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Restorative Justice in socioeconomic and corruption crimes

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RESTORATIVE JUSTICE IN SOCIOECONOMIC AND CORRUPTION CRIMES

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Material Competence of the EPPO

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PIF Crimes

- Offences affecting the financial interests of the European Union
(fraud in respect of non-procurement-related expenditure, fraud with respect to procurement-related expenditure, Fraud with respect to revenues other than VAT, VAT fraud, money laundering, bribery, embezzlement).
- Participation in a criminal organization focused on committing PIF offences.
- Offenses that are *inextricably linked* to those falling in the first cluster

Supra-individual legal assets of exclusive state ownership

- Owners: the state or a part of the administration.
- The only ones who could legitimately defend these interests should be the Public Prosecutor's Office and the State Attorney's Office (e.g. offences against public order or offences against the Constitution).

Supra-individual legal assets of shared state ownership

- Owners: ownership is held jointly by all citizens, the international community or humanity itself.
- The state assumes the "representation" of the protected interest, although not exclusively (e.g. tax fraud, bribery, embezzlement, etc.).

Is the response of the traditional penal system satisfactory?

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- They protect supra-individual legal interests (of a collective or diffuse nature).
- Neither the community owning the interest nor the associations acting on its behalf are recognised as injured parties.
- When the state acts on our behalf, it weakens our sense of community and makes us invisible as victims.

- The damages are not always direct and economic in nature, but social (social damage), indirect and diffuse (affecting an indeterminate group of people, society as a whole).
- e.g., loss of public confidence in certain institutions

- Civil liability *ex delicto* (arts. 109 et seq. CC) is granted in favour of individuals or groups of individuals identified when it is proven that they have suffered damage as a direct and necessary consequence of the criminal act.
- There is no channel for claiming reparation for the social damage resulting from these offences.

PIF crimes and restorative justice: problematic issues

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Socioeconomic and corruption crimes present different characteristics from classic crime - the hard core of criminal law- which represent, at the very least, several challenges for carrying out restorative justice processes.

Victim

- Absence of an identifiable individual victim.
- The victim is the collective, society, the State that is the owner of the legal interest protected.

Damage

- Problematic identification of the reparable damage or harm.
- There is no direct damage or harm to be quantified and agreed in favour of the victim.

PIF crimes and restorative justice: challenges

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1. Delimitation of the concept of restorative justice
2. Participation in restorative encounters: legitimation
3. Redefinition of the damages (material and immaterial) of a collective nature resulting from these offences.
4. Most appropriate restorative practice

Restorative practices: classification

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Only when all three sets of primary stakeholders are actively involved, such as in conferences or circles, is a process “fully restorative.”

Why only a natural person as victim in restorative justice?

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Directive 2012/29/UE

Victim

A **natural person** who has suffered harm, including physical, mental or emotional harm or economic loss which was directly caused by a criminal offence (art. 2)

The CJEU judgment C-205/2009 of 21 October 2010 held that “Articles 1(a) and 10 of the Framework Decision must be interpreted as meaning that **the concept of 'victim' does not include legal persons for the purposes of promoting mediation in the criminal cases (...)**”.

However, 'the Framework Decision neither prevents nor obliges Member States to apply its provisions also in cases where the victim is a legal person'.

2. The positive effects of restorative justice for the victim have also traditionally focused on psychological or emotional benefits.

1. The crime in this area has been represented as "a violation of one individual against another", which appeals to personal victimisation

4. The institutional representative is perceived as an impersonal authority figure, unable to convey to the offender the effects caused by the crime as would a natural person who has directly suffered the consequences of the crime

3. Difficulties in determining who acts as the representative of the legal person

Supra-individual legal interest: procedural standing

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The defence of supra-individual interests, at least in the procedural field, can be legitimately exercised by associations, corporations or groups representing the community to which the legal interest is linked (e.g. environmental associations, consumer protection associations, etc.).

International legislation

Directive 2004/35/CE on environmental liability with regard to the prevention and remedying of environmental damage

Art. 12.- Request for action

1. Natural or **legal persons**:

- a) affected or likely to be affected by environmental damage
- b) **having a sufficient interest in environmental decision making relating to the damage (...)**

What constitutes a 'sufficient interest' shall be determined by the Member States. To this end, **the interest of any non-governmental organisation promoting environmental protection and meeting any requirements under national law shall be deemed sufficient for the purpose of subparagraph (b).**

National legislation

Organic Law 6/1985, 1st July, on the Judiciary

Art. 7.3: Judges and Courts will protect legitimate rights and interests of individuals and groups to avoid defencelessness of citizens. **In order to uphold the rights of groups, associations, entities and bodies which have been affected or are legally authorised to defend and foster such rights may appear before the Courts.**

Criminal Procedure Code

Art. 109 bis 3:

Criminal proceedings may also be initiated by associations of victims and by legal persons which the law recognises as having legitimacy to defend victims' rights, as long as this is authorised by the victim of the offence.

Legitimised victims: restorative encounter

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Representatives of the collective interest

(e.g. associations or organisations acting on behalf of collective interests, groups representing the branch of activity that has been affected by the offence or representatives of a certain economic sector).



Those individuals or groups who have been directly harmed by the offence

(the beneficiaries of the civil liability)



Those individuals or groups who have suffered indirect or collateral damage

(e.g. the employees of the offending company through their trade union or workers' representatives or the shareholders of an offending company who face a fine or a disqualification or reduction of their economic capacity to act).

Associations or groupings representing the collective interest: selection criteria

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Its **corporate purpose must be closely related to the legal interest that has been harmed**

The **association or organisation must be legally constituted and registered in the register of associations prior to the commission of the offence affecting its interests.**

Term? 2 years in environment.

Territorial scope:

- a) territorially based associations coinciding with the place where the crime was committed (geographical community).
- b) other organisations representing these interests (community of identity)
(e.g. Transparency International, GRECO, the Executive Service of the Commission for the Prevention of Money Laundering and Monetary Offences)

The object of restorative encounters: damage and restorative outcomes

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- The damages resulting from these crimes is social, indirect and diffuse.
- **Social damage:** damage suffered by the collective interest regardless of the specific damage suffered by individuals.
 - Material social damage:** cost overruns in the construction of a work contracted by the state or financial costs associated with improper payments received by public officials.
 - Intangible social damage:** potential decrease in the economic income of the population, reduction of foreign investments, deficient provision of basic public services, citizenship in certain institutions or companies, reputational damage for entities in the same sector, etc.
- All those entitled to intervene in restorative encounters could contribute to:
 - ✓ determine the "damage" in a broad sense caused by the offence.
 - ✓ propose the actions they would consider appropriate to repair the damage inflicted on society (deliberative reparation) (e.g. order to notice to victims, what measures should be taken by the offending company to avoid a repetition of the offence, strengthening the culture of compliance, community fines, to give a specific destination to the confiscation of the proceeds, etc.). Possible combination of public and private sanctions

Restorative best practice: conferencing

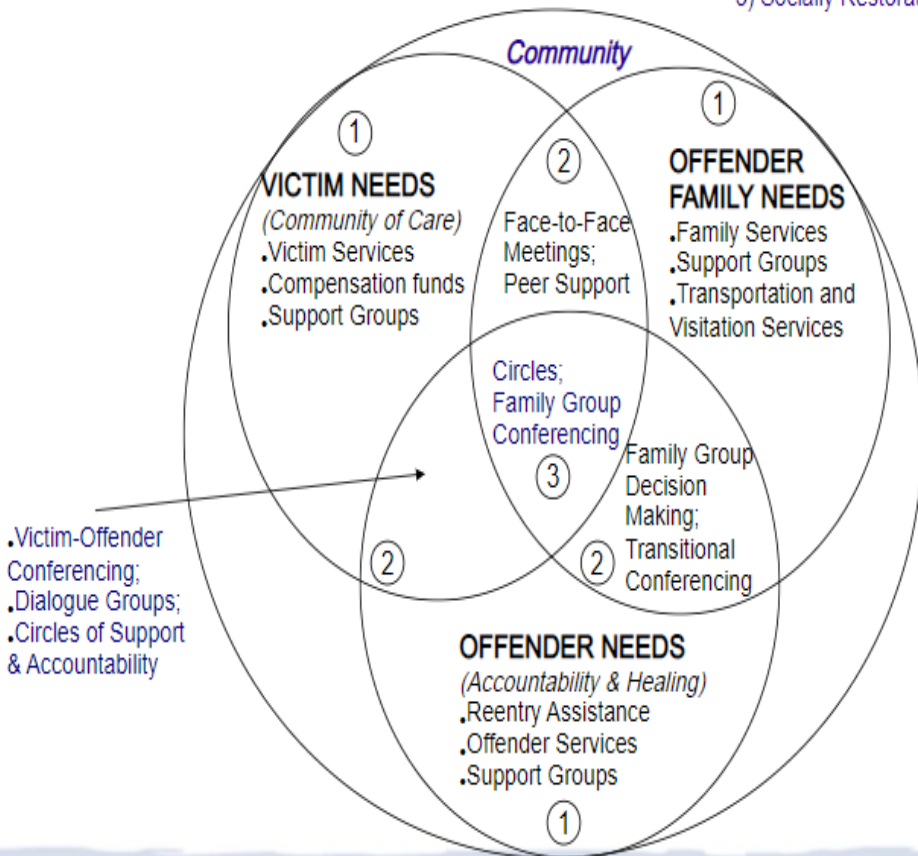
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Levels of Restorative Practice

- 1) Individually Restorative
- 2) Relationally Restorative
- 3) Socially Restorative

Restorative Values

Community



Conferencing

A restorative justice practice that aims to involve all those who have been affected by a crime in the process of deciding how best to respond to the crime.

Community

When the State acts on our behalf, it weakens our sense of community.

Giving access to the process and also to the restorative meetings to associations or groups of citizens:

- ✓ would make society co-responsible.
- ✓ would generate networks, collective links.
- ✓ would involve the community in the solution of the issues that affect them.
- ✓ would make visible to the perpetrator the damage resulting from his/her action.

Restorative justice and criminal process

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- **Restorative justice can act as an effective complement to the exercise of the opportunity principle.**
- An interesting provision in this respect is envisaged in a preliminary draft law on Criminal Procedure Code.
- In this regard, it is established that it will be the Public Prosecutor who may, *ex officio* or at the request of a party, refer the parties to a restorative procedure (art. 182.1 APLECrIm). Once the process is concluded, the restorative justice service will issue a report on the positive or negative result of the activity carried out, accompanying, in the positive case, the reparation certificate with the agreements reached by the parties (art. 183.1 APLECrIm).
- The Public Prosecutor, assessing the agreements reached by the parties, the concurrent circumstances and the status of the procedure, may:
 - ✓ **decree the file by opportunity**, imposing as rules of conduct the agreements reached by the parties (arts. 181 to 185 and art. 773) (opportunity principle)
 - ✓ **proceed according to the special rules of the plea agreement.**

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