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# Briefing Paper about the Regulation of Restorative Justice in the Directive 2012/29/EU

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**2016**

**Briefing paper about the regulation of restorative justice in the Directive 2012/29/EU from the point of view of the European Forum for Restorative Justice.**



This publication has been funded with the support of the European Commission. The sole responsibility of this publication lies with the EFRJ. The European Commission is not responsible for any use that may be made of the information contained herein.

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## INTRODUCTION

### Aim of the Briefing Paper

The *Directive 2012/29/EU* (hereinafter referred to as *Victims' Directive*) establishing minimum standards on the rights, support and protection of victims of crime was adopted on 25 October 2012. The Victims' Directive was to be implemented by the Member States into their national law by 16 November 2015.

This *Briefing Paper*<sup>1</sup> launched by the European Forum for Restorative Justice (EFRJ) aims to assess the potential and to highlight the limits provided by the Victims' Directive in relation to the *regulation of restorative justice* in the European Union (EU).

Members of the EFRJ and all other stakeholders with an interest in the further development of restorative justice in Europe are invited to send their comments to the EFRJ and also answer the brief survey launched together with this Briefing Paper.

The EFRJ will subsequently develop a *Position Paper* with extensive policy recommendations for Member States and the European Commission (EC) on behalf of the EFRJ.

### European Forum for Restorative Justice

The EFRJ since its creation in 2000 has focused primarily on the application of restorative justice to criminal matters. Despite its main focus, other areas, such as family, school and community mediation, are also considered important.

The general aim of the EFRJ is to contribute to the development of restorative justice throughout Europe. To achieve this aim, the EFRJ:

- √ promotes international information exchange and mutual support;
- √ promotes the development of restorative justice policies, services and legislation;
- √ raises awareness about restorative justice;
- √ stimulates research on restorative justice;
- √ assists in the development of principles, standards, training and good practice.

The EFRJ through its projects, events, and publications promotes continuous *cooperation* between practitioners, policymakers and researchers. This Briefing Paper reflects this ongoing cooperation, which we hope to further stimulate in the future.

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<sup>1</sup> The author would like to acknowledge the support of Katrien Lauwaert in drafting this paper, and especially her already existing extensive work on the regulation of restorative justice in the Victims' Directive, on which this paper is largely based.

**THE DIRECTIVE 2012/29/EU****Context**

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The question of the standing of victims of crime in criminal proceedings has recently gained significance both at international and national levels of legal systems. Triggered by a series of instruments adopted at the United Nations<sup>2</sup> and the Council of Europe<sup>3</sup>, and by the increased cross border mobility within the EU, the issue gradually became a *legislative priority* at EU level.

The main contribution to the implementation of the procedural rights of victims was made by the Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings (hereinafter referred to as *Framework Decision*), in which the EU expressed its commitment to foster the rights of victims of crime in a consistent and comprehensive manner. The Framework Decision was the first international hard law instrument on the position of victims of crime (see Pemberton and Rasquete, 2010).

Nevertheless after more than a decade, the Framework Decision's intention for consistency in the implementation of victims' rights was not achieved (see Hinajeros, 2008; Groenhuijsen and Pemberton, 2009; Groenhuijsen, 2014). Based on the assessment reports on the effective implementation of the requirements of the Framework Decision in 2004 and 2009, the EC deemed that Member States had not adequately complied with their obligations.

Consequently, recognising the importance of a coordinated and long-term strategy, in December 2009 the EC adopted the Stockholm Programme including a package of EU legislative proposals. In June 2011 (during the Hungarian Presidency), the EC passed a Resolution of the Council on a roadmap for strengthening the rights and protection of victims in criminal proceedings (known as the "*Budapest Roadmap*"). The roadmap stated that the Framework Decision was outdated and that new legislation was needed to protect victims' rights.

The EC submitted on 18 May 2011 a package of instruments aimed at improving the existing system of protection of victims, which included a Communication on the protection of victims of crime as well as a proposal for a Directive establishing minimum standards on the rights, support and protection of victims of crime. The negotiations on the draft Directive started later in 2011 (under the Polish Presidency), and in 2012 the European Council and the Parliament adopted

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<sup>2</sup> The United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (passed and adopted on 29 November 1985); United Nations Convention against Transnational Organized Crime (adopted on 15 November 2000); the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially in Women and Children; and the United Nations Convention against Corruption (adopted on 9 December 2003).

<sup>3</sup> For example the Recommendation No. R (85)11 of the Committee of Ministers to member states on the position of the victim in the framework of criminal law and procedure (adopted on 28 June 1985); Recommendation No. R (87)18 of the Committee of Ministers to member states concerning the simplification of criminal justice (adopted on 17 September 1987); Recommendation No. R (87)21 of the Committee of Ministers to member states on assistance to victims and the prevention of victimisation (adopted on 17 September 1987 but replaced by the following Recommendation); Recommendation Rec (2006)8 of the Committee of Ministers to member states on assistance to crime victims (adopted on 14 June 2006) which stipulate various procedural rights for victims.

*Directive 2012/29/EU* establishing minimum standards on the rights, support and protection of victims of crime (Victims' Directive), which replaced the Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings.

## **Legislative status of the Victims' Directive**

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The Victims' Directive replaces the Framework Decision and is a legally binding instrument. The EU Member States<sup>4</sup> were obliged to transpose the Victims' Directive into their domestic national laws by 16 November 2015. The EC has issued a *Justice Guidance Document* (hereinafter referred to as the Guidance Document) interpreting the provisions of the Victims' Directive that would make it easier for the Member States to ensure victims' rights at the EU level. Additionally the EC has invested a considerable amount of resources in order to prepare Member States for November 2015, including the award of grants to EU-wide projects aiming to help with the Victims' Directive's implementation.

Member States are expected to transpose the provisions of the directive into binding provisions. After the transposition date, Member States must have implemented at least the Victims' Directive's *minimum standards*. However Member States have some discretion on how to interpret and implement certain provisions in the Victims' Directive. Likewise they are free to extend the rights beyond the minimum standards provided for in the Victims' Directive.

The EC assesses the extent to which each Member State has put in place measures or (if necessary) legislation in order to comply with the Victims' Directive. Each Member State sends therefore its officially adopted texts, which implement the Victims' Directive in its country, to the EC, which examines their compliance. After the evaluation, the EC decides whether or not to begin *infringement proceedings* against a Member State, which could also lead to proceedings in the European Court of Justice. If the EC is successful the Member State has to take actions to remedy the breaches and violations. Likewise, infringement proceedings by the EC can also be triggered by the submission of complaints by citizens or entities (for example civil society organisations) residing in a Member State which indicate explicitly the violation of EU law by the national authorities, regardless of whether their own rights have been violated. The complaints need to be obviously well substantiated and backed with the necessary documents and facts that proves the breaches of the Directive.

By 16 November 2017, and every three years thereafter, Member States must provide the EC with *data* showing how victims have accessed the rights set out in the Victims' Directive. Recital 64 specifies what type of statistical data should be provided, including at least the number and type of crimes reported and, if known and available, the number of victims, and their age and gender. Relevant statistical data can include judicial, police and administrative data. The last type of data can be collected by health and social services, victim support organisations and restorative justice services and other organisations working with victims.

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<sup>4</sup> Specifically: Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, and United Kingdom.

## Structure and content of the Victims' Directive

The Victims' Directive contains overall 72 *recitals* and 32 *articles* divided into 6 *thematic chapters* concerning: general provisions (Chapter 1); provision of information and support (Chapter 2); participation in criminal proceedings (Chapter 3); protection of victims and the recognition of victims with specific protection needs (Chapter 4); other provisions (Chapter 5); and final provisions (Chapter 6).

<b>Structure and content</b>	
<b>Chapter 1</b> General provisions	<b>Art. 1</b> – Objectives
	<b>Art. 2</b> – Definitions
<b>Chapter 2</b> Provision of information and support	<b>Art. 3</b> – Right to understand and be understood
	<b>Art. 4</b> – Right to information from first contact
	<b>Art. 5</b> – Right of victims when making complaints
	<b>Art. 6</b> – Right to receive information about their case
	<b>Art. 7</b> – Right to interpretation and translation
	<b>Art. 8</b> – Right to access victim support services
<b>Chapter 3</b> Participation in criminal proceedings	<b>Art. 9</b> – Support from victim support services
	<b>Art. 10</b> – Right to be heard
	<b>Art. 11</b> – Rights of decision not to prosecute
	<b>Art. 12</b> – Right to safeguards in restorative justice
	<b>Art. 13</b> – Right to legal aid
	<b>Art. 14</b> – Right to reimbursement of expenses
	<b>Art. 15</b> – Right to return of property
<b>Chapter 4</b> Protection and specific needs	<b>Art. 16</b> – Right to decision on compensation
	<b>Art. 17</b> – Rights of victims resident in other Member States
	<b>Art. 18</b> – Right to protection
	<b>Art. 19</b> – Right to avoid contact
	<b>Art. 20</b> – Right to protection during criminal investigations
	<b>Art. 21</b> – Protection of privacy
	<b>Art. 22</b> – Individual assessment
<b>Chapter 5</b> Other provisions	<b>Art. 23</b> – Protection for specific needs during investigations
	<b>Art. 24</b> – Protection of child victims during criminal proceedings
<b>Chapter 6</b> Final provisions	<b>Art. 25</b> – Training of practitioners
	<b>Art. 26</b> – Cooperation and coordination of services
	<b>Art. 27</b> – Transposition (16 November 2015)
	<b>Art. 28</b> – Provision of data and statistics (16 November 2017)
	<b>Art. 29</b> – Report (Commission by 16 November 2017)
	<b>Art. 30</b> – Replacement of Framework Decision 2001/220/JHA
<b>Art. 31</b> – Entry into force (15 November 2012)	
<b>Art. 32</b> – Addressees (to Member States)	

The Victims' Directive provides for *new rights* and strengthens the already existing standards of protection<sup>5</sup>. In terms of *scope*, the Victims' Directive applies to criminal offences committed within the EU and to criminal proceedings taking place in the EU, regardless of whether the victim is an EU citizen or not, and whether he or she resides in the EU (recital 13). This will have obviously important implications for third country nationals, undocumented migrants and stateless persons who become victims of crime in the EU given that the Victims' Directive applies to them equally and addresses a number of barriers that limit their access to justice, for example language barriers (see the PICUM Guide to the Victims' Directive, 2015). Additionally, the Victims' Directive, compared to other more tailored and specific instruments, provides for rights and protection for *all* victims of crime. The interpretation of criminal proceedings is also broad and refers to the moment at which a complaint is made or when authorities initiate criminal proceedings *ex officio* (recital 22).

Furthermore, compared to the Framework Decision, the Victims' Directive extends the scope of the definition of a *victim* to family members and defines them (see Article 2.1a and 2.1b). Victims are defined as natural (instead of legal) persons who have suffered harm, including physical, mental or emotional harm or economic loss which was directly caused by criminal offence. Family members of a person whose death was directly caused by a criminal offence and who have suffered harm as a result of that person's death are also considered victims, allowing them to benefit from the victim's rights set out in the Victims' Directive. Nevertheless, one of the pitfalls is that family members of survivors are not included. Member States are also invited to use 'inclusive' understandings of family members, especially with regards to victim's partners, without prejudice to the legal status of their unions (e.g. marriage).

Various provisions in the Victims' Directive, especially as they relate to 'role of the victim in the criminal justice' (recital 20), are *qualified* by recourse to national law, both in the application of the rights of the victim and in the procedure to be adopted to achieve these rights (Blackstock, 2012). It is therefore 'the role of the victim' in the relevant criminal justice system (not to be confused with the definition of the victim) that determines the direction for the implementation, the criteria and the scope of some of the rights of the Victims' Directive, for example the right to a review of a decision not to prosecute, the right to compensation or reimbursement, the right to interpretation, or the right to be heard (see also Buczma, 2013; Lauwaert, 2013). Most of the rights and support are given to all victims of crime, while some are clearly ensured only for the victims that have made a formal complaint, or that have a role in the criminal proceedings.

One of the main characteristics of the Victims' Directive, argues Lauwaert (2013), is the orientation of a *personalised approach* towards victims. The Victims' Directive obliges Member States to ensure that victims' needs are addressed on the basis of personal characteristics (e.g. gender, disability, age, maturity, relationship to offender, etc.) and individual assessment (Lauwaert, 2013). This approach will clearly increase the needs-based evaluations and risk-assessment testing on behalf of competent authorities. Although the personalised approach is appreciated by many, there have been voices of criticism (e.g. organisations working victims with

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<sup>5</sup> For an extended analysis of rights introduced in the Victims' Directive see Buczma (2013).

disabilities) who think that a social, structural or ecological approach that does not merely conduct individual assessment and offer individual remedies, but aims at changing systems and structures that create and maintain obstacles for victims of crime would have been more adequate.

Starting from the assumption that victims can make use of their rights only if they are aware of them Lauwaert (2013) highlights that an important mechanism for increasing the effectiveness of victims' rights set out in the Victims' Directive is the introduction of the obligation to offer *information* on all the rights without unnecessary delay from the first contact victims have with a competent authority (Article 4). The competent authorities acting in the criminal proceedings will be determined by national law, but they generally refer to a broader group than 'law enforcement agencies'. The emphasis again here is the individually tailored effective communication and differentiated information to the victims, which can in the long run be beneficial but can also lead to the increase of discretionary practices.

Important emphasis in the Victims' Directive has been given both to the *training* of all practitioners and professionals in contact with victims, and to *cooperation and coordination of services* both within Member States and among them (Recital 61, 62, 63, and Article 25 and 26). In relation to training, the Victims' Directive expects Member States to provide training to police, court staff, judges, prosecutors, lawyers, and members of staff of victim support and restorative justice services on increasing their awareness of victims' needs. DG Justice has funded many projects for training practitioners and continues to do so under the Justice Programme. In relation to cooperation and coordination of services, Member States are urged to exchange best practices, consult in individual cases and assist European networks working on matters directly related to victims' rights (see also Buczma, 2013; Lauwaert, 2013).

Finally, *restorative justice* has been acknowledged in the Victims' Directive<sup>6</sup> as an important way to take into account interests and needs of the victim, and to repair the harm done to the victim as well as to avoid further harm (see Buczma, 2013: 247; Gavrielides, 2015; Lauwaert, 2013). Already a decade ago, Jolien Willemsens (2008) had foreseen the possibility of a right to restorative justice to be incorporated in instruments dealing both with victim and offender rights. She had articulated such a right to be operationalised in three elements: right to complete, understandable and unbiased information about restorative justice; right to a voluntary decision whether or not to engage in restorative justice practices; and right to access a good quality restorative justice service. In what follows, the position of restorative justice in the Victims' Directive is analysed in a more detailed fashion.

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<sup>6</sup> Besides the Victims' Directive, instruments worthwhile mentioning are the Committee of Ministers Recommendation Rec (99) 19 concerning mediation in penal matters (Council of Europe, 1999); Resolution 2002/12 of the Economic and Social Council of the United Nations on basic principles on the use of restorative justice programmes in criminal matters (United Nations Economic and Social Council, 2002); Council of Europe Recommendation No. R. (2003) 20 concerning new ways of dealing with juvenile offenders and the role of juvenile justice (Council of Europe, 2003); Council of Europe Recommendation No.R. (2008) 11 on European Rules for Juvenile Offenders Subject to Sanctions or Measures (Council of Europe, 2008); Council of Europe Recommendation No.R. (2006) 2 concerning the European Prison Rules (Council of Europe, 2006).

## RESTORATIVE JUSTICE IN THE VICTIMS' DIRECTIVE

The Victims' Directive provides an adequate definition of restorative justice services, introduces an obligation for the Member States to inform victims as to the availability of restorative justice services and to facilitate referrals to these services, and provides safeguards for victims of crime in relation to restorative justice. The Victims' Directive recognises on the one hand the benefits of restorative justice for victims of crime, and on the other hand focuses on important safeguards to prevent secondary and repeat victimisation (recital 46). Both the benefits and the safeguards have been established in practice and research. The Victims' Directive introduces restorative justice mainly through recital 46, article 2.1.d, article 4j (right to receive information from the first contact with a competent authority), and article 12 (right to safeguards in the context of restorative justice services).

### The importance and ambivalence of the broad definition

The definition of restorative justice in the Victims' Directive is clearly an open definition, allowing for different kinds of restorative justice *processes* and *outcomes*. The definition overall focuses on some of the core principles of restorative justice: the *active participation* of the people involved in the crime, the *voluntariness* of the parties to participate and the *impartiality* of the third party present during the process (APAV, 2016: 133).

#### Article 2.1d

Restorative justice means any process whereby the victim and the offender are enabled, if they freely consent, to participate actively in the resolution of matters arising from the criminal offence through the help of an impartial third party.

The definition by qualifying the activity taking place in the restorative process as *active participation*, includes potentially also processes whereby communication between victim and offender is organised not through an actual face-to-face meeting, but through indirect mediation such as 'shuttle diplomacy', or via letters and video messages. Although not matching the benefits of face-to-face meetings, these practices too have been shown to lead to satisfactory results for the participants, especially in the case of very serious offences, when the victim does not wish to meet with the offender (see APAV, 2016; Lauwaert, 2013; Gustafson, 2005; Flaten, 1996).

Likewise, shifting the emphasis from the outcome of obtaining an agreement towards the restorative *process* and the active participation of the stakeholders in this process, is also important, because research has shown that successful mediation processes may focus purely on a fruitful exchange of information and communication between parties without coming to an agreement (see Madsen, 2004, 2005; Aertsen and Peters, 1998; Rugge and Cormier, 2003).

The definition of restorative justice provided in the Victims' Directive is the same as that in the Recommendation R (99) 19 of the Council of Europe, with the only difference that 'mediation' has been replaced with 'restorative justice'. This change in terminology reflects accurately the developments in restorative justice in Europe, which indeed is not just about victim-offender mediation but about a *variety of practices*. In fact, in recital 46, differentiating restorative justice further, the Victims' Directive acknowledges the variety of the restorative justice services, as 'including for example victim-offender mediation, family group conferencing and sentencing circles'.

Furthermore, most importantly, the definition by not specifying or qualifying timing restrictions, leaves room for a restorative process which can take place at *any stage* of the criminal proceedings from investigation to sentence and even post-sentence. This also reflects the current development of restorative justice in Europe, both in terms of legislation and practices (see APAV, 2016; Dünkel et al., 2015; Lummer et al., 2011). In the Guidance Document, the EC acknowledges further that restorative justice services encompass a range of services, whether attached to, running prior to, in parallel with or after criminal proceedings (pre-trial and post-trial).

While the broad and inclusive definition of restorative justice in the Victims' Directive intends to cover the variety, the sheer existence of this variety is at the same time what can also lead to *ambivalence*. As shown for example by the IVOR project (APAV, 2016), only a few countries mention explicitly the *term* 'restorative justice' in their legislation, while most of the Member States use either the term 'victim-offender mediation' or other terms such as 'offense resolution', 'out of court settlement', 'settlement with intermediary', 'settlement agreement', 'conciliation', or 'reconciliation'. Even if nominally, the terminology indicates the differences of what is intended in the Victims' Directive and what already exists in the Member States. This difference becomes relevant for example when collecting data, when offering information, and especially when assessing the level and forms of safeguards and standards.

Additionally, besides the terminology, there are also ambiguities created by the existing differences in *scope, core principles, or objectives* of both legislation and practice. For example in some cases, restorative justice is understood to be an 'alternative conflict resolution' mostly used in civil, family or labour cases. In other cases, contrary to the core principles of restorative justice, non-communicative methods which do not involve the victim such as 'community work' or 'compensation' for the damages are also mentioned as part of restorative justice programmes. Finally, in other cases, restorative justice services are still used merely as diversion measures in favour of the offender (see APAV, 2016; Dünkel et al., 2015).

Despite the important open and broad definition of restorative justice in the Victims' Directive, it is the national legislative, institutional and practice-related contexts that will determine its implementation, especially in terms of influencing victims' *experiences* with restorative justice (see Bolivar et al., 2015; Gavrielides, 2015).

## The right to receive information

Under the right to receive information from the first contact with a competent authority, Member States should guarantee that information is provided to victims on available restorative justice services without unnecessary delay, from their first contact with a competent authority (Article 4.1j).

<b>Article 4</b> <b>Right to receive information from the first contact with a competent authority</b>	
1) Member States shall ensure that victims are offered the following information, without unnecessary delay, from their first contact with a competent authority in order to enable them to access the rights set out in this Directive:	
<b>(a)</b>	the type of support they can obtain and from whom, including, where relevant, basic information about access to medical support, any specialist support, including psychological support, and alternative accommodation;
<b>(b)</b>	the procedures for making complaints with regard to a criminal offence and their role in connection with such procedures;
<b>(c)</b>	how and under what conditions they can obtain protection, including protection measures;
<b>(d)</b>	how and under what conditions they can access compensation;
<b>(e)</b>	how and under what conditions they can access legal advice, legal aid and any other sort of ad-vice;
<b>(f)</b>	how and under what conditions they are entitled to interpretation and translation;
<b>(g)</b>	if they are resident in a Member State other than that where the criminal offence was committed, any special measures, procedures or arrangements, which are available to protect their interests in the Member State where the first contact with the competent authority is made;
<b>(h)</b>	the available procedures for making complaints where their rights are not respected by the competent authority operating within the context of criminal proceedings;
<b>(i)</b>	the contact details for communications about their case;
<b>(j)</b>	<b>the available restorative justice services;</b>
<b>(k)</b>	how and under what conditions expenses incurred as a result of their participation in the criminal proceedings can be reimbursed.
2) The extent or detail of information referred to in paragraph 1 may vary depending on the specific needs and personal circumstances of the victim and the type or nature of the crime. Additional details may also be provided at later stages depending on the needs of the victim and the relevance, at each stage of proceedings, of such details.	

In line with the personalised approach in the Victim's Directive, the extent or detail of information given may vary depending on the specific needs and personal circumstances of the victim and the type or nature of the crime, and additional details may also be provided at later stages depending on the needs of the victim and the relevance, at each stage of proceedings, of such details (Article 4.2). Furthermore, Recital 21 urges for effective communication strategies, stating: "Information and advice provided by competent authorities, victim support services and restorative justice services should, as far as possible, be given by means of a range of media and in a manner which can be understood by the victim. Such information and advice should be provided in simple and accessible language".

The importance of this article for restorative justice cannot be underestimated, as research has constantly shown that lack of information about restorative justice is one of the main obstacles and reasons for its underuse (see Willemsens, 2008; Laxminarayan, 2014; APAV, 2016). Giving information about existing restorative justice services depends on several factors: whether, when, how often, by whom, and how this information will be provided. Simply mentioning these services with the contact details on official forms, giving more information in a brochure, using alternative visual media, or mentioning it explicitly as a possibility in contacts with the victim are all possible mediums of disseminating information to parties (Lauwaert, 2013: 420).

Research shows that there are several important elements to consider when informing parties about the option to participate in a restorative justice programme, which include the level of influence and authority of the initiator, the information provided, the mode of the offer, the language of the offer, the timing and the frequency of the offer (Umbreit, 2001; Wemmers and Cyr, 2005).

Further research that looked at how this right is enforced in practice concluded that it is important to repeat this information at different moments and that the information should come from different sources (e.g. police, prosecutor, victim support, judge, social workers) (Laxminarayan, 2014). Information received by criminal justice authorities may be expected to create some pressure to participate (De Mesmaecker, 2011; Laxminarayan, 2014), but it is useful to raise awareness about the existence of restorative justice services and give them legitimacy and credibility. Likewise, the IVOR project (APAV, 2016) showed that in some countries, on the pretense of victim's protection, the information about restorative justice is not shared with the victim, and restorative justice services are not given access to the victim's contact details and information. Two obstacles that have been identified in particular regardless of legislation or availability of services, are negative attitudes by referring bodies (Van Camp and Wemmers, 2013) and poor cooperation among partners involved (Casado-Coronas, 2008). Furthermore, for obvious reasons the Directive is oriented towards the work and role of institutions (authorities), while the possibilities for citizens who become victims of crime to address restorative justice services themselves directly are less clear. In other words how should we inform, support, and guide victims so that they make use of restorative justice services more directly, without depending on the professionals in different sectors?

While the right to information about available restorative justice services in the Victims' Directive is clearly very important, it does not create any obligation for Member States either to create restorative justice services where these are lacking, or

to promote actively accessibility to existing restorative justice services. Both in the CoE (2007) guidelines for a better implementation of the existing recommendation concerning mediation in penal matters, and in the study on the quality of penal mediation in Europe by L’Huillier (2007), *availability, accessibility and awareness* of restorative justice programmes had been identified as key to the effective implementation of restorative justice in Europe. Laxminarayan (2014) had identified ten factors that impede or assist parties in *accessing* restorative procedures: availability, legislation, exclusion criteria, awareness, attitudes, cooperation, trust, institutionalisation, good practices and costs. Likewise, Lauwaert (2013: 424) refers to several important factors that must be considered to achieve *equal access* to restorative justice: information about restorative justice, costs of services, availability, self-referrals and eligibility for restorative justice. While the Victims’ Directive doesn’t go too far with regards to many of these factors, recognising the right to information and obliging Member States to ensure this right is certainly one important -even if small- step, in the right direction.

## Safeguards to restorative justice

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Besides the failure to actively promote accessibility to restorative justice for victims of crime or to even create a right of equal access, the *tone* of the Victims’ Directive in relation to restorative justice is somewhat problematic, and it will undoubtedly influence its future development, although whether positively (in terms of developing further quality services) or negatively (in terms of reducing its use) it remains to be seen. In the recital 46, restorative justice is introduced in the following way:

### Recital 46

Restorative justice services, including for example victim-offender mediation, family group conferencing and sentencing circles, can be of great benefit to the victim, **but** require safeguards to prevent secondary and repeat victimisation, intimidation and retaliation. Such services should therefore have as a primary consideration the interests and needs of the victim, repairing the harm done to the victim and avoiding further harm. Factors such as the nature and severity of the crime, the ensuing degree of trauma, the repeat violation of a victim's physical, sexual, or psychological integrity, power imbalances, and the age, maturity or intellectual capacity of the victim, which could limit or reduce the victim's ability to make an informed choice or could prejudice a positive outcome for the victim, should be taken into consideration in referring a case to the restorative justice services and in conducting a restorative justice process. Restorative justice processes should, in principle, be confidential, unless agreed otherwise by the parties, or as required by national law due to an overriding public interest. Factors such as threats made or any forms of violence committed during the process may be considered as requiring disclosure in the public interest.

While the recital starts by admitting the “great benefit to the victim” of restorative justice, the benefits unfortunately end there without listing them. The benefits of

restorative justice to the victim or the experiences of the victims with restorative justice have been time and again validated by research as being both the opportunity to participate and be allowed to let one’s voice being heard, but also to receive information and answers to their questions. These lead to feelings of empowerment, restoring of self-respect, sense of control and dignity, reduction of fear and anxiety, realistic perception of offender and offense, and high satisfaction with the restorative process and its outcomes, including a higher sense of justice (see generally Vanfraechem et al., 2015; De Mesmaecker, 2011; Bolivar, 2012; Umbreit et al., 2008; Pelikan and Trenczek, 2008; Umbreit, 1994; Umbreit, Coates and Gehm; 1989; Beven et al., 2005; Strang, 2002; Wemmers and Cyr, 2005; Aertsen and Peters, 1998; Bradshaw and Umbreit, 1998; Sherman and Strang, 2007; Pemberton and Vanfraechem, 2015; Netziget et al., 1996; Morris et al., 1993; Shapland et al., 2011).

Moreover the sentence is immediately followed with a “but”, listing a number of safeguards relating not only to the restorative process, but also to the referrals made to the restorative justice services. Furthermore, contrary to its balanced purpose (between victim, offender, and community) the restorative process is asked to aim at having “primary consideration the interests and needs of the victim, repairing the harm done to the victim and avoiding further harm” (see Lauwaert, 2013: 423). Only in the Guidance Document we find the statement that that “any restorative justice process must also safeguard the fundamental procedural rights of the offender”.

Having set this tone of caution or warning towards restorative justice, the Victims’ Directive offers as a main provision to restorative justice the Article 12 which establishes the right of victims to safeguards to ensure that “victims who choose to participate in restorative justice processes have access to safe and competent restorative justice services”. As stated in the Guidance Document, the purpose of Article 12 is to ensure that *where* such services are provided, safeguards are in place to ensure the victim is not further victimised as a result of the process, and the Article does not in any way oblige the Member States to introduce restorative justice services if they do not have such a mechanism in place in national law.

<b>Article 12.</b>	
<b>Right to safeguards in the context of restorative justice services</b>	
<b>1.</b> Member States shall take measures to safeguard the victim from secondary and repeat victimisation, from intimidation and from retaliation, to be applied when providing any restorative justice services. Such measures shall ensure that victims who choose to participate in restorative justice processes have access to safe and competent restorative justice services, subject to at least the following conditions:	
<b>(a)</b>	the restorative justice services are used only if they are in the interest of the victim, subject to any safety considerations, and are based on the victim’s free and informed consent, which may be withdrawn at any time;
<b>(b)</b>	before agreeing to participate in the restorative justice process, the victim is provided with full and unbiased information about that process and the potential outcomes as well as information about the procedures for supervising the implementation of any agreement;

<b>(c)</b>	the offender has acknowledged the basic facts of the case;
<b>(d)</b>	any agreement is arrived at voluntarily and may be taken into account in any further criminal proceedings;
<b>(e)</b>	discussions in restorative justice processes that are not conducted in public are confidential and are not subsequently disclosed, except with the agreement of the parties or as required by national law due to an overriding public interest.
<b>2.</b> Member States shall facilitate the referral of cases, as appropriate to restorative justice services, including through the establishment of procedures or guidelines on the conditions for such referral.	

First regarding the positive sides of this article, which paradoxically start from the bottom, the most important point is that Member States are required to *facilitate* referrals to restorative justice services, and establish procedures and guidelines directing the referrals (Article 12.2). How this will be implemented depends on the national circumstances in the Member States, because although they are asked to facilitate referrals, the qualification ‘as appropriate’ leaves room for different interpretations, including many possible restrictions.

In fact one way to qualify ‘*appropriateness*’ will be through elaboration of exclusion criteria, most likely to be elaborated in procedures and guidelines by the Member States. According to the Victims’ Directive, restorative justice will only be possible if ‘the offender has acknowledged the basic facts of the case’ (Article 12.1c). Lauwaert (2013: 423) argues that articulating the exclusion criteria in terms of ‘basic facts’ and not in terms of ‘guilt’ makes automatically more offenders eligible for restorative justice, a moderate position which fits well with practice-based evidence.

It is important that the Victims’ Directive itself *does not explicitly exclude* any victim from participating in restorative justice, but only mentions a list of factors to be considered to protect victims participating in a restorative justice process, which are: ‘the nature and severity of the crime, the ensuing degree of trauma, the repeat violation of a victim’s physical, sexual, or psychological integrity, power imbalances, and the age, maturity or intellectual capacity of the victim’ (Recital 46).

The *possibility* for victims to participate in restorative justice programmes, despite their vulnerability is important and research has shown that differences between victims exist only in the way they actually experience the process, but not according to the crime or vulnerability of the victim (Bolivar, 2012). Likewise, the legal qualifications of a crime and seriousness of harm caused have been shown to be poor indicators of the personal repercussions and the type of process desirable, while criteria like the structural imbalance of power between parties and the degree of emotional impact of the crime are more relevant indicators when deciding the eligibility of a case (see Willemsens, 2008).

But despite the potential inclusiveness of victims and offenders for participating in restorative processes in the Victims’ Directive, many Member States have specific exclusion criteria in their legislation, according to vulnerability, categories of victims of certain crimes, age of offender, or seriousness of offence which will be used to define the ‘*appropriateness*’ (Miers and Aertsen, 2012; APAV, 2016). Overall,

research has shown that- with a few exceptions- in most European countries, criteria and procedures to select and refer cases to restorative justice programmes are related to characteristics of the offender or the offence, and not to characteristics or needs of the victim (Düinkel et al., 2015).

Lauwaert (2013) in fact argues that the safeguards that Member States are required to respect in relation to restorative justice refer to core principles of restorative justice, among which the most important ones are the voluntariness of participation and the confidentiality of the process. In relation to *voluntariness*, the Victims' Directive distinguishes three main dimensions of voluntariness: first, voluntary decision to participate based on informed consent following full and unbiased information about the process, potential outcomes and procedures for supervising the implementation of any agreement (Article 12.1b); secondly, freedom to withdraw the consent to participate at any time (Article 12.1a); thirdly, voluntarily reached agreement (Article 12.1d) (see Lauwaert, 2013: 421).

In relation to *confidentiality*, argues Lauwaert (2013), the stipulation that 'discussions in restorative justice processes that are not conducted in public should be confidential and are not subsequently disclosed, except with the agreement of the parties' (Article 12.1e) is a standard interpretation of confidentiality in the restorative processes. The article adds another condition in which discussions held during the restorative process can be disclosed: 'if required by national law due to an overriding public interest'. Read together with recital 46 which specifies further that 'factors such as threats made or any form of violence committed during the process may be considered as requiring disclosure in the public interest', the main purpose of this stipulation is to protect the victim and prevent the offender from abusing the restorative process for the purpose of repeat victimisation, intimidation or retaliation under the cover of confidentiality (Lauwaert, 2013: 421).

The requirement that *safety issues* are considered before the start of a restorative process and that services should only be used if they are in the interest of the victim (Article 12.1a) reflect minimum considerations on behalf of practitioners during their preparatory work. As noticed in the recital 46, however, the Victims' Directive goes further, stating that restorative justice services 'should ... have as a primary consideration the interests and needs of the victim, repairing the harm done to the victim and avoiding further harm'. Although, this is obviously a legitimate expectation of a Directive which focuses on victims, it nevertheless goes against one of the core principles of restorative justice which is to find a balanced approach during a reaction to crime between the interests of victim, offender, and society (Lauwaert, 2013: 423).

The requirement to provide information about the procedures for *supervising* the implementation of agreements (Article 12.1b) is new. This concern is likely based on research which has argued that lack of follow-up communication with the victim or feedback about the agreement can be a problem for victims (see Zernova, 2007; Garbett, 2016; Vanfraechem and Bolivar, 2015). This orientation can lead in the worst case to a more probationary function of restorative justice services, or to a lower referral rate and more restricted accessibility to restorative justice cases, and in the best case to improved cooperation between services but these hypothesis remains to be confirmed.

Finally, expressing that voluntary agreements may be taken into account in any further criminal proceedings (Article 12.1d) is an important provision that supports *the link* between the restorative process and the criminal procedure. In this way, the efforts that victims and offenders make in the restorative process can be valued in the criminal procedure (Lauwaert, 2013: 422). In the Guidance Document, the EC writes for example that the use of mediation will be an important factor that plays a role in the conditional discontinuation of proceedings or out-of-court settlement at the pre-trial stage of the proceedings, and that has an important link to offender compensation to the victim (as an alternative or complement to financial compensation).

Besides the Article 12, the Guidance Document of the EC asks Member States to establish national restorative justice service providers as a public authority or concluding service agreements with accredited private/non-governmental restorative justice service providers so as all restorative justice measures delivered in their territory fulfil the minimum standards in this Article. The EC suggests further that it “may be useful to develop national service delivery standards relating to the provision of restorative justice, which fulfil the Directive’s requirements and reflect European good practice in relation to victims of crime. These should include the ability of the parties to give free consent, be duly informed of the consequences of the mediation process, issues of confidentiality, access to impartial/neutral advice, the possibility to withdraw from the process at any stage, the monitoring of compliance with the agreement and the competence of mediators. The interests of victims should be fully and carefully considered when deciding upon and during a mediation process, taking into account the vulnerability of the victim”.

Overall, Article 12 could have introduced restorative justice in a more *balanced* way in line with the recital 46, which states that restorative justice can be of great benefit to victims of crime while also taking into account the safeguards. The benefits as they stand currently in the Victims’ Directive are completely overridden by the safeguards. Perhaps instead of a right to safeguards in restorative justice, what we need in Europe is a *right to access to restorative justice* services for all stakeholders (victims, offenders, other affected persons and local communities).

## **Training practitioners**

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The importance of *training* in the Victims’ Directive is mostly related to offering information and increase awareness on the *victims’ rights and needs* to police, criminal justice staff and other practitioners who are in contact with victims of crime, including restorative justice practitioners. In relation to the restorative justice practitioners, they should also receive training tailored towards observing professional standards to ensure such services are provided in an impartial, respectful, sensitive, professional and non-discriminatory manner. The Victims’ Directive training obligations nevertheless apply more closely to police officers and court staff, while they are strongly recommended for the other professionals.

In the Guidance Document, the EC emphasises additionally the importance of feedback from victims, e.g. by providing procedures whereby victims can complain about the manner in which they were treated by professionals and/or the lack of

access to their rights in practice, stating that if a professional, authority, or entity is found to have breached a victim's rights, it could be obliged to undergo specialised victim awareness training to inform staff of victims' rights and to raise their awareness of the needs of victims of crime.

## **Article 25 Training of practitioners**

**1.** Member States shall ensure that officials likely to come into contact with victims, such as police officers and court staff, receive both general and specialist training to a level appropriate to their contact with victims to increase their awareness of the needs of victims and to enable them to deal with victims in an impartial, respectful and professional manner.

**2.** Without prejudice to judicial independence and differences in the organisation of the judiciary across the Union, Member States shall request that those responsible for the training of judges and prosecutors involved in criminal proceedings make available both general and specialist training to increase the awareness of judges and prosecutors of the needs of victims.

**3.** With due respect for the independence of the legal profession, Member States shall recommend that those responsible for the training of lawyers make available both general and specialist training to increase the awareness of lawyers of the needs of victims.

**4.** Through their public services or by funding victim support organisations, Member States shall encourage initiatives enabling those providing victim support and restorative justice services to receive adequate training to a level appropriate to their contact with victims and observe professional standards to ensure such services are provided in an impartial, respectful and professional manner.

**5.** In accordance with the duties involved, and the nature and level of contact the practitioner has with victims, training shall aim to enable the practitioner to recognise victims and to treat them in a respectful, professional and non-discriminatory manner.

The Victims' Directive does not oblige Member States to offer training on restorative justice, presupposing that such training is available, or a requirement for accreditation, as articulated in the Guidance Document. As a result, according to recital 61, the implementation of Article 25 will be assessed against the capacity of all practitioners to actually conduct the tasks and missions that are part of Member States' obligations under the Victims' Directive. Member States' actions on training should be complemented by guidelines, recommendations and exchange of best practices in accordance with the "Budapest roadmap".

Although the training has not been conceived to inform the different justice practitioners about restorative justice, given the *momentum* of organising training in the framework of the Victims' Directive, the chance should not be lost to incorporate such elements. For example training could focus on understanding the law about restorative justice and learning about practical tools for informing about restorative justice, for referring a case and for initiating and concluding a process. Training is

also important for learning the benefits of restorative justice and share experiences, thus it influences the general awareness and attitudes that criminal justice authorities have about restorative justice practices.

Nevertheless, the lack of a standardised procedure for training restorative justice practitioners in Europe is a major *obstacle* in understanding restorative justice and further implementing these practices in all Member States. The vagueness and lack of transparency on training procedures limits further comprehension on the benefits that restorative justice may have for victims of crime, since the ‘safety’ and ‘competency’ of services may be undermined (see APAV, 2016).

## **Cooperation and coordination of services**

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Article 26 on *cooperation and coordination of services*, is also extremely important and relevant for restorative justice, as it promotes all actions that improve the access to victims’ rights, including exchange of best practices, consultation in individual cases, information and awareness raising campaigns, research and education programmes and assistance to European networks working on matters directly relevant to victims’ rights.

Nevertheless, the emphasis on cooperation and coordination of services *within* a Member State as stipulated in Article 26 is actually only in relation to information and awareness raising campaigns and research and education programmes, while the general emphasis in the Article 26 is in relation to cooperation and coordination among Member States. It would have been of an additional value if the cooperation and coordination of services within a Member State was more strongly emphasised in the articles on cooperation and coordination. In recital 62 and in the Guidance Document this emphasis is present, as the EC writes that it is of utmost importance to pay particular attention to inter-agency cooperation and a coordinated national approach that ensures horizontal collaboration and coherence between police, judicial authorities, victim support organisations and health, social, welfare services and education providers. It is asked specifically that mediators and those directly involved in restorative justice processes should cooperate with psychologists, psychiatrists, debt counsellors, child protection specialists, etc. Furthermore Member States are asked to organise regular meetings with service providers of restorative justice to discuss opportunities and challenges, for instance, how current service delivery meets the needs of victims of crime, any gaps regarding victims not able to access restorative justice services and how that can be addressed.

Member States are encouraged to exchange best practices through the European Judicial Network in criminal matters, the E-Justice Portal as well as through experts’ meetings, workshops organised by DG Justice in Brussels or on a regional basis. Assistance to European networks working on matters directly relevant to victims’ rights can be provided through policy dialogue with victims’ support organisations, and European standards of good practice in selected areas can be formulated in cooperation with DG Justice.

<b>Article 26</b> <b>Cooperation and coordination of services</b>	
<b>1.</b> Member States shall take appropriate action to facilitate cooperation between Member States to improve the access of victims to the rights set out in this Directive and under national law. Such cooperation shall be aimed at least at:	
<b>(a)</b>	the exchange of best practices;
<b>(b)</b>	consultation in individual cases; and
<b>(c)</b>	assistance to European networks working on matters directly relevant to victims' rights.
<b>2.</b> Member States shall take appropriate action, including through the internet, aimed at raising awareness of the rights set out in this Directive, reducing the risk of victimisation, and minimising the negative impact of crime and the risks of secondary and repeat victimisation, of intimidation and of retaliation, in particular by targeting groups at risk such as children, victims of gender-based violence and violence in close relationships. Such action may include information and awareness raising campaigns and research and education programmes, where appropriate in cooperation with relevant civil society organisations and other stakeholders.	

## **The importance of other rights and protections**

While these were the main articles and provisions that will most probably have a direct impact on the regulation of restorative justice, indirectly other rights might either foster or impede the development of restorative justice in the EU, depending on the weight they will have in the national legislation.

While it is difficult at the moment to estimate either the amount of impact or its direction, other articles emphasise aspects which are at the heart of restorative justice (e.g. a tailored approach, voice, participation, inclusiveness, reparation), and therefore it is possible that they influence the general receptivity within the criminal justice system for restorative elements. The rights that might have indirectly an impact might be for example:

- √Article 10. Right to be heard;
- √Article 7. Right to interpretation and translation;
- √Article 9; Support from victims' services;
- √Article 16. Right to decision on compensation from the offender in the course of criminal proceedings;
- √Article 17. Rights of victims resident in other Member States;
- √Article 22. Individual assessment.

## **CONCLUSION**

The *Directive 2012/29/EU Victims' Directive* establishing minimum standards on the rights, support and protection of victims of crime is obviously the most important supranational instrument on the regulation of restorative justice in the EU due to its binding status. Both the recognition of the benefits restorative justice can have for

victims of crime and the attention paid to safeguards in restorative processes are important, but the focus on safeguards remains unbalanced in relation to the focus on benefits.

Likewise, the Victims' Directive falls short on *proactive measures* to either increase availability, accessibility or guarantee equal access to restorative justice services for victims of crime. The limited accessibility to restorative justice continues to remain one of the main obstacles to the further development of restorative justice in Europe, therefore it is crucial that the EFRJ remains an important platform for sharing best practices, standardising safeguards and methods throughout Europe.

By 16 November 2017, and every three years thereafter, Member States must provide the EC with data showing how victims have accessed the rights set out in the Victims' Directive. Recital 64 specifies that relevant statistical data can include data recorded by the judicial authorities and by law enforcement agencies and, as far as possible, administrative data compiled by healthcare and social welfare services and by public and non-governmental victim support or restorative justice services and other organisations working with victims of crime. Service-based administrative data can include, as far as possible, data on how victims are using services provided by government agencies and public and private support organisations, such as the number of referrals by police to victim support services, the number of victims that request, receive or do not receive support or restorative justice.

We *invite* therefore all our members and stakeholders with an interest in the further development of restorative justice in the EU to send us comments, experiences, relevant data, research results, opinions and thoughts in relation to the current and future development of restorative justice in relation to the Victims' Directive, but not only, in order for the EFRJ to draft a Position Paper with important recommendations to the Member States and to the EC<sup>7</sup>.

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<sup>7</sup> The EFRJ is additionally in the process of organising a workshop on the Victims' Directive in the framework of the Criminal Justice Platform which will focus on training and cooperation; of drafting a practice guide for restorative justice practitioners; and of preparing a document which will present the existing research in a nutshell. Therefore your contribution and participation is welcomed and encouraged. For more information you can always visit our website ([www.euforumrj.org](http://www.euforumrj.org)) or contact the staff at the secretariat or the board for the EFRJ.

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## **Documents and policy instruments (UN, Council of Europe, and EU)**

- Proposal for a directive of the European Parliament and of the Council establishing minimum standards on the rights, support and protection of victims of crime (COM (2011)275). Brussels, final 18.5.2011
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