannot be ignored and should be considered as a relevant criteria when deciding on any transfer.

Additional minimum EU rights of victims should be considered when developing a transfer system

It can be anticipated that addressing these matters will be practically and politically complex. As such, the EU Commission should explore whether for the transfer of proceedings an additional layer of minimum victims' rights should be established to facilitate simplified decision making mechanisms.

Given that victims in a cross border situation are highly vulnerable, often have much greater difficulties in enjoying their rights compared to victims in a national situation, and that they may lose rights they would have if the proceedings remained in their country of residence, it may be necessary for the effective operation of a transfer system to ensure additional measures for e.g. information provision, assistance to participate and be heard in proceedings such as legal representation and support throughout the proceedings. In addition, it should be explored how to enable and empower organisations representing victims of crime as well as victims themselves to be consulted to allow the voice of victims to be heard and included in transfer decisions.

Measures to mitigate potential harm resulting from a transfer

A range of minimum rights have already been suggested above. However, other mitigating actions could also be put in place which are not necessarily connected to the establishment of new rights.

For example, active participation could be greatly facilitated by the use of new technology, information sharing systems, online video conferencing facilities etc. Participation in person could also be facilitated by paying for the costs of travel, accommodation etc. In considering such costs, these should not be limited only to where a victim is giving testimony or bearing witness. If victims' rights are to be limited as a result of a transfer, then mitigation measures should go beyond the bare minimum to ensure prosecutors are able to get a witness to court.

In addition to measures allowing victims to actively participate, measures to help them to listen to proceedings should also be put in place. As has been seen in the Paris terrorism trials, the radio platform for victims has been highly appreciated and successful. This type of victim centric innovation, couple with appropriate support and interpretation and translation should be explored.

As individual Member States have their own criminal trial procedures and associated requirements, information on their differences, and similarities must be highlighted in a victim-centric manner once any decision on a transfer of proceedings has been reached. After agreeing that a transfer of proceedings is to take place, to be able to participate fully the victim must be provided with timely access to translation and interpretation services. Member States must agree to the provision of these services and determine who will be responsible for their payment.

The cost benefit to victims for a transfer of proceeding, through harmonized Member State legislation and in coherence with the Victims' Rights Directive, will be that their active participation in timely – victim orientated – efficient investigations, and criminal proceedings, can provide them with the

opportunity to find closure and to mitigate secondary victimisation as well as simplifying the judicial process for all concerned.

When exploring solutions to mitigate the risks of any transfer decision, the EU Commission should consider whether such solutions can best be achieved through enhanced rights not only within an EU transfer law but also through amendments to the EU Victims' Directive.