Annex 16
Working paper for general discussion
MAPPING OF RELEVANT ISSUES
(updated: November 2020)
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Introduction

Nature and purpose of the document. Rationale

The Mapping of relevant issues is a confidential working paper only for internal circulation and discussion among the members of the Re-Justice consortium. This discussion has been initiated during Work Package 2 (Training Needs Assessment on Restorative Justice; WP2) and in view of Work Package 3 (Design of Training Course on Restorative Justice; WP3) by one of the partners (UCSO) out of the need of a common understanding of (the use of) restorative justice in criminal matters according to UN, CE and EU standards and regulations. The proponents intended to provide the research group with a tentative list of critical issues prepared to serve as a basis for a common dialogue towards a shared awareness of significant topics, and possibly shared proposals or solutions to be presented during the training activities and in the Manual ‘Judiciary Training on RJ’ (WP3, D.3.5).

This document is the result of a preliminary general discussion among the project’s university partners, EFRJ, Moderator with the fundamental contribution of single members of some of the Schools for the Judiciary involved in the project. This discussion took place during e-meetings and thanks to online feedbacks.

The working paper consists of a mere (though rich) inventory of issues, questions, problems raised by the cross-fertilisation of restorative justice and criminal justice. The document, at this stage, does not provide answers nor solutions; answers and solutions may result from further debate within the entire consortium. This, of course, if coming to uniform (not identical) conclusions and possibly practical proposals will be commonly perceived as a shared need in view of the delivery of training. This document is, therefore, an unforeseen output of the Re-Justice project, whose topics and purposes fruitfully challenge the partners own understanding of restorative justice in the first place, before conveying it to others—and particularly to the project beneficiaries during the judicial training activities.

Consistent with the Competency Profile report (WP2, D. 2.1.), the pillars of the Re-Justice training course on restorative justice are threefold: knowledge, skills and attitudes, resulting in specific competence(s) prosecutors and judges should acquire in the field. Therefore, the design of the training is not only a matter of ‘structuring’ the course, but also a matter of filling it with proper contents. The purpose of this document is to provide a flexible, but hopefully robust, basis to possibly build a shared vision of the contents the consortium aims at conveying to trainees throughout the project’s training activities. The quest for harmonisation is particularly relevant in the frame of EU law, and it becomes even more necessary when dealing with a relatively new topic and a poorly regulated tool, such as restorative justice in criminal matters.

The adoption of recommendations drafting basic principles and a set of minima standards
internationally is the sign of the need to both encourage restorative justice and orient, position and adjust its use in the proper and advisable forms. The United Nations, the Council of Europe, and the European Union have all addressed the need to set common, uniform standards in the use of restorative justice programmes in criminal matters, while acknowledging in several ways the persistent lack of awareness, accessibility, availability about this tool. On the other hand, comprehensive national regulations concerning restorative justice in criminal matters are currently lacking in the majority of European Countries, not to mention those Countries (like Italy, for instance) where no regulation at all is available yet. This means that the use of restorative justice is still largely discretionary: discretion consisting here in both practical (in)accessibility and (un)availability of restorative justice and inbending restorative justice to the purposes the single State addresses with its criminal policy, sometimes even regardless of the particular crime policy restorative justice expressly supports. This is why the UN Basic Principles (together with the newly released UNODC Handbook), the CE 2018 Recommendation, and the Victims Directive represent a fundamental ‘compass’ to guide the adoption and implementation of restorative justice in criminal matters.

This said, matching the restorative principles and standards set by the UN, CE, UE with the national criminal justice systems and, partially, with the EU legislation (in the field of criminal justice and victims’ rights) is not always an easy task, nor it is easy to practically draft the ways restorative justice can ‘complement traditional criminal proceedings or be an alternative to them’ (cf. CE CM/Rec(2018)8, emphasis added). The diversity of judicial systems and criminal justice systems makes—it seems—all the more necessary to strengthen a uniform core concept of restorative justice, in terms of main values, basic principles and minima standards, following the valuable international and European documents we dispose of.

This is why an open discussion among all the project partners is deemed necessary to (at least) identify the most relevant issues and thorny problems the judiciary (here including prosecutors and judges) faces (or will face) when encouraging, promoting, resorting to, using, or evaluating restorative programmes in criminal matters consistent with international basic principles and standards. These issues and problems will probably come up from trainees during the training activities in terms of questions, cases, personal/professional experiences, etc.

Furthermore, while moving towards WP3, and even more during Work Package 4 (Delivery of Training Course on Restorative Justice), to take these topics into account beforehand might be a useful exercise in preparation to the training—and in preparation to its uniform, harmonised (not identical) delivery in the project Countries. This is the reason why each item of the map is combined with references to one or more elements of the competency framework presented in the Competency Profile report (knowledge, skills, attitudes). The merger of elements resulting from the mapping exercise and the Competency Profile, and data resulting from focus groups (WP2) may provide a good assessment of the contents of the training and the manual in terms of practical guidelines for prosecutors and judges. Along these lines, to make the concept of restorative justice more concrete for prosecutors and judges, theoretical issues mapped during the
exercise could be turned into practice, by building a few model cases, each attracting one or more mapped topics. These topics could in turn be discussed by trainers and trainees during the training in the context of the case.

Finally, given the great expertise and high qualification of the project partners in the all the concerned fields (judicial/prosecutorial functions, judicial training, restorative justice) a constructive and proactive discussion may potentially result in the drafting of recommendations for policymakers and legislators at the UN, EU and national levels (this activity, in case, might be part of Work Package 5, Sustainability and Dissemination of Judiciary Training Course on Restorative Justice) for prosecutors and judges, theoretical issues mapped during the exercise could be turned into practice, by building a few model cases, each attracting one or more mapped topics. These topics could in turn be discussed by trainers and trainees during the training in the context of the case.

Finally, given the great expertise and high qualification of the project partners in the all the concerned fields (judicial/prosecutorial functions, judicial training, restorative justice) a constructive and proactive discussion may potentially result in the drafting of recommendations for policymakers and legislators at the UN, EU and national levels (this activity, in case, might be part of Work Package 5, Sustainability and Dissemination of Judiciary Training Course on Restorative Justice).
The mapping ‘exercise’

As said, the document is nothing but a working paper to trigger a discussion. It is more like an agenda, rather than a text.

The drafters have gathered the basic principles and core standards from the UN, CE, EU legal tools, and put them in relation to criminal justice, having particularly the role of prosecutors and judges in mind. Furthermore, reflecting on the scope and contents of the said legal tools, it is interesting to analyse the possible interaction between, on one hand, the legally binding EU Victims Directive and its national transpositions — which provide a general frame for the development of restorative justice in the European Union — and, on the other, the soft law principles and standards set by both the United Nations and the Council of Europe — which provide basic recommendations and ‘orientations’ on several issues concerning restorative justice and its relation to the criminal justice system. The result of this interaction, together with the national legal framework (constitutional principles and relevant criminal law and procedure), shape the field where the criminal justice and restorative justice can meet and complement each other, moving the way responses to criminal wrongdoing are conceived in new directions.

This work has insofar resulted in a conceptual re-organisation of the said principles and standards of restorative justice under a few transversal items. These items have been matched basically with fundamental legal safeguards and principles related to the role of the judiciary (here including also prosecutors), the due process of law, etc. This resulted in turn in a sort of open survey of relevant issues/topics for discussion that may be potentially critical and/or problematic. There might be Countries where some (or all) the topics mentioned in the paper do not pose any problem— neither in theory nor in practice—, and others where they may represent severe obstacles in making restorative justice properly available, accessible and delivered. If this were the case, it is all the more worth exchanging good practices and solutions (even legal or judicial solutions) to ensure the harmonisation of restorative justice and its accessibility and availability throughout the EU.

For each item, the drafters have:

- included a reference to the Competency Profile in terms of knowledge, skills, attitudes...
- quoted the legal source providing the international/European standard(s)
- provided an open list of topics for common discussion within the partnership organisation; it is a list of questions—open to new, and potentially constant, feeds—: answers to these questions directly concern the kind of recommendations, advice, suggestions the partners would like to convey to trainees and beneficiaries of the training manual.

The use of colours and bullet points helps the reader identify quotes and questions.

In brief, the text is divided into three parts — from theory and ideals (§1) to problems and practice
(§2), to further developments and future challenges (§3):

**CRIME POLICY AND RESTORATIVE JUSTICE**

Tentative statements that in principle should be agreed upon within the partnership organisation, since they stem from UN and CE recommendations and refer to these common standards. Nonetheless, it might be worth checking how common and shared this understanding is).

**CRITICAL TOPICS DRAWN FROM INTERNATIONAL/EUROPEAN PRINCIPLES AND STANDARDS**

A collection of critical issues and related questions for the partners to answer according to a common (not necessarily identical) understanding of restorative justice, consistent with the contents the project wants to convey for the purposes of the training delivery and the drafting of the manual (WP3, WP4). The inventory of critical issues and related questions is practice-oriented: it addressed largely unresolved topics that are relevant to the proper implementation and accessibility of restorative justice programmes in criminal matters according to international / European principles, standards and regulation.

**CHALLENGES AND OTHER RELEVANT THEMES OF DISCUSSION**

A collection of inputs from partners concerning other very relevant challenges and topics for discussion with a broader scope.
1. Crime policy and restorative justice

Do we agree about the following statements drawn international and European principles and standards?

(Reference to the Competency Profile: Knowledge)

- RJ is not an ally of and does not support
  - retributive justice
  - punitive justice (deterrence and incapacitation)
  - penal populism, enemy criminal law
  - over-criminalisation [CE Rec(2018)8]
  - overuse of punitive criminal sanctions [CE Rec(2018)8]

- RJ promotes
  - the *ultima ratio* principle in criminal law
  - the rethinking of criminal law and criminal justice in restorative directions, the progressive development of a restorative criminal law, restorative criminal justice
  - responsive regulation and responsive models of justice
  - procedural fairness and respect towards all those involved
  - participatory, voluntary, collaborative, inclusive responses to wrongdoing
  - constructive, forward-looking responses to wrongdoing
  - compliance (comprehension of and consent to rules of conduct, behaving accordingly)
  - responsibility-taking; active responsibility vs. passive responsibility
  - offender desistance
  - victim recovery and redress; victim empowerment
  - citizens’ and stakeholders’ participation and empowerment, and therefore a stronger democratic sensitivity in criminal justice
  - the understanding of the underlying causes of crime [UN Basic Principles: preamble]
  - community well-being [UN Basic Principles: preamble]

- RJ advocates
  - criminal justice reform (underpinning of broader reforms to criminal justice: [CE Rec(2018)8; Rule 14])
  - respect of the dignity and equality of each person
  - non-discriminatory practice
  - a greater sense of respect and reciprocal obligations between citizens
  - victims’ and offenders’ reintegration
  - community involvement, citizens’ and stakeholders’ participation
  - a needs-based approach to all those involved in the matters arising from the crime
  - building of understanding, and promotion of social harmony through the healing of victims, offenders and communities [UN Basic Principles: preamble]
  - social relationships and cohesion / social inclusion and social integration
- restoring safety and security by bringing people together to undo injustices and repair harms through dialogue and agreement [EFRJ, Practice Guide on RJ Values and Standards]
- de lege ferendathe formal and legal recognition of restorative justice as a right

- RJ
  - advances criminal justice to support its reform towards a responsive–restorative direction
  - is a service (people should be entitled to access and request RJ)
  - is freely, equally and easily accessible to all those interested
  - is not a privatisation of criminal justice, nor a privatisation of the management of conflicts of criminal relevance
  - is not a mere diversion mechanism, nor aims at diversion per se, although it can have impacts on the reduction of proceedings, charges, and convictions, etc.
  - is not equivalent to victim support and assistance, although it can contribute to support victims
  - is not equivalent to community service and reparation schemes, although voluntary community service and voluntary reparation may be incorporated in restorative outcomes and agreements resulting from restorative processes
  - is not equivalent to diversion, although it can have a diversion effect or be a component of a diversion measure
  - is not equivalent to alternatives to detention/non-custodial measures, although it can be a component of a non-custodial response and programme or scheme
  - is not equivalent to offender rehabilitation, although it can contribute to offender rehabilitation
  - is not equivalent to reconciliation or forgiveness, nor aims at them, although RJ can incorporate both provide the conditions for them to flourish (e.g. reconciliation in transitional settings)
2. Critical topics drawn from international/European principles and standards

2.1. RJ and criminal proceedings

2.1.1. PRESUMPTION OF INNOCENCE

{ Reference to the Competency Profile: Knowledge }

- “(...) Participation in restorative justice should not be used as evidence of admission of guilt in subsequent legal proceedings” [CE Rec(2018): Rule 30.2]
- “Participation of the offender shall not be used as evidence of admission of guilt in subsequent legal proceedings” [UN Basic Principles: para. 8.2]

Topics for common discussion:

- Why is this principle so important in restorative justice?
- What recommendations are we going to provide the judiciary with?
- With regard to this principle, relevance of a clear distinction between criminal proceeding and restorative processes is deemed necessary.
- What might be the implications of the in dubio pro reo principle in restorative justice processes?
- What is the relationship, or interconnection, between this principle and the principle requiring the ‘acknowledgement of’ / ‘agreement on’ the basic facts of the case? (see below § 2.2.5.)

2.1.2. ACCUSATION AND CHARGES

{ Reference to the Competency Profile: Knowledge }

- “Restorative processes should be used only where there is sufficient evidence to charge the offender” [UN Basic Principles: para. 7]

Topics for common discussion:

- What recommendations are we going to provide the judiciary with?
- What fundamental rights and safeguards is this principle addressing?
• At what stage of proceeding information about restorative justice services should be provided by the judiciary? (see also below § 2.2.1. availability at all stages of the criminal proceeding).

• Would it be good to nuance this principle a little? The judiciary (especially prosecutors) might refer the case to help resolve conflicts that are not of criminal nature; of course in these cases the judiciary discharges the suspect/accused. Prosecutors may also refer cases where a criminal offence is not strictly identified but a need for a restorative process may emerge (e.g., neighbours’ disputes). Which may be the possible impact, in terms of net–widenig effect, of such nuances or exceptions to this relevant principle?

• Impact and consequences of mandatory/discretionary charging systems on restorative justice.

• What is the relationship between diversion and restorative justice? How does diversion impact (or affect) restorative justice?

2.1.3. TIME

{ Reference to the Competency Profile: Knowledge, Skills and Attitudes }

• “Restorative justice may be used at any stage of the criminal justice process” [CE Rec(2018): Rule 6; see also UN Basic Principles: para. 6]

• “Facilitators must be afforded sufficient time and resources to undertake adequate levels of preparation, risk assessment and follow-up work with the parties” [CE Rec(2018): Rule 29.1]

• “The facilitator should take sufficient time to prepare the parties for their participation (...)” [CE Rec(2018): Rule 47.2]

• “Restorative justice should be carried out efficiently, but at a pace that is manageable for the parties. Sensitive, complex and serious cases, in particular, may require lengthy preparation and follow-up(...)” [CE Rec(2018): Rule 48.1]

• “A decision to refer a criminal case to restorative justice, where this is taken with a view to discontinuing legal proceedings in the event that an agreement is reached, should be accompanied by a reasonable time frame within which the judicial authorities should be informed of the state of the restorative justice process“[CE Rec(2018): Rule 31]

• “In order to make mediation accessible, its use should not be prevented by the risk of expiry of limitation terms. In order to rectify this problem, member states are encouraged to consider implementing provisions for the suspension of limitation terms” [CEPEJ 2007 Guidelines: para. 35]

Topics for common discussion:

• Multifaceted experience of time: time and pace for those involved, time-stage and pace of the story, time-stage of the criminal proceeding: how to balance them? Which should prevail? At what costs?

• Accessibility and availability of RJ at all stages of the criminal justice process and time issues [CE Rec(2018): Rules 6, 18-19, 28; UN Basic Principles: para. 6].
2.1.4. IMPACT OF RJ ON JUDICIAL DECISIONS

{ Reference to the Competency Profile: Knowledge and Skills }

- “(...) any agreement is arrived at voluntarily and may be taken into account in any further criminal proceedings” [2012/29/EU Dir.: art. 12, d]]

- “Restorative justice agencies should be given sufficient autonomy in relation to the criminal justice system. Balance should be preserved between the need for these agencies to have autonomy and the need to ensure that standards for practice are adhered to” [CE Rec(2018)8: Rule 20]

- “Decisions by judicial authorities to discontinue criminal proceedings on the grounds that a restorative justice agreement has been reached and successfully completed, should have the same status as decisions on other grounds, which, according to the national law, have the effect of discontinuing criminal proceedings against the same persons, in respect of the same facts and in the same State” [CE Rec(2018)8: Rule 34]

- “When a case is referred back to the judicial authorities without an agreement between the parties or after failure to implement such an agreement, the decision as to how to proceed should be taken without delay and in accordance with legal and procedural safeguards existing in national law” [CE Rec(2018)8: Rule 35]

- “Where restorative processes are not suitable or possible, the case should be referred to the criminal justice authorities and a decision should be taken as to how to proceed without delay. In such cases, criminal justice officials should endeavour to encourage the offender to take responsibility vis-à-vis the victim and affected communities, and support the reintegration of the victim and the offender into the Community” [UN Basic Principles: para. 11]

- “The results of agreements arising out of restorative justice programmes should, where appropriate, be judicially supervised or incorporated into judicial decisions or judgements. Where that occurs, the outcome should have the same status as any other judicial decision or judgement and should preclude prosecution in respect of the same facts” [UN Basic Principles: para. 15]

- “Where no agreement is reached among the parties, the case should be referred back to the established criminal justice process and a decision as to how to proceed should be taken without delay. Failure to reach an agreement alone shall not be used in subsequent criminal justice proceedings” [UN Basic Principles: para. 16]

- “Failure to implement an agreement made in the course of a restorative process should be referred back to the restorative programme or, where required by national law, to the established criminal justice process and a decision as to how to proceed should be taken without delay. Failure to implement an agreement, other than a judicial decision or judgement, should not be used as justification for a more severe sentence in subsequent criminal justice proceedings” [UN Basic Principles: para. 17]
Topics for common discussion:

- The achievement of a restorative process and the possible restorative outcomes can have only mitigating effects (always pro reo) and shall never, in principle, be used to strengthen, harshen, increase the punitiveness of a measure or sanction

- Autonomy of RJ and relevance/impact of its outcome on the criminal proceeding: how to reconcile those issues? Which are the risks?

- What might be the benefits of the autonomous position of restorative justice for the criminal justice system? The autonomous position of restorative justice should not be considered as a threat or something embarrassing [See also CE Rec(2018)8: Rule 20]

- Impact and effect of RJ in criminal justice: on what grounds? Under which requirements? With what limits?

2.1.5. IMPACT OF RJ AT THE POST-CHARGE STAGES

{ Reference to the Competency Profile: Knowledge and Skills }


- “In appropriate cases, and having due regard to the rights and needs of victims of crime, offenders should be enabled and encouraged to make reparation for their offences to the victims or to the community” [CE Rec(2017)3, Rule 10].

- “Regime activities (...) may include (...) l. programmes of restorative justice” [dealing with juveniles“[CE Rec(2008)11: Rule 77]

Topics for common discussion:

- What recommendations will we provide the judiciary with?
- Which is the range of legal consequences of restorative processes on the execution of criminal sanctions in each national system?
- What about offender-initiated RJ in this phase?
- What about victim-initiated RJ in this phase (e.g. mediation for redress in Belgium)?
- How can the judiciary support these initiatives?
- What could the role of prison personnel be at this stage? What connections are there between the role of the judiciary and the role of prison staff / rehabilitation staff?
- Relevance of voluntariness
- Need to avoid that restorative justice is used as an intensification of – or an ‘add-on’ to – the original penalty or measure.

2.2. Operation of RJ in relation to criminal justice
2.2.1. ACCESS TO RJ AT ALL STAGES OF THE CRIMINAL JUSTICE PROCESS

{ Reference to the Competency Profile: Knowledge, Skills, and Attitudes }

[CE Rec(2018)8: Rules 6, 18-19, 25, 28; UN Basic Principles: para. 6]

- “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”[2012/29/EU Directive: art. 12]

- “(...) Member States are invited to consider encouraging the use of mediation during criminal proceedings, as well as during the execution phase, at least in cases of less serious or minor crimes [2001 FD, EU Commission, 2009 Implementation Report]

Topics for common discussion:

- Role of the judiciary in referrals (see also below § 2.3.) and its interconnection with the principle of availability and accessibility of restorative justice at all stages of the criminal justice system

- The ‘who’ of referrals: the police, the prosecutor, the judge? All of them depending on the case?

- The ‘how’ of referrals

- Which is the impact of diversion on restorative justice?

- While affirming in principle to refer as many cases as possible, and to formulate the offer to as many suspects/accused/offenders and victims as possible,

  - Would it be good to follow a case-by-case selection?
  
  - Would it be good to think of contraindications to referrals?
  
  - Would it be good to propose discussion/coordination between the judiciary and mediators over the wisdom of referral and the doability of RJ programme? Is it wise to refer t?
  
  - Would it be good to support local coordination and cooperation?

- Conditions for referrals? ‘Suitability’ of cases? Preclusions? Who decides on suitability: the judiciary or RJ service? What degree of discretion and flexibility on the part of the judiciary in referring cases to RJ? What if a victim wants to participate in a restorative process but the judicial professional feels the case is ‘unsuitable’ (cf. also below §§ 2.2.2. Voluntariness of RJ; 2.2.3. Victim rights and safeguards)? What if an offender wants to participate in a restorative process but the judicial professional feels the case is ‘unsuitable’? (cf. also below §§ 2.2.2. Voluntariness of RJ; 2.2.4 Suspect/accused/offender rights and safeguards; 2.2.10 RJ responses to serious crimes)

- How to reconcile the principle of easy, equal accessibility to RJ and the obligation to protect victims from repeat and secondary victimisation? (Cf. also below §§ 2.2.1. Access to RJ at all stages of the criminal process; 2.2.2. Voluntariness; 2.2.3. Victims’ rights and safeguards; 2.4. RJ responses to serious crimes and RJ programmes with vulnerable subjects; 2.2.10 RJ responses to serious crimes)

- EU recommendation to facilitate referrals and to encourage them at all stages of CJS
Is the introduction of RJ services in criminal justice systems mandatory?

- Not mandatory, according to Directive 2012/29/EU [cf. DG JUSTICE GUIDANCE DOCUMENT on 2012/29/EU Dir., art. 12, page 32: “The Article does not oblige the Member States to introduce restorative justice services if they do not have such a mechanism in place in national law”; CJEU rulings in cases C-205/09 Eredics and Joined Cases C-483/09 and C-1/10 Gueye/Sanchez interpreting Article 10 FD on mediation has confirmed that Member States are not obliged to introduce mediation/restorative justice for all offences]

What are the margins to implement RJ when criminal proceedings cannot take place (because of time limitations or other legal reasons? (Cf. also below § 2.5 Restorative justice inside/outside the CJS)

2.2.2. VOLUNTARINESS OF RJ

{ Reference to the Competency Profile: Knowledge, Skills, and Attitudes }

- “No person should be induced by unfair means to participate in restorative justice” [CE Rec 8(2018): Rule26].

- “Prisoners who consent to do so may be involved in a programme of restorative justice and in making reparation for their offences” [European Prison Rules: rule 103.7, cf. the commentary: “Rule 103.7 acknowledges the increasing recognition that the techniques of restorative justice may be used with sentenced prisoners who wish directly or indirectly to make reparation for their offences. It is important that such participation is voluntary and does not amount to an indirect form of further punishment”]

- “Restorative justice shall not proceed with those who are not capable, for any reason, of understanding the meaning of the process” [CE Rec 8(2018): Rule26]

Topics for common discussion:

- Voluntariness of RJ by victims (cf. also below § 2.2.8 Unbiased information); voluntariness in cases where RJ can have a mitigating effect; guarantees that victims are not pushed to accept RJ (e.g. in juvenile justice: by providing the victim with information that makes the victim feel responsible for the offender’s rehabilitation)

- Voluntariness of RJ and coercive nature of (punitive) criminal justice: how to reconcile this contradiction? Which procedural safeguards to ensure voluntariness and voluntary participation or non-participation by suspected, convicted and/or imprisoned persons?

- Procedural safeguards to ensure voluntariness by juveniles (whether as victims or as accused or as convicted persons) [CE Rec 8(2018): Rule24]

- Procedural safeguards to ensure voluntariness by any vulnerable subject (no matter the role in the RJ process, and no matter the reason of the vulnerability: e.g., non-native speaker, migrant, elderly, etc.)

- What about offenders and victims who are not capable of understanding? Is the somewhat ‘categorical’ provision of Rule 26 [CE Rec 8(2018): Rule26] and the
subsequent direct exclusion of those who are not capable of understanding the process always fair? Do we want to recommend and advocate milder case-by-case approaches?

2.2.3. VICTIM RIGHTS AND SAFEGUARDS WITHIN RJ PROCESSES WITH SPECIAL REGARD TO THE FOLLOWING BINDING PROVISION

{ Reference to the Competency Profile: Knowledge, Skills, and Attitudes }

- “(...) the restorative justice services are used only if they are in the interest of the victim” [2012/29/EU Directive: art. 12]

but see on the contrary CE Rec 8(2018) introducing balances

- “Restorative justice should not be designed or delivered to promote the interests of either the victim or offender ahead of the other. Rather, it provides a neutral space where all parties are encouraged and supported to express their needs and to have these satisfied as far as possible” [CE Rec 8(2018): Rule15]

Topics for common discussion:

- Do we agree to recommend equal consideration of the interests of all those involved (victims, suspect or accused persons, offenders, family members, community members, other interested subjects)?
- Safeguards for victims with special protection needs

2.2.4. SUSPECT/ACCUSED/OFFENDER RIGHTS AND SAFEGUARDS WITHIN RJ PROCESSES

{ Reference to the Competency Profile: Knowledge, Skills, and Attitudes }

Cf. rules and principles mentioned above at §§ 2.1.1. (Presumption of innocence), 2.1.2. (Accusation and charges), 2.1.4. (Impact of RJ on judicial decision), 2.2.2. (Voluntariness of RJ)

- “Restorative justice should not be designed or delivered to promote the interests of either the victim or offender ahead of the other. Rather, it provides a neutral space where all parties are encouraged and supported to express their needs and to have these satisfied as far as possible” [CE Rec 8(2018): Rule15]

Topics for common discussion:

- Do we agree to recommend equal consideration of the interests of all those involved?
- Safeguards for offenders with special needs, such as juveniles or offenders with reduced criminal capacity.
2.2.5. ACKNOWLEDGEMENT OF THE BASIC FACTS

{ Reference to the Competency Profile: Knowledge }

• “(...) the offender has acknowledged the basic facts of the case” [2012/29/UE Dir.: art. 12, c)]

• “The basic facts of a case should normally be acknowledged by the parties as a basis for starting restorative justice (...)” [CE Rec(2018)8: Rule30.1]

• “The victim and the offender should normally agree on the basic facts of a case as the basis for their participation in a restorative process” [UN Basic Principles: para. 8.1]

Topics for common discussion:

  o What does this principle mean? Which are the aims of this principle? Which safeguards does it entail? Which risks does it carry?
  o Why is this a ‘basic’ principle?
  o How should this principle be interpreted?
  o How should this principle be implemented?
  o Is ‘acknowledgement of’ / ‘agreement on’ the basic facts really necessary? For the sake of whom? For the sake of what?
  o ‘Basic facts’: what does this expression mean? Which facts? The concept of ‘facts’ in (more) ‘informal’ restorative processes and in (more) ‘formal’ criminal proceedings are not equal (narrative concept of ‘fact’, legal concept of ‘fact’, fact with criminal relevance)
  o What is the relationship between this ‘acknowledgement of’ / ‘agreement on’ and the presumption of innocence? (see also above the presumption of innocence § 2.1.1.)
  o What is the relationship between this ‘acknowledgement of’ / ‘agreement on’ the basic facts and the confidentiality principle? (see also below § 2.2.6.)
  o Should we advocate a change of this standard at the UN, EU and CE level?
  o How does this principle work in cases where neither the offender nor the victim take part in the RJ processes? E.g., “A Conversation”, where only the families of the offender and the victim participated in a RJ encounter
  o Exception to the principle from the victim’s side: victims desiring to meet the offender besides the dis-agreement or non-acknowledgement of the basic facts
  o Exception to the principle from the suspect/accused/offender’s side: suspect/accused/offender desiring to meet the victim besides the dis-agreement or non-acknowledgement of the basic facts
  o Is the principle necessary to avoid judicial referrals for investigative purposes?
2.2.6. CONFIDENTIALITY [CE REC(2018)8: RULES 17, 49, 53; UN BASIC PRINCIPLES: PARA. 14; 2012/29/EU DIRECTIVE: ART. 12, E)]

{ Reference to the Competency Profile: Knowledge, Skills, and Attitudes }

Topics for common discussion:

- Why is this principle of confidentiality so important, what is its function in restorative justice?
- Which interests conflict with the confidentiality principle (such as the need for justice to be seen)?
- Impact of RJ on judicial decisions; relevance of the restorative outcome in subsequent criminal proceedings
  - “Any agreement is arrived at voluntarily and may be taken into account in any further criminal proceedings” [2012/29/EU Directive: art. 12, d]);
- Crime reporting obligations
  - e.g., “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” [2012/29/EU Directive: art. 12, e]);
  - e.g. “Notwithstanding the principle of confidentiality, the facilitator should convey information about imminent or serious crimes which may come to light in the course of restorative justice to the competent authorities” [CE Rec(2018)8: Rule49];
  o Privilege reporting exemption; disclosure exemption
  o Hearsay – witness exemption
  o What is the relationship between the confidentiality principle and the acknowledgement of ‘/ ‘agreement on’ the basic facts of the case? (see also above § 2.2.5.)

2.2.7. PROVIDING INFORMATION TO THE FACILITATOR

{ Reference to the Competency Profile: Knowledge and Skills }

- “Before restorative justice starts, the facilitator should be informed of all relevant facts of the case, and provided with the necessary information by the competent judicial authorities or criminal justice agencies” [CE Rec(2018)8: Rule 33]

Topics for common discussion:

- Is this a duty of judicial authorities (prosecutors / judges)? Judicial authorities seem to be supposed to provide information on the case, but maybe they will not receive information from the facilitator after the mediation at all because of the confidentiality
o What pieces of information are relevant for facilitators? Why?
o Should judicial authorities (prosecutors / judges) provide facilitators with clear information about the judicial scenario taking place with / without a restorative outcome?
o Minimalist approach (minima information) to leave room to narratives?
o Facts and/or identification of those involved?
o Secrecy of pre-trial investigations
o Is a legal recognition of mediators / facilitators and a regulation of their role needed to legitimise their access to information (e.g., GDPR and data protection; secrecy of pre-trial investigation)

2.2.8. PROVIDING INFORMATION TO THE PARTICIPANTS. UNBIASED INFORMATION, POTENTIAL OUTCOMES, PROCEDURES OF SUPERVISING THE IMPLEMENTATION OF THE OUTCOMES, GRIEVANCES

{ Reference to the Competency Profile: Knowledge and Skills }

- “(...) 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” [2012/29/EU Directive: art. 12]
- “Before agreeing to restorative justice, the facilitator must fully inform the parties of their rights, the nature of the restorative justice process, the possible consequences of their decision to participate, and the details of any grievance procedures” [CE Rec(2018): Rule 25]
- “Before agreeing to participate in restorative processes, the parties should be fully informed of their rights, the nature of the process and the possible consequences of their decision” [UN Basic Principles: para. 13.b]
- “Restorative justice is voluntary and shall only take place if the parties freely consent, having been fully informed in advance about the nature of the process and its possible outcomes and implications, including what impact, if any, the restorative justice process will have on future criminal proceedings. The parties shall be able to withdraw their consent at any time during the process” [CM/Rec(2018): Rule 16]

Topics for common discussion

- What recommendations will we provide the judiciary with?
- Which is the range of legal consequences of restorative processes in each national system?
- What kind of supervision of the implementation of agreements is compatible with RJ? What kind of supervision is compatible with each national legal system?
- What legal status does an agreement reached in mediation have?
- What consequences for non-implementation of agreements?
- What do grievances refer to? Outcomes, denials of referral, both?
Need for cooperation and coordination among the judiciary, the defence lawyers and RJ practitioners to avoid creating wrong expectations and to avoid incorrect information to the parties about restorative outcomes, implications and impact on the criminal proceeding (see also §§ 2.2.7, 2.4.)

Cf. also the discussion topics mentioned above § 2.2.2. Voluntariness of RJ

### 2.2.9. DATA PROTECTION AND RJ

{ Reference to the Competency Profile: Knowledge and Skills }


Topics for common discussion

- Given the generalised lack of comprehensive European and/or national legislation on restorative justice, what recommendations will we provide the judiciary with?
- Relevant issues impacting on the applicable EU/national legislation concerning the lawful processing of personal data in restorative processes:
  - nature of RJ in relation to the GDPR and Directive (EU) 2016/680
  - the function and/or qualification of facilitators in relation data protection duties and obligations
  - the type of personal data processed during RJ processes
  - access to data, data protection and other rights of the parties

### 2.2.10. RJ RESPONSES TO SERIOUS CRIMES; RJ PROGRAMMES WITH VULNERABLE SUBJECTS/SUBJECTS WITH SPECIAL NEEDS

{ Reference to the Competency Profile: Knowledge, Skills, and Attitudes }

[CE Rec(2018)8: Rules 18, 43; UNODC, Handbook on Restorative Justice Programmes, 2020 edn: Chapter 6]; cf. also above §§ 2.2.3. Victim rights and safeguards; 2.2.4. Suspect/accused/offender rights and safeguards; 2.3.1 The role of the judiciary in referrals

- “Restorative justice should be a generally available service. The type, seriousness or geographical location of the offence should not, in themselves, and in the absence of other
considerations, preclude restorative justice from being offered to victims and offenders” [CE Rec(2018)8: Rule 18]

• “Facilitators should be experienced and receive advanced training before delivering restorative justice in sensitive, complex or serious cases” [CE Rec(2018)8: Rule 43]

Topics for common discussion

• How to reconcile the principled availability of RJ potentially in all cases, no matter the type and seriousness of the offence, with the obligation to ensure tailored protection to victims, especially those with special protection needs, following the Victims Directive, (arts. 18 ff.)?

• Which recommendations or guidelines are we going to provide the judiciary with (during training) in relation to the management of ‘special’ cases (partner/domestic violence, sex offences, human trafficking, terrorism, organised crime, international core crimes, etc.)?

• Which recommendations or guidelines are we going to provide the judiciary with (during training) in relation to vulnerable groups and vulnerable subjects (e.g., children/juvenile victims and/or offenders; people with disabilities; the elderly; migrants, asylum seekers, refugees, etc.)?

• How to reconcile the basic principles and standards on RJ – and particularly the presumption of innocence [CE Rec(2018)8: Rule 30.2; UN Basic Principles: para. 8.] and the principle that “Restorative processes should be used only where there is sufficient evidence to charge the offender” [UN Basic Principles: para. 7] – with the fact that in some ‘sensitive’ cases there may not be sufficient evidence to charge the offender (e.g. sexual abuse in the church, family violence, violence against children, paedophilia)?

• How to promote confidence by the judiciary on the competence of mediators and facilitators in dealing with sensitive cases / vulnerable subjects / subjects with special needs?

2.3. The role of the judiciary (prosecutors and judges)

2.3.1. ROLE OF THE JUDICIARY IN REFERRALS [2012/29/UE DIR.: ART. 12; CE REC(2018)8: RULES 6, 18–19, 28]

{ Reference to the Competency Profile: Knowledge, Skills, and Attitudes }

Topics for common discussion

○ Conditions for referrals? Equal accessibility?
○ ‘Suitability’ of cases? Appropriateness of cases / of referrals?
○ Preclusions?
○ Need/not need for guidance/guidelines from head of judicial offices (both prosecutors and courts)
Do we need to work with a system of ‘positive selection’ or ‘negative selection’: do we need reasons to refer a case to restorative justice, or do we need reasons not to refer some cases (when the law prescribes, for example, that all victims and offenders have to be informed about the offer of mediation, and when it has to be considered as a ‘general available service’, see CE 2018 Rec)?

Role of prosecutors in mandatory/discretionary charging systems in relation to restorative justice, its accessibility, implementation, and impact on judicial decisions

When referring a case, the judiciary should provide the parties with an unbiased information regarding the fact that RJ is carried out in the balanced interest of all the parties (victim and offender, others involved) and not in one’s interest at the expense of the other [CE Rec(2018)8: Rule 15]. Need for coordination between the judiciary and other subjects, professionals and agencies providing information to the parties before judicial referral.

Impact of RJ on investigations

Safety and security of all participants [UN Basic Principles.: para. 10]: is it a facilitators’/mediators’ task to ensure safety and security? Or has the judiciary a role to play in it when referring cases (or not)?

Repeat and secondary victimisation, retaliation, intimidation [2012/29/UE Dir.: arts. 12, 18, 20]. Is it a facilitators’/mediators’ task to ensure safety and security? Or has the judiciary a role to play in it when referring cases (or not)?

Which interpretation of UN Basic Principles: para. 9 (“Disparities leading to power imbalances, as well as cultural differences among the parties, should be taken into consideration in referring a case to, and in conducting, a restorative process”)?

Which recommendations are we going to provide the judiciary with?

2.3.2 JUDICIAL SUPERVISION OF RESTORATIVE PROCESSES AND OUTCOMES

{ Reference to the Competency Profile: Knowledge and Skills }

- “The need for judicial supervision is greater if restorative justice will have an impact on judicial decisions, as when the discontinuation of prosecution depends on an acceptable settlement, or when the agreement is put to court as a recommended order or sentence” [CE Rec(2018)8: Rule 7]

- “Where a case is referred to restorative justice by the judiciary before conviction or sentencing, the decision on how to proceed after the outcome agreement between the parties is reached, should be reserved to the judicial authorities” [CE Rec(2018)8: Rule 32]

- See also above § 2.1.4.

Topics for common discussion
- Pros and cons
- Fundamental rights and safeguards connected to judicial supervision (see also § 2.2.6)
2.3.3. SOFT, NON-TECHNICAL ‘RESTORATIVE’ SKILLS AND JUDICIAL POWERS AND WARRANTIES

{ Reference to the Competency Profile: Skills and Attitudes }

Topics for common discussion

- Is there a ‘restorative’ prosecutor? Is this recommendable? If so, how? If not, why? Which are the risks? Which are the challenges? Which are the opportunities?
- Is there a ‘restorative’ judge? Is this recommendable? If so, how? If not, why? Which are the risks? Which are the challenges? Which are the opportunities?
- From the perspective of judicial authorities (prosecutors / judges), how can I technical-legal skills interact well with judicial non-technical-restorative skills within the function, role, power and guarantees attributed to the judiciary?

2.4. COOPERATION AND COORDINATION

{ Reference to the Competency Profile: Skills and Attitudes }

- “There should be regular consultation between judicial authorities, criminal justice and restorative justice agencies, legal professionals, offenders and groups acting on behalf of victims and communities, in order to enable the development of a common understanding of the meaning and purpose of restorative justice” [CE Rec(2018): Rule 55]

Topics for common discussion
● Need for a better knowledge and a common understanding inside judicial authorities (prosecutors / judges) about RJ in general
● Need for a common understanding about RJ (its objectives and limits) in the particular case among the public prosecutor, the judge and the defence lawyers
● Need for a common understanding of RJ in general and in the particular case among all the subjects institutionally involved, including RJ practitioners, in order to avoid the parties' expectations being deceived, frustrated or betrayed
● What should this ‘regular consultation’ look like in practice? How should this ‘regular consultation’ be carried out?
● On which level this consultation should happen (case-level, local, national...)?
● What are the implications of this Rule (interdisciplinarity, joint-training, etc.)?

2.5. RJ INSIDE AND OUTSIDE THE CRIMINAL JUSTICE SYSTEM

{ Reference to the Competency Profile: Skills and Attitudes }

[CE Rec(2018)8, Rule 8, sec. VII, Rules 60–61; cf. also European Prison Rules: Rule 56.2 with regard to conflicts between prisoners, and between prisoners and prison officers; cf. CE Rec(2008)11: Rule94.1 with regard to juveniles]

Topics for common discussion

○ Pros and cons
  ○ How can restorative justice be used internally (in case of conflict between staff ...) for a better functioning of the CJS? (CE Rec (2018)8, Rule60–61)

○ Risks:
  ○ Net–widening effect
  ○ Everything becomes restorative justice; RJ features are lost
3. Other challenges and relevant themes of discussion

3.1. Different understandings of RJ

- Victim-oriented, balanced, offender oriented, meeting, reparation,...
  and international principles and standards
- Procedural justice and RJ

3.2. The role of regulation in implementing RJ in criminal matters

- Lack of comprehensive regulations in the field of RJ and the role of the judiciary (prosecutors and judges) within the frame of the principle of legality and the rule of law.
- Would it be convenient to regulate how to use restorative justice in legal proceedings?
- How to reconcile the possible need for binding provisions with the necessary flexibility of RJ?
- What would be a good level of regulation of the RJ processes to avoid the dangers of a very detailed regulation? Is soft law regulation—easily changed, adapted to every community—convenient enough? Should it be sensible, in relation to restorative justice, to advocate a combination of — or a distinction between — formal/primary legislation, and more local, subordinate and ‘flexible’ forms of regulations (guidelines, circular letter from Ministries, ...)? Would this compatible with the rule of law and the legality principle in criminal matters?
- Cf. CE REC (99)19 Explanatory memorandum: Necessity to leave room for adaptation; possible wisdom of different levels of regulation. In most countries most regulation is lower sources (guidelines; internal regulation, standards, and ethical codes by RJ services Not expect everything from the law
- RJ and legal system reform: drafting of a ‘restorative legal system’?
3.3. EU policy

- How can RJ impact and improve the EU ‘new strategy to empower victims’ (European Commission, EU Strategy on victims’ rights (2020-2025))?  
- How to keep together the UN Handbook on RJ practice, the Coe 2018 Rec and EU policies?  
- Can policy proposal stem from the project?

3.4. The issue of language: restorative vocabulary and legal vocabulary

- How can RJ become an instrument to improve regulations themselves?  
- How can RJ influence the production/development of regulations, laws?  
- How can the language used by judges affect people?