

VICTIMS AND CORPORATIONS

Implementation of Directive 2012/29/EU
for victims of corporate crimes and corporate violence

Guidelines for Corporations

Preventing Victimization
and Dealing with Victims
of Corporate Violence

November 2017



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By

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November 2017

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FOREWORD

These guidelines are an output developed within the framework of the project ‘Victims and Corporations. Implementation of Directive 2012/29/EU for victims of corporate crime and corporate violence’.

The Directive 29/2012/EU carries the potential for a significant change within European criminal law systems: it introduces a set of minimum standards on the rights, support, and protection for victims of crimes, and their participation in criminal proceedings, without prejudice to the rights of the offender (for a summary of the Directive, **see § I**).

The project is based on the assumption that within the scope of the Directive, and its definition of “victim”, there is a relevant group of vulnerable victims who have not yet received sufficient consideration, and whose ability to access to justice is in question. These are the *victims of corporate crimes*, and particularly of *corporate violence*, where the latter means those criminal offences committed by corporations in the course of their activities which result in harms to natural persons’ health, integrity, or life.

The project focuses on three main strands of corporate victimisation: environmental crimes, food safety violations, and offences in the pharmaceutical industry. These are considered to be criminal offences that exemplify the problems related to corporate violence, taking into account the relevant number of victims, the seriousness and widespread import of harm, and the frequent cross-border nature of the offences and/or of the offenders. Corporate violence, however, is always a complex phenomenon, so that episodes of work safety violations, for instance, often turn out to be intertwined with other kinds of corporate crime – as can be seen in the cases we have studied.

Our empirical research has confirmed that victims of corporate violence appear to have an extreme need to “receive appropriate information, support and protection”, and to be enabled “to participate in criminal proceedings”, both because they comprise a category of extremely vulnerable subjects, and due to a lack of (public as well as personal) recognition of their status as victims (**see § II**; for a deeper analysis: *Individual Assessment of Corporate Violence Victims’ Needs. A Practical Guide*, April 2017, available at www.victimsandcorporations.eu).

The Directive applies to a large number of target groups, and in particular to judicial and social professionals: enforcement agencies officers (police officers, prosecutors, judges), lawyers, victim support agencies, restorative justice services, and victims’ organisations.

Corporations may not constitute the *immediate target group*; but, as far as victims of corporate violence are concerned, they do form a highly relevant *intermediate*

target group. In fact, corporations' attitudes to victims may play a decisive role in reaching the substantive aims of the Directive. Corporations are involved in respect of preventing primary and repeated victimisation (**see § III**), as well as cooperating in avoiding secondary victimisation, and dealing with victims in an appropriate manner when criminal proceedings take place (**see § IV**).

The project assumes and tries to demonstrate that this final aim is also in the corporations' interest, and not only in respect of the values of *social responsibility*. In fact, corporate violence can also have an impact on the corporation itself, in terms of potential sanctions pursuant to criminal proceedings and reputational damage. Therefore, a proactive and positive approach in dealing with potential or actual victims may significantly *mitigate the conflict* at all levels (including the community in which the corporation operates, and the wider public sphere of consumers), and establish a favourable forum of dialogue to repair and compensate the damages.

These Guidelines aim, first, to foster a more victim-sensitive, pro-social, and cooperative approach when faced with victims' allegations and requests. To this end, the first part of the document is dedicated to increasing awareness of the needs and rights of victims of corporate violence, as well as understanding the profile of their vulnerability (**see § II**, and for a detailed framework of the project results, see *Needs of Victims of Corporate Violence: Empirical Findings* including the national reports from Italy, Germany and Belgium, available at: <http://www.victimsandcorporations.eu>).

By taking into account the range of possible contexts in which the relationship between victims and corporations could come into play (**see § III.1**), the guidelines also make recommendations aimed at preventing primary and repeated victimisation, and reducing the burden of controversy within and outside criminal proceedings (*Cases of corporate violence victimisation. Midterm Report*, available at www.victimsandcorporation.eu). Some recommendations are also addressed at managing issues of compensation, reparation, or other remedies.

We would like to express our gratitude to the researchers and supervisors who carried out the theoretical and empirical research and contributed to make the writing of this document possible, and, above all, we would like to state our sincere appreciation to the victims who shared their personal stories with us, as well as to the professionals who allowed us to learn from their experience, in the interviews and focus groups organised during the empirical research. Without their collaboration it would not have been possible to write this *Guidelines*.

For updates about the Project's next steps and results, please refer to our website: www.victimsandcorporations.eu.

I.

**DIRECTIVE 2012/29/EU
ESTABLISHING MINIMUM STANDARDS
ON THE RIGHTS, SUPPORT
AND PROTECTION OF VICTIMS OF CRIME***

To better **contextualise the directions** set out below in the sections of this *Practical Guide*, as a preliminary point, it may be useful to look at the **main directions** provided by the **Directive 2012/29/EU** on the **rights, support, and protection of victims of crime**; these victims being individuals who, above all, must be properly understood in terms of their **needs** and treated “**in a respectful**, sensitive, professional and non-discriminatory manner” (Recital 61).

The purpose of the Directive is to ensure that victims of crime receive appropriate information, support, and protection and are able to participate in criminal proceedings (Art. 1).

In general terms, this implies that contact and interaction with victims of crime, regardless of who is responsible for and/or handles such, must involve:

- **recognition of the victim** as a victim, regardless of whether an offender is identified, apprehended, prosecuted or convicted (and regardless of any familial relationship between them) and, in addition, regardless of any delay in reporting a criminal offence (due to fear of retaliation, humiliation or stigmatisation);
- **respect for the victim’s physical, mental, and moral integrity**, sensitivity, professionalism, and **avoiding any type of discrimination** (based on race, skin colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, belonging to a national minority, heritage, birth, disability, age, gender, gender expression, gender identity, sexual orientation, residency status or health);
- **consideration for the victim’s personal situation** as well as immediate needs, age, gender, possible disabilities, and maturity;
- **protection** from **secondary victimisation** (namely possible negative emotional and/or relational consequences from contacts between the victim and public

* By ARIANNA VISCONTI (translation from Italian by Lawlinguists Srl, Milano)

institutions in general, and the criminal justice system in particular) or from **repeat victimisation**, from **intimidation**, and from **retaliation**;

- **minimisation of unnecessary interactions with the authorities**, by simplifying interaction between the authorities and the victim, ensuring the avoidance of **any unnecessary suffering**, and adopting a respectful approach to allow victims to establish a level of **trust in the authorities**;

- commitment to ensuring appropriate **support** to facilitate **recovery** and ensure that victims have **sufficient access to justice**;

- **protection of the victim's private life** and privacy;

- commitment to providing **information and advice** via the widest possible range of media and in simple and accessible language, to ensure that the victim **can be understood** and **can take informed decisions** regarding participation in the criminal proceedings;

- commitment to **ensure that the victims can be understood**, taking into account their knowledge of the language used to provide information, age, maturity, intellectual and emotional capacity, literacy level, and any mental or physical impairment;

- **consideration also for any indirect victims of the crime**, that is, for example, members of the victim's family who, in turn, are harmed as a result of the crime.

The Directive, therefore, establishes a set of **rights** for **victims of crime**, which can be summarised as follows:

- the right to **understand** and to **be understood**, when first registering the complaint and at every stage and level of the criminal proceedings (Arts 3 and 5), including a specific right to interpretation and translation (Art. 7);

- the right to receive **information** from the first contact with a competent authority about: the type of support they can obtain and from whom; access to medical support and/or any specialist support including psychological; alternative accommodation; the procedures for registering the complaint; how and under what conditions they can obtain protection; the possibility to access various forms of legal assistance; how and under what conditions they can seek compensation; the right to interpretation and translation; the procedures to follow should they be resident in a different Member State; the procedures available for making complaints where their rights are not respected; the contact person for communications about their case; the restorative justice services available; how and under what conditions they can seek reimbursement for expenses incurred due to their participation in the criminal proceedings (Art. 4); progression of their case at every stage and level of the criminal proceedings (Arts 5 and 6);

- the right to access **victim support services**, free of charge and acting in the interests of the victims, before, during, and for an appropriate time after the criminal proceedings (Arts 8 and 9);
- the right to **participate in the criminal proceedings** (the right to be heard – Art. 10; the right to a review of a decision not to prosecute and related rights – Art. 11; the right to protection, including in the event of access to restorative justice services – Art. 12; the right to legal aid – Art. 13; the right to a reimbursement of expenses incurred in order to participate in criminal proceedings – Art. 14; the right to the return of property owned by the victim and seized – Art. 15; the right to a decision on compensation from the offender – Art. 16; the right to have difficulties reduced to a minimum, where the victim is resident in another Member State, – Art. 17);
- the right to **protection** (of victims and their family members) from secondary and repeat victimisation, from intimidation, and from retaliation, including against the risk of emotional or psychological harm, and to **protection of their dignity** during questioning or when giving testimony (including the right to avoid contact with the offender, the right to protection during investigations, the **right to protection of privacy**, the **right to a timely and individual assessment** in order to determine any specific needs and whether and to what extent they would benefit from special measures during the criminal proceedings, the right to access such special measures, where necessary, and the specific right to protection for children – Arts 18-24).

It is a **prerequisite** that **anybody, who comes into contact with victims of crime, possesses the ability to identify victims and their specific individual needs to guarantee that every other, more specific, direction** contained in the Directive is respected and, therefore, to guarantee the rights established therein. Thus, the following section provides a brief summary of corporate violence victims' specific needs.



II.

THE VICTIMS OF CORPORATE VIOLENCE AND THEIR NEEDS*

1. The concept of corporate violence and its practical value

'Corporate violence' means criminal offences committed by corporations in the course of their legitimate activity, which result in harms to natural persons' health, integrity, or life.

For examples of this type of offence, the main point of reference is the comprehensive report on empirical research (*Needs of Victims of Corporate Violence: Empirical Findings*) and the *Practical Guide* on the individual assessment of victims' needs available at www.victimsandcorporations.eu. The point to be made here is that even **simply alleged criminal offences** corresponding to corporate violence cases **also fall under the scope of the Directive** and its implementation. This is clear from the definition of a "victim of crime" adopted by the Directive: natural persons who have «suffered harm, including physical, mental or emotional harm or economic loss which was directly caused by a *criminal offence*» as well as the 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» (**Art. 2, par. 1**), «*regardless of whether an offender is identified, apprehended, prosecuted or convicted*» (**Recital 19**).

It should, however, be made clear that the concept of corporate violence has a **criminological and sociological framework**, with the result that it does **not** perfectly **overlap** with the **categories, established in law, of 'violence' or of 'corporate criminal liability'**.

In terms of the first category, **corporate violence** covers what is a **broader yet contemporaneously more restricted range of cases** compared to the **legal concept of violence** that has evolved, even recently, in the Italian legal system:

➤ broader, because it **does not** contain any **implication of intention** (which in fact means that it will usually be excluded from the scope of application of Directive 2004/80/EC relating to the right to compensation for victims of violent *intentional* crime) **nor** any **implication of direct interaction between offender and victim**;

* By ARIANNA VISCONTI (translation from Italian by Lawlinguists Srl, Milano)

➤ more restricted, because it was only devised in relation to cases of **'material' violence**, implying an **impact on life, integrity, and mental and physical health**, and **not** in relation to cases consisting of **purely psychological violence**, as may well arise also in the case of *corporate crime* (think to workplace mobbing).

In terms of the second category, the concept of **corporate violence**, without doubt, covers a **range of criminal offences extending far beyond** those (that are violent in the broad sense or might lead to violent crimes or in any event to harm to an individual's life or psycho-physical integrity) and are currently included in the **list** of unlawful acts that might give rise to **corporate criminal or quasi-criminal liability**, according to the models adopted by the national legislations.

However; this discrepancy stems from the **empirical and social origin** of the notion of **corporate violence** and, therefore, lends itself to better reconstruct actual types of harm and suffering experienced by the **victims of this type of crime**, as well as the specific **challenges** surrounding adequate protection for this particular group of victims. Therefore, it seems clear that the concept of corporate violence, as well as sensitivity to the empirical and social reality underlying it, are **essential** with a view to the **effective and operative implementation of the Directive**, and more specifically regarding a **correct individual assessment of the needs** of these victims.

In fact, it is **extremely important** that anyone who is to come into contact with these victims, for any reason whatsoever, is sufficiently **aware** of the **complex empirical reality** of **corporate violence victimisation**, to ensure that the victim of the crime is treated with respect: this being the first and most general pillar of the protection system established by Directive 2012/29/EU.



2. Problematic aspects of corporate violence victimisation: a summary

In this section, an **essential overview of the peculiar types of harm** belonging to corporate violence cases is provided along with a summary of the **specific problems** inherent in identifying the **needs and requirements to be taken into account when dealing with victims** of this **specific category**. Therefore, readers interested in the most in-depth description available of corporate violence victims' specific needs,

should refer back to the earlier cited *Practical Guide* (www.victimsandcorporations.eu/publications).

As mentioned earlier, the Directive classifies **victims** as such upon having **suffered harm**, including **physical, mental or emotional harm or economic loss** which was directly caused by a criminal offence (**Art. 2, par. 1**).

As in the case of almost every serious crime, the harm consequent to victimisation resulting from corporate violence tends to be physical, psychological and economic. The usual complexity of these offences generally implies that the victim does not experience these types of harm separately, but as aspects of one single traumatic experience in which each fuels the other. In addition, the harm often goes unnoticed at first and is either delayed and/or emerges gradually, as does the feeling by the victim on a psychological level that they have suffered a particularly serious ‘betrayal of trust’.

☐ **Physical harm** can range from **death** (immediate or following a short-term or long-term illness) to **personal injury of various degrees of severity and of varying durations**, including **conditions resulting in a severe disability and/or disfigurement**, which, in particular, imply serious repercussions on the victim’s work life, emotional life, and relationships (see below). **Foetuses and new-born babies** can also be affected (one example being the phocomelia cases linked to the use of Thalidomide during pregnancy). The harm can **emerge in the immediate aftermath** of the crime **or a considerable time afterwards**, possibly decades later, given that diseases linked to the exposure to toxic agents can remain **latent for lengthy periods of time**. The **symptoms and/or causes may be unclear**, given the continuing **scientific uncertainty** surrounding the origin of the condition in question and the role played (or not played) by exposure to certain substances, to the extent that it is often impossible to identify conclusively a link between the illness and the criminal offence.

☐ **Psychological and emotional harm** can result **from a single traumatic event** (in the case of disasters, for example) or be predominantly the **consequence of physical injury and economic loss** and the related stress. In both cases, the results of empirical research carried out as part of this project and of literature review alike demonstrate how psychological and emotional harm can manifest itself **in forms and with levels of intensity that are no different from the harm that arises from ‘ordinary’ violent crimes** (PTSD, depression and anxiety attacks, etc.). What is nearly always evident is a specific sense of **‘betrayal’** regarding the organisation in question and its representatives (which aggravates the psychological effects mentioned above). In fact, the victim is generally linked to said agents by a **necessary relationship of delegated or implied trust** (a consumer in respect to a manufacturer, a patient in respect to the pharmaceutical industry or an employee in respect to their employer etc.). In some cases, this is magnified by what is an outright **dependency** linking victim and perpetrator (examples here are a haemophiliac who is dependent on lifesaving blood derivatives, or a workforce or entire communities who are financially dependent on factories that are unsafe). This sense of betrayal often extends to public institutions

when the victim perceives a failure to carry out checks that could have prevented the crime or a failure to counter it once discovered. Psychological stress can be exacerbated by the **fear that the harm will get worse or be repeated** (think for example to cases involving asbestos and the psychological suffering linked to, in the case of diagnosis, the certain fatal development of pleural mesothelioma; or to the death of relatives or friends exposed to the same environmental factors to which the current or potential victim is exposed). This is often aggravated by **scientific uncertainty** and by a **fear of retaliation** by the corporate offender, in relation to whom the **disparity in strength and knowledge** is something that the victim is generally aware of. Moreover, given that there are many **cases** here which can be considered to **some extent as ‘jointly caused’ or ‘prompted’ by the victim** (because of the choice, perhaps a repeated one, to use a specific product, or of the choice of a certain job, or of the decision to have plastic surgery, and similar), feelings of **shame and self-blame** are not infrequent, and these have a huge emotional impact on the victim. Where the victim’s place of residence has been seriously affected (as in cases of pollution on a severe scale) and they are forced to and/or are able to move out, **harm to interpersonal relationships** can also arise resulting from this forced uprooting. Harm of a similar type can also result from the onset of **medical conditions that are seriously disabling or cause serious disfigurement** (an example being Thalidomide victims) and, more generally, from the **stress caused to victims and/or their relatives** as a result of the crime and its medium and long-term consequences.

□ In these cases, **economic harm** can mostly be linked to factors such as **medical expenses** incurred in relation to the sustained physical harm (these are often high, depending on the severity and duration of the medical conditions contracted), **job loss** or **deterioration in working capacity**, the loss of a partner who was the only or main breadwinner in the family, **costs incurred in changing residence**, when possible (e.g. abandoning a seriously polluted area), **or in reducing, using the victim’s own resources, the risk** of repeat victimisation (decontamination work or the purchase of protective equipment and devices etc.).

It is apparent from this summary that where **victims of corporate violence are concerned, there is frequently a coexistence** of **multiple factors of vulnerability** (as better specified below) that, when dealing with such victims, are to be taken into consideration both individually and based on how they interact with one another.



3. Corporate violence victims: vulnerability profiles and needs

3.1. RECOGNITION: To feel recognised, as a person *and as the victim of a crime*, is in fact the **primary need** for the majority of victims in general and, in particular, for those of corporate violence, being an integral part of the «**respect**» which, pursuant to **Art. 1 of the Directive**, underpins the rights of the victim that it sets out and enacts.

Victims of corporate violence often complain that **they do not at all feel recognised** as such, **by the corporation** that (allegedly) committed the crime, **by many of the legal professionals with whom they come into contact** as a result of the suffered crime, by the general public, by the authorities (which results as being even more harmful) and, in certain cases, by their relatives, colleagues or members of their particular group.

Contributing to this situation are all the critical issues typical of this form of victimisation, ranging from the scientific uncertainty surrounding the symptoms and/or causes of their medical conditions, to the fragmented manner in which the harm emerges both geographically and over time, and to the lack of severity with which the law recognises the crimes they have suffered (crimes that nearly always involve negligence and are mostly classed as misdemeanors, especially when what is alleged is not an event resulting in harm but the creation of a risk to the health and safety of those affected), etc.

3.2. PROTECTION: It refers to the victims' needs, to which Directive 2012/29/EU pays close attention, more specifically regarding the right of every **vulnerable victim**, due to their «**particular vulnerability to secondary and repeat victimisation, to intimidation and to retaliation**» (**Art. 22**), to have access to measures of **special protection** to prevent this from happening and better protect their private and family life.

Article 22 of the Directive provides a list of the factual elements to be specifically taken into consideration when assessing a victim's protection needs. By entwining these (general) factors with the peculiarities of corporate violence victimisation, as summarised above (and as set out in greater detail in the above-cited report on *Needs of Victims of Corporate Violence: Empirical Findings* <http://www.victimsandcorporations.eu/publications/>), it can be concluded that the extent of a victim's vulnerability is to be assessed particularly in relation to:

- ❑ **the victim's personal characteristics**, such as **illnesses or infirmities that were pre-existing or are the result of the crime** (at times a combination of the two: think to the emblematic case of the haemophiliacs who contracted infections after being administered contaminated blood products), or cases of **financial or other types of dependence** on the offender;
- ❑ **nature and type of the crime**, often seen to involve, in cases of corporate violence, extremely serious and widespread harm with repercussions on every aspect of the victim's work, personal, family and social life;

- ❑ **the circumstances of the crime**, mostly consisting of a **large imbalance of resources, information, and power** in favour of the corporation and often characterised by a **cross-border nature** linked to both the multinational scope of many businesses and the widespread nature of victimisation resulting from a defective product or an environmental offence; added to this is the fact that it is often **impossible for the victim to give up the job and/or home** that keeps them exposed to the same risks of victimisation;
- ❑ **the victim's wishes and fears** (see Recital 58 and Art. 22 par. 6 of the Directive).

In closer detail, cases featuring a **reversal of blame onto the victim** are among the **specific problems** faced by corporate violence victims: particularly regarding cases of 'joint responsibility' for causing the harm (see above) and/or where the cause cannot be ascertained beyond reasonable doubt. Also frequent are cases in which the victim (typically an employee of the business facing the accusations) is unlawfully made subject to **disciplinary measures, demotion, dismissal or bullying in the workplace** or faces threats that the factory will be shut down, or the **factory is in fact shut down in the absence of decontamination and compensation**, and the like.

Whenever the victim is dependent, financially or in some other way, on the corporation (think to cases involving accidents at work or occupational diseases, or where individuals suffering from certain medical conditions must continue to take pharmaceutical products manufactured by the business in question or others suspected of following similar practices), **or cannot give up their job or move from a dangerous place** (e.g. because of environmental contamination from toxic substances), exposure to **repeat victimisation** is implicit.

It is precisely this **need for protection from repeat victimisation** and/or to prevent further harm that **is one of corporate crime victims' most frequently and urgently expressed needs**; a protection which they view as a clear duty – all too often neglected – on the part of the State and public institutions. Moreover, victims attach **huge psychological and moral importance** to the possibility that **their suffering** might at least help to **avoid that others suffer from similar offences**, thanks to quick and effective government action aimed at effectively preventing further cases of victimisation. Corporate attitudes toward prevention of future risks are also an issue on which – beyond possible acceptance, even partial, for liability on the corporation's part – victims place huge symbolic importance.

Corporate violence cases, implying harm to the life, health, and psycho-physical integrity of the injured parties, are **generally extremely delicate** in terms of showing **respect for the privacy and dignity** of victims during questioning or when testifying (Art. 18). Participation in court proceedings can expose these victims' sensitive data, relating to their health, family life or sex life etc., in some cases with high **risks of social**

stigmatisation (think, for example, to cases of HIV contamination from using infected blood products).

In cases of corporate violence, communities, and groups to which the victims belong, at times, demonstrate **ambivalence** towards them. More specifically, **where the complaint** made by the victim/s is **perceived as a threat to the economic security** of their colleagues or the community as a whole (typically, due to the heavy dependency of these individuals on a production plant for their livelihood, which such complaints could, directly or indirectly, shut down), victims can experience **hostility and ostracism** by those on whose support they feel they should be able to count.

Thus, it must also be acknowledged that, for victims of corporate violence, the presence of **continually evolving personal situations and relationships** is more or less the norm, such rendering the position of this type of injured party particularly delicate. It is often found that **problems accumulate, relating to obtaining adequate information**, to difficulties in effectively gaining **access to special protection** measures and quality and affordable **legal assistance**, to the possibility of guaranteed and effective **participation in the criminal proceedings** (including adequate privacy protection during hearings and proceedings), and to the availability of support services which are not always provided (or uniformly and effectively provided) for. The **cumulative effect** of all of these issues clearly exceeds the sum of their parts. Hence, in the end, **they fuel one another** in a vicious circle with an **existential impact that is potentially devastating**.

Where **the proceedings are dragged out**, this generally has a lasting negative impact on victims of corporate violence, resulting in a **frequent failure to remove the risk of repeat victimisation**, to which the victim can remain exposed, perhaps for years or even decades, and often also in **secondary victimisation, as a result of what is frequently very frustrating contact** with public institutions in general and with the courts in particular.

3.3. INFORMATION: The **right to be informed** not only occupies a central position in the Directive (**Arts 4-6**), but for **victims of corporate crime this generally proves to be a vital element**, linked not only to **practical requirements** (the first of these being to be able to «**take informed decisions about their participation in proceedings**» - Recital 26), **but also** to the chance to **regain some form of control** over their own lives following the crime.

From this standpoint, the **first need** on the part of victims of corporate violence is often to obtain **correct, complete, and comprehensible information about their situation**, which, more often than not, includes their exact state of health and the likelihood of recovery/deterioration, their future prospects and viable treatments etc.

Victims of corporate crime generally express a **particularly acute need** to obtain **complete and truthful information on their case**, on what exactly happened, and on who is responsible: they need this information **as much as** to reach a sense of **closure**

regarding the crime suffered, as they need to know that **there will not be a repeat of similar events in the future**. This need, however, is **very often frustrated** by the above-stated **'structural' problems** in corporate violence cases that range from scientific uncertainty surrounding the causes and evolution of the harm, to the lack of resources and knowledge when compared to those available for the defendants, who usually can benefit from an **asymmetry in information** often insuperable.

Victims of corporate violence very often have somewhat complex **needs for medical, psychological, and social support and assistance** (see below); where these needs are concerned, **access to adequate information can prove difficult**. For the injured parties, navigating a path between the various possible forms of financial support (social security, private insurance, specific compensation funds, if any, and claims for damages, etc.) can be equally complicated.

3.4. SUPPORT: As already highlighted, the Directive provides for «specific confidential **victim support services**, free of charge, acting in the interests of the victims before, during and for an appropriate time after criminal proceedings» (**Art. 8**); victims of crime should therefore be guaranteed a **minimum level and range of services (Art. 9)**, namely: «**information, advice and support relevant to the rights of victims** including on accessing national compensation schemes for criminal injuries, and on their role in criminal proceedings including **preparation for attendance at the trial**»; «**information** about or direct referral to any **relevant specialist support services in place**; «**emotional [support]** and, where available, psychological support»; «**advice** relating to **financial and practical issues** arising from the crime»; «unless otherwise provided by other public or private services, **advice** relating to the risk and **prevention of secondary and repeat victimisation, of intimidation and of retaliation**». Where the **specialist support services** are concerned, these services should also include «shelters or any other appropriate **interim accommodation for victims in need of a safe place** due to an imminent risk of secondary and repeat victimisation, of intimidation and of retaliation» and «**targeted and integrated support** for victims with specific needs».

In terms of services providing social support, healthcare assistance, and financial support, the **picture** appears to be a **particularly fragmented in the European context**. Given that these services are not uniformly provided in different countries, and that, even when they do exist, they might not be accustomed to dealing with corporate violence cases, it is important that all those in contact with victims of crime make every effort to direct them, as efficiently as possible, to the welfare bodies that are in place, which can provide at least some of the referenced services. **Formal and informal victims' associations** play a particularly important role here. Currently, these associations, often **set up spontaneously** in cases of collective victimisation (as cases of corporate violence often are), are in some cases (such as, for instance, in Italy, where no specific victims support services exist) **the only source of support** “for the victim to recover from and overcome potential harm or trauma as a result of a criminal offence”. Support and self-support – essentially via **information** provided to the

victims on their rights and the provision or exchange of **advice** “without excessive formalities” and generally in “simple and accessible language”, also providing, where possible, information about specialist **medical support**, “short and long-term **psychological counselling**, trauma care, **legal advice, advocacy**” – are all indispensable requirements if the victim is to be treated «with dignity, respect and sensitivity» (Recitals 21, 37 and 38).

Additionally, these informal substitute associations often take on the role of fostering an **agreed approach** where the authorities, the media, and the corporations are concerned, **leading legal action** against the (alleged) corporate offenders, **supporting and coordinating the victims’ participation in the criminal proceedings** and taking ‘**political’ advocacy action** with a view to removing, through structural or legislative measures, the risks of repeat victimisation or of victimisation of others in episodes similar to those suffered by their associates, etc.



III.

PREVENTING VICTIMISATION

1. Dealing with victims or potential victims: the types of context*

As far as victims of corporate violence are concerned, corporations constitute a pertinent **intermediate target group** as regards implementing the aims of the Directive (see § I) and avoiding any form of victimisation, in terms of:

- preventing corporate violence** and, as a consequence, **primary victimisation** (interaction between offender and victim during the commission of the offence)
- investigation and **ascertainment of facts about harm and liabilities** (the victims' need to obtain complete and truthful information about their case)
- dealing with victims** in an appropriate manner and repairing harmful consequences **after conduct involving potential corporate violence is discovered** (preventing further harms; protecting victims from **repeat victimisation**)
- dealing with victims** in an appropriate manner **when criminal proceedings take place** (need for protection from **secondary victimisation**)
- providing for adequate compensation and reparation when it is proven that corporate conduct has harmed human life or health.

A relationship between victims and corporations may obtain “**at times before**” and “**in arenas other**” than the criminal proceedings themselves. In fact, in the perspective embraced by this project – and also according to the notion of victim adopted by Art. 2 of the Directive – the relationship – and also the conflict inherent in that relationship – should not only be considered in the context established by the existence of criminal proceedings.

Victimisation is not a STATUS which arises and terminates inside the criminal proceeding, but a DYNAMIC PROCESS which may begin and develop at a time before the criminal investigation starts, and conclude after the criminal proceeding output.

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The situations where the corporation comes into contact with the category of victims (or potential victims) of corporate violence may be conveniently divided into two main contexts:

I. Outside and regardless of the criminal proceedings. This context includes two different situations: the ordinary **management of risks** related to activities which can be harmful for human life or health (**prevention of primary victimisation**), and the “internal” management of **harmful activities or events** (**avoiding repeated victimisation**).

II. When a crime is reported and criminal proceedings take place.

These two contexts have different levels of **possible interactions** and they are not always clearly distinguished. In fact, a case of corporate violence exists **from the very day the action or the omission which caused it took place**. Victims therefore exist before the case is discovered or reported to the public authorities, and even if criminal proceedings never begin. The project’s results highlight that, with the sole exception of so-called disasters, criminal proceedings for corporate violence usually start years after the action or omission in question took place (see *Data Collection on Leading Cases*, available at www.victimsandcorporations.eu). The reasons for this are linked, for example, to the **long latency of this type of damage** (see § II) or to the **asymmetry of information** between corporation and victims, so that victims are not aware of being victims, and do not access justice for a long time.

Outside the context generated by the criminal proceedings, the relationship is mainly – but not entirely – directed at **potential victims**. In fact, although it is true that according to recital 22 of the Directive “*The moment when a complaint is made should, for the purposes of this Directive, be considered as falling within the context of the criminal proceedings*”, it is no less true that, according to recital 19 “*A person should be considered to be a victim regardless of whether an offender is identified, apprehended, prosecuted or convicted. This should also include situations where authorities initiate criminal proceedings ex officio as a result of a criminal offence suffered by a victim*”. Therefore, in the context prior to a report being made to public authorities or the offence being investigated by them, **corporations may have a relationship with potential as well as with effective victims**.

This is a context where it is up to the corporation to decide how to include potential victims’ needs (e.g. to inform them and protect them), and how to manage situations of conflict that arise due to the fact that “something has happened” or damages are already evident, without any judicial accusation or determination of their causes and liabilities. A **responsible approach** here should aim at **preventing corporate violence**, as well as providing for **(at least internal) reparative measures** each time something – whether or not relevant from a criminal point of view – has proved to be harmful. This approach should incorporate the following activities:

- ❑ **ON AN ETHICAL AND REPUTATIONAL LEVEL**, adopting business models embracing **social corporate responsibility standards**, especially those focused on respecting human rights, and social and environmental sustainability (see § III.2 and § III.3 below)
- ❑ **ON AN ORGANISATIONAL AND OPERATIONAL LEVEL**, adopting the best standards (going beyond simple regulatory compliance) to **manage the risks** of production or of products liable to cause damage to the health and safety of workers, consumers, and citizens (see §. III.4 below)
- ❑ At the base of both these activities is the fundamental principle of **TRANSPARENCY OF INFORMATION** for workers and, more generally, for all stakeholders (see § III.6). For preventing future damage and making victims aware of their status, corporations should **disclose**, in advance, **sufficient information on the types of risks arising from their business activities**.

Within the criminal proceedings. In this context, of course, it is more difficult to describe common scenarios and generalise over issues and recommendations. In fact, the **role of victims** in the criminal justice system and whether they can actively participate in criminal proceedings **varies across Member States**. At root, their role is determined by one or both the following criteria: whether the national system provides for a legal status as a party to criminal proceedings; and whether the victim is under a legal requirement or is requested to participate actively in criminal proceedings, for example as a witness. This project considers the national systems in Italy, Germany, and Belgium: according to all three systems, **victims have the right to take full part in the criminal proceedings as a directly injured party** (or as family members of a victim), depending on four conditions: a criminal offence must have been committed; the injury or loss must have been caused directly by the offence; the damage must be personal to the victim, existing and current; and the victim must have a legal entitlement under national law to claim for damages within the criminal proceedings. The victims' access to criminal justice may also depend on the existence of other judicial options for **claiming damages**. In Italy, access to *criminal justice* seems to be the preferred choice for this aim, while in Germany and Belgium civil lawsuits seem to be an option to which victims frequently revert, as an *additional* course of action or as an alternative to the criminal justice system. Finally, a relevant variable also resides in the **punitive model adopted by national systems to sanction corporate liability** in itself.

Quite apart from the jurisdiction wherein the claim for damages is lodged, a result of this project is that, once criminal proceedings begin, **the conflict between victims and corporations increases** – and this for many reasons. In fact, **accusation and defence strategies** – often mediated by lawyers, prosecutors, and amplified by the media – **normally prevail over any other considerations** and change both parties' perspectives and attitudes. The project results reveal, for example, that when the victim is aware, informed, and assisted, access to justice becomes a strategy to put pressure on the corporation to obtain compensation. Given the lack of any prior

dialogue with the corporation, the criminal proceedings are seen as the only option to obtain a reconstruction of facts and a recognition of responsibilities (see § III.5). From the corporation's perspective, instead, the attitude to dialogue and negotiation seems to depend on "judicial convenience", in terms of accessing incentives offered by judicial systems such as a reduction of sanctions, as well as on the chance to obtain an acquittal (see § IV).

2. The corporation's attitude towards potential victims: addressing human rights in business*

Today, corporations are expected to respect human rights. This expectation can be seen in the development of international and national law in recent years. In national law, corporate responsibility for human rights mainly stems from the "hard" obligations to respect constitutional rights. In international law the responsibility is mainly based on several "soft" law instruments: the **UN Guiding Principles on Business and Human Rights**, the **OECD Guidelines for Multinational Enterprises**, the **ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy**, and the **UN Global Compact Initiative**.

Corporate responsibility exists independently of States' human rights obligations, and does not diminish those obligations. Public national action plans take up corporate international regulations and implement them in the respective national systems. In this respect, even soft international obligations have now become part of a comprehensive strategy for improving corporate activities with regard to the protection of human rights.

The human rights perspective offers corporations the possibility of **avoiding victimisation** arising from corporate violence **at an early stage**:

- ❑ Taking the effects of corporate activities on specific human rights into account **raises awareness** within the corporation about the issue.
- ❑ A human rights due diligence approach sets up the structural framework for **identifying, preventing, mitigating, and accounting for adverse human rights impacts**.
- ❑ A permanent human rights impact assessment allows the **adjustment of corporate policies, operations, products, and services** at an early stage in order to **avoid adverse effects**.

Besides fulfilling hard and soft legal obligations to respect human rights, a corporate human rights strategy offers several positive **side effects for corporations**:

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- ❑ First, it actually **reduces risks of violations** and therefore punitive legal consequences for the corporation.
- ❑ Second, it **demonstrates corporate awareness** and action in regard to human rights, which can be a valuable and positive criteria when determining public action and sanctions in cases of violations through corporate conduct.
- ❑ Third, it provides **reputational benefits for shareholders**, customers and other public stakeholders. These benefits can have a monetary value, e.g. for stock prices or potential investors.

Besides the national requirements, the responsibility of corporations to respect human rights refers to **internationally recognised human rights**. These include the International Bill of Human Rights (consisting of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social, and Cultural Rights) and the principles concerning fundamental rights set out in the International Labour Organization's Declaration on Fundamental Principles and Rights at Work. Additionally, business enterprises may address further standards, e.g. in regard to the rights of indigenous peoples, women, minority groups, children, persons with disabilities, or migrant workers. In armed conflicts, business enterprises should respect the standards of international humanitarian and international criminal law.

Respecting human rights as a corporation means that the organisation should **avoid adverse human rights impacts when doing business**. In practice, doing business can have an impact on virtually the entire spectrum of internationally recognised human rights, so corporations have the responsibility to respect all these rights. Yet, depending on the particular industry and type of business, some human rights may be at greater risk than others and deserve heightened attention. As situations may change, human rights risks should be the subject of periodic review. In the context of corporate violence, **great importance attaches especially to the right to life, the right to health (physical and emotional integrity), and the right to a healthy and adequate environment**.

Addressing human rights means that corporations have to take **adequate measures for the prevention, mitigation, and remediation of human rights violations**. In this respect, they have a duty to prevent **victimisation through business conduct**. Where violations occur, the corporation has to address such impacts and try to remedy them. The main emphasis is on the prevention of human rights violations that can be directly linked to the operation of the corporation, its products or services. Yet obligations do not apply only to the corporation's own activities, but also to business partners linked with its operations, products, and services. In regard to **relationships with business partners** in its value chain and other cooperation partners, corporations have to try to prevent violations by exercising due care in regard to the selection and supervision of partners (e.g. by supply chain due diligence). To this extent a corporation needs a

comprehensive human rights compliance system. Corporate human rights strategies are a complement to state strategies and should not undermine state efforts to promote human rights, especially not by weakening the integrity of judicial processes (e.g. by impeding investigations and influencing public bodies).

The scope of corporate human rights activities – besides the level of risks for human rights violations – depends on the size, sector, operational context, ownership, and structure of the corporation. As a basis, the activities should include a clear policy commitment towards human rights obligations, an internal process for identifying and preventing human rights violations, and mechanisms for the remediation of such violations.

BEST PRACTICES in the **corporate human rights frameworks** of leading corporations include an **express and publicly available policy commitment** by the corporation to the respect for human rights. This commitment is approved at the highest level of the organisation and clearly sets out the corporations' human rights expectations of its personnel and external partners. It is based on an assessment of risks of human rights violations by corporate activities, involving external expertise.

External expertise can involve the consultation of affected groups (“potential victims”) and other stakeholders. For example, local human rights organisations could be involved in the assessment of the impact of certain products and services in a specific region.

CORPORATE PROCESSES on any level within the organisation are to be adjusted to guarantee a minimum of risks of human rights violations. This includes training in human rights issues and providing for a system of controls. For the case of (unavoidable) violations of human rights by the corporation, it has to provide for a **remediation process that includes effective participation and compensation mechanisms for victims** (see §§ III.4, III.5 and IV for an integrated approach).

The remediation process can involve setting up a dialogue-based procedure that provides for a competent (and if appropriate transnational) contact point within the corporation, offers speedy access to information, and provides for early possibilities of remediation in order to prevent harms from escalating (see §§ 3.4, 3.5 for an integrated approach).

It can also involve participating in/supporting an independent body that can receive complaints about human rights violations, assess them, and propose further action (including remediation).

The assessment of risks and processes is done on a continuous basis and provides for a timely adjustment of the policy commitment and associated processes.

3. The corporation's attitude towards potential victims: corporate social responsibility*

Corporate social responsibility (CSR) is based on the idea of the corporation being **part of society and acting as a responsible citizen** (a “good corporate citizen”). It recognises the significant effect corporate activities can have on employees, customers, communities, the environment, competitors, business partners, investors, shareholders, governments, and others. It acknowledges that corporations do **contribute not only to their own wealth but to the overall societal wealth**. As a consequence, the good corporate citizen takes into account the effect on the world at large when making decisions. To this end, CSR aims at active compliance with the law, other national or international norms, and ethical standards. Human rights compliance can be one sectoral CSR commitment integrated into the overall CSR strategy.

Within effective CSR strategies corporations can make a positive impact on the environment and stakeholders including consumers, employees, investors, and communities. As working and production conditions are one of the core topics of a CSR strategy, there is a close connection to corporate violence in the field of workplace safety, product safety, and environmental protection.

This broad approach to CSR allows corporations to open a route to working with those most affected by corporate decisions. Taking effects into account at an early stage **can avoid or reduce the victimisation of certain groups**, especially of employees, and consumers of corporate products/services. It thus helps the corporation to **develop safe, innovative, and economically viable products, processes, and services within its normal business processes**. Society thus profits, e.g. from improved social conditions or environmental protection.

This means that a solid CSR strategy in the end **reduces business and legal risks**. In the context of corporate violence, possible incidents e.g. of product or environmental liability can be avoided or their number reduced. In case of an incident CSR structures can help as an instrument or **common standard to mitigate the damages and the conflict** with the affected persons and the authorities involved (see §§ III.4 and III.5 for an integrated approach).

Measures to prevent and to deal with risks can involve, for example:

- Establishing **policies** (e.g. to ensure the health and safety of all employees) and make the policies known to employees;

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- ❑ Establishing an **environmental management system** with objectives and procedures for evaluating progress, minimising negative impacts, and transferring good practices (see also § 3.4);
- ❑ Establishing **mechanisms for addressing problematic behaviour** (anonymous hotlines or ombudspersons) and procedures dealing with problematic incidents (communications channels, reaction teams, etc.).

CSR strategies that set the corporation's direction and scope with regard to relevant CSR aspects not only provide the framework for a coherent business strategy on these issues, but also provide the basis for long-term success by creating good relations with individuals, groups, and institutions.

It thus serves as a criterion for shareholders, investors, and the evaluation of the corporate reputation within the financial market.

A corporate CSR commitment also meets consumer expectations e.g. in regard to socially and environmentally responsible business behaviour. Last but not least it gives corporations an edge in attracting good employees.

Altogether, CSR strategies have a significant reputational benefit.

CSR policies are mostly implemented into corporate processes as a form of corporate self-regulation (see § III.4). No formal act of legislation exists in regard to CSR structures, but it is widely accepted that CSR systems should adhere to similar principles, **ISO 26000** being the most widely recognised international standard.



4. Preventing primary victimisation: how to manage the risk*

Prevention is vital to reducing corporate violence and, as a consequence, primary victimisation.

Adopting preventive measures and tools aiming at protecting the life and health of consumers, citizens, and workers should be, first of all, a **public aim**. To this aim, in addition to criminal offences most European countries provide for **laws and administrative regulations** (health and safety requirements in the workplace, environmental laws, food laws, regulatory laws in the pharmaceutical sector) specifically designed to introduce **mandatory requirements to guarantee safe products, as well as a healthy and safe workplace and environment**. These laws usually go together with **provisions** that **punish the failure** to comply with certain essential health and safety requirements. It is evident that a legal system which enforces such regulations both **enforces prevention** and **incentivises the corporation to adopt appropriate attitudes in this respect**. These regulations incentivise corporations to prevent corporate violence whenever they include, as a form of hard compliance (mandatory obligations), the adoption of **the best standards of prevention**. At the same time, these regulations appear to be less useful if systematic controls are not implemented by public authorities or administrative agencies.

Although corporations can be "forced" to prevent corporate violence by mandatory requirements, a **voluntary commitment** is still a necessary part of the process. The public, **normative approach**, where present, is not sufficient *per se* without the **cooperation of corporations**: corporations must, in all cases, initiate a **self-regulation process** in order to customise the mandatory requirements to the specific risks that pertain to their context of business.

A responsible corporate approach should provide for preventive measures even in the lack of normative requirements, and go beyond the mandatory compliance, when NEEDED (according to the assessment of risks) and/or RECOMMENDED BY THE BEST PRACTISE.

This **pro-active attitude** should be reflected not only in the **corporate values and strategies** embraced in the **Ethic Codes** or **CSR business models** (see § 3.3), but must also be translated into **concrete operating and organisational procedures and practices**. Unlike ethical declarations, this level of commitment is **practical, and tangible** in everyday business activities. And **it requires investments**.

The adoption of effective preventive measures mostly depends on the monetary investments allocated by the management of the corporation to this aim. Costs–benefits calculations may not result in short-term advantages, but they should translate into certain long-term, concrete benefits for the corporation.

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Appropriate investments mitigate the risks of incidents and avoid - in a long-term perspective - adverse effects on corporate business, reputation, and economic assets.

In practice, corporations should protect victims before they become victims by implementing an effective **organisational and procedural system to manage the risks**. Managing risk includes some basic steps: identifying hazards; assessing the risks those hazards present; and controlling the risks so as to protect workers, consumers, and citizens from injury. As far as corporate violence is concerned, the following areas are specifically concerned:

- **Health, Safety, and Environmental (HSE) Policies:** policies aiming at demonstrating how seriously an organisation **in fact** takes its health and safety responsibilities, and how the organisation **in fact** protects those who could be affected by its activities
- **Health, Safety, and Environmental (HSE) Management Systems,** which include systems, standards, procedures, records, and incorporates health and safety activities and programs into **business processes**
- **Quality management system:** a collection of business processes focused on meeting customer and other applicable regulatory requirements
- **In-house procedures and instructions**

This type of self-regulation is not lacking in **references**. Indeed, many **national and international standards** have been already drafted, tested, shared, and proved to be effective in providing organisations with **a framework to create quality of business processes and protect health, safety, and the environment**.

The standards have been drafted taking into account the perspectives of all involved, while also aiming to **reconcile all the possible conflicting interests**. Of course, their adoption will not in itself guarantee the elimination of risks, but their successful implementation can be used to assure interested parties that **an effective management system and international best practice are in place**.

The scope and complexity of these types of systems vary, of course, depending on many factors including: context of the organisation, size and risks of each workplace, the nature of the work performed, the compliance obligations related to the specific sector of production, and the nature of activities, products, and services.

For example, with reference to the **international standard certifications**, the following are recognised world-wide – and also adopted as normative references by some national regulations – as the **most common and effective**:

- **BS EN ISO 9001:2015 Quality management system certification**
- **BS OHSAS 18001:2007 Occupational health and safety management system certification**, one of the most often implemented models, covers standards to provide

a framework to improve employee safety, reduce workplace risks, and create better, safer working conditions, and instructions to develop an environmental management system. Being compliant with these policies and procedures also implies permanent monitoring of occupational accidents, and remediation activities each time an adverse event occurs.

- **UNI EN ISO 14001:2015 Environmental management system**

As far as **preventing corporate violence** is concerned, many requirements of these standards directly concern the **prevention of primary victimisation**, and impose, *inter alia*, various expectations which can be recast as recommendations.

One of the key purposes of all management systems is to act as a preventive tool. A certified health and safety system aims to eliminate or minimise risks to personnel and other interested parties who could be exposed to hazards associated with business activities. Proven benefits include a **reduction in accident and incident rates** by reducing or eliminating workplace hazards, and **improvement of the incident investigation process**. Environmental management systems conforming to the standard are used instead to **reduce adverse environmental impacts**.

Understanding the NEEDS AND EXPECTATIONS OF INTERESTED PARTIES is a requirement of the standards.

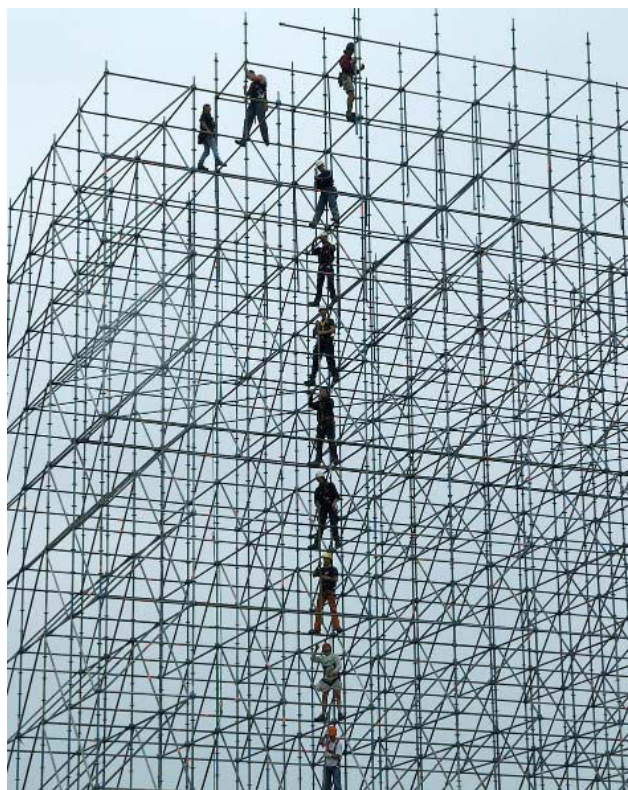
According to **UNI EN ISO 14001:2015**, the corporation shall determine, *inter alia*, which of these needs and expectations shall become its compliance obligations. The requirements of interested parties are not necessarily requirements of the corporation. Some requirements of interested parties reflect needs and expectations that are mandatory because they have been incorporated into laws, regulations, permits, and licences through governmental or even court decisions. The organisation may decide to voluntarily agree to or adopt other requirements of interested parties (e.g. entering into a contractual relationship, subscribing to a voluntary initiative). Once the organisation adopts them, they become organisational requirements (i.e. **compliance obligations**) and are taken into account when planning the environmental management system. Among them, there is the requirement to be mindful of the **needs and expectations** of interested parties when developing or reviewing environmental aspects, as well to provide, to appropriate interested parties, **relevant information** and training related to emergency response.

BS OHSAS 18001 does not have a separate clause with requirements for interested parties, but rather spreads them across the standard. In fact, the OHSAS 18002 — Guidelines for the implementation of OHSAS 18001:2007 — says that the corporation needs to consider the needs of persons working under the control of the organisation and the views of the interested parties when developing its Health and Safety Policy. OHSAS 18001 expressly requires the corporation to consider the views of interested parties when defining and reviewing its objectives. These views can be expressed

through legal and other requirements, **communication with external interested parties**, or **during consultation and participation activities**, and this information should reflect the objectives. Also required is the **consultation and participation of workers** as concerns various health and safety topics. This can include information concerning **normal operations** or **potential emergency situations**. When planning emergency responses, the organisation must take into account the needs of interested parties, e.g., emergency services and neighbours. In the draft of the new internal standard for occupational health and safety, **UNI ISO 45001** (expected publication in December 2017), **understanding the needs of interested parties** is clearly mentioned as a requirement.

Another benefit for the protection of victims according to these standards is the requirement to establish, implement, and maintain the processes needed to evaluate the fulfilment of compliance obligations. **When a non-conformity occurs**, the corporation shall react to the non-conformity and:

- **take action** to control and **correct it**;
- **deal with the consequences**, including mitigating adverse impacts;
- evaluate the need for action to eliminate the causes of the non-conformity, in order that it does **not recur or occur elsewhere**, by: reviewing the non-conformity; determining the causes of the non-conformity; determining if similar non-conformities exist, or could potentially occur; implementing any action needed; reviewing the effectiveness of any corrective action taken; and making changes to the environmental management system, if necessary.



5. How to deal with victims in case of harmful events: preventing repeated victimisation*

Once the activities have caused damage or it is likely they did, relationships with victims should be managed and the damages should be managed and repaired.

The victim's right to information, and his/her right to protection from repeated victimisation, intimidation, and retaliation as established by the Directive, should be considered as an aim also outside the perimeter of criminal proceedings.

Some **adverse events** can be predicted **in advance by corporations**, just as the **harmfulness** of a production process or product put on the market can be discovered by a corporation before the general public, victims, or public authorities become aware of it. This awareness may emerge via many channels:

- the **internal control system** (e.g. audit activities),
- internal reporting systems** (including costumers complaints, whistleblowing, union claims, etc.),
- external inspections** which draw attention to some abnormal or critical violations of HSE regulations.

In some cases harms and damages are already evident, while in others there are only warning signals. In the circumstances of internal reporting, close attention must be paid to the **security and confidentiality of any reporting** through the establishment of a system that ensures that those **who report are fully protected against open or disguised reprisals**. Detrimental treatment includes: any form of retaliation or penalty, dismissal, disciplinary action, threats, or other unfavourable treatment connected with raising a concern, as well as disguised discrimination and damage to a whistle-blower's career at any time in the future, as a result of their having raised a complaint.

It is a common situation in cases of corporate violence that if the source of damage is not eliminated at the early stage, a single case of harmful misconduct may turn into **widespread behaviour**, or a specific misconduct which at the beginning affected few individuals may change in something **more harmful**, affecting lots of persons or an entire community. Therefore, **repeated victimisation** depends essentially on the **corporate commitment to take action as soon as possible to terminate, remove, or repair the source of damage**.

Internal investigations are necessary to identify immediate and root causes of unsafe conditions, activities, or conducts.

According to international standards, for example, the **investigation of an incident is a requirement of HSE management systems** (see § III.4). HSE systems imply that, in

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case of an incident, investigation should also identify ways to prevent similar incidents from happening in the future, and that remediation activity be immediately taken to avoid further similar incidents.

But these two activities **cannot be generalised**, nor **applied in many cases of corporate violence**. Incidents, in fact, are easy to check and investigate when they are a “single” identified event or when they manifest a linear cause–effect progression. Except for so-called disasters (calamitous events that cause severe losses to human, material, and economic or environmental goods), the damage has a certain temporal distance from the corporate decision or action that triggered the chain of events leading to people being injured or killed. There are also well-known *difficulties* in understanding the *causal relationship* between the corporate action and its harmful effects.

Internal investigations in the case of corporate violence normally require an effort, in terms of time and costs, which goes beyond the ordinary requirements of the investigation of an incident according to the HSE management system.

Other difficulties arise when the internal investigation and the action in response try to **identify victims**, and **identify and assess consequences and damages**. Without this step, remediation activities can be addressed **only to the elimination of the sources of risk** but **not to the elimination of the consequences of misconduct**. It must be considered that sometimes also the identification of the sources of risks is not possible without knowing the effects of the adverse circumstances. In conducting both these activities, it is important to remain aware that the **harms of corporate violence** often go unnoticed at first and are either **delayed and/or emerge gradually** (see § 2). **Collective entities and associations** – such as unions or associations established to protect victims sharing the same illness or damage caused by the same source, as well as community representatives – may have an **irreplaceable role** with respect to the identification of potential victims as well as in reconstructing historical data and performing technical evaluations that would otherwise be difficult to carry out. In the case of environmental damage or harm to consumers, a similar role has been played by public institutions or recognized associations tasked with protecting collective interests.

It's notable that in many cases even such **cooperation can be insufficient**. In fact, the process of ascertaining that an incident of corporate violence or misconduct has occurred often involves **scientific evidence**, which raises obstacles for at least two reasons: **the scientific uncertainty in itself** (which also extends or limits the categories of victims potentially involved), and the **need to have access to (and pay) experts in order** to ascertain the causes and their implications in terms of health. Therefore, the **damages and consequences are not immediately or easily identifiable and, again, require relevant effort and commitment**.

Despite the fact that in cases of corporate violence, prompt internal investigations may be highly time-consuming and expensive, they are necessary to ascertain the sources of damages at an early stage, which is in the interest of both parties.

In conducting an investigation, the **protection of witnesses and victims** is an important **complementary activity**. It is very important to establish a system that ensures that those **who participate and report are fully protected against open or disguised reprisals**. An employee, for example, should not be discharged, demoted, suspended, threatened, harassed, or discriminated against, in any manner, based upon her/his participation in the investigation or her/his claim to be a victim.

But, more importantly, a responsible approach should embrace and establish a **favourable forum of dialogue** to share information, understand how to prevent repeated victimisation, and reduce the burden of controversy.

In the interests of both parties, it is recommended that attempts be made to create and maintain an ongoing dialogue with victims or potential victims from the moment harmful activity is discovered, taking into consideration the protection of all the participants against open or disguised reprisals.

Where dialogue is completely lacking, there is no opportunity to mitigate further conflicts, nor to open negotiations on compensation or remediation activities before proceedings begin or outside the perimeter of the judicial system. In the absence of dialogue, it is also difficult to prevent repeated victimisation, because consequences and damages are often **not identifiable** without the cooperation of both parties, nor perceivable by victims. And, finally, without dialogue the only way victims can satisfy their needs is through seeking **access to justice**, this being their only option for being **recognised** as victims, to **ascertain** the facts, and **obtain compensation and remediation activities**.

Corporations should, therefore, endorse a commitment aimed at informing potential victims about the risks/damages discovered and their possible effects, so as to make victims aware of being victims, as well as starting a dialogue aimed at sharing information, understanding victims' needs, and the type of damages suffered (and so avoiding repeated victimisation).

This behaviour appears, after all, to be **an obvious consequence/practical implementation** of all CSR models, standards, and tools adopted by corporations to prevent corporate violence. In fact, although **disclosing results of internal investigations** is not a specific mandatory requirement of HSE management systems (see however § III.6 on the disclosure of non-financial information), **CSR standards** and **HSE policies** require constant **consultation with and the participation of shareholders and workers**, and an **understanding of their needs and expectations** (see §§ III.3 and

III.4). This relationship should be pursued not only during ordinary business, but, *a fortiori*, when **risk management systems have failed** or adverse effects have become evident.

This recommendation, of course, **takes into consideration the sensitivity of this desirable outcome for corporations**. In fact, it is unquestionable that when the case leads to severe implications for corporations in terms of penalties and reputational damages, obstacles arise due to the employment of **defensive strategies** and **cost–benefit assessments**.

The cost–benefit analysis is mainly based **on the risk of the fact being discovered and the case reported to public authorities**. Except where the case arises due to workers' or consumers' complaints, victims are usually not aware of being victims, whether actual or potential. Therefore, corporations may remain the **only holders of information** about what went wrong and why. Here, the corporation's attitude to victims becomes the key factor, with some possible mitigating circumstances. Despite declarations in CSR models or Ethics codes, when the risk of being prosecuted is significant, corporations reveal a tendency to **close down dialogue** with victims, in order to **protect information until public concerns or judicial accusations arise**. The aim is clear: to assess what behaviour would be more beneficial in the event of, and only in the event of, a specific judicial accusation being lodged.

The **disclosure of sources of risks and damages does not and should not in itself imply the admission of guilt**. But, it is true – especially in those systems adopting the mandatory prosecution principle – that such disclosure and associated dialogue with victims or potential victims can result in the case being **reported to public authorities** and in a criminal investigation. Due to these circumstances, **self-defensive reasons** can legitimately come into play. Corporations should have the right to decide where an internal investigation resulting in solid evidence of violations is to be voluntarily reported to public authorities.

Thus, the **protection of information** from **undue reporting** to public authorities and, in general, the **confidentiality of the information disclosed**, must be considered a possible and reasonable request.

The dialogue with victims or potential victims can be limited to the context of identified interested parties, and participants can be asked to sign a confidentiality agreement, in order to protect information and AVOID A PUBLIC DISCLOSURE OF INTERNAL INVESTIGATIONS RESULTS.

Of course, the opportunity to obtain such conditions depends on the circumstance that **interested parties have been identified in advance** (in case of a significant number of victims, **the intermediation of associations** and representatives can be a key factor), and the determination of the interested parties to accept the abovementioned conditions.

Any decision not to disclose results of internal investigations does not exempt the corporation from **managing the situation in order to avoid repeated victimisation in the interests of both parties**. This action, in fact, may be implemented **even without a prior disclosure of information** on causes and liabilities. Regardless of the initiation of criminal proceedings and associated defense strategies, after the discovery of harmful misconduct, corporations must be proactive.

In dealing with victims or potential victims of a case of corporate violence, corporations should adopt pro-active and responsible behaviour patterns aiming at avoiding repeated victimisation, as well as mitigating future expected conflict with victims.

The protection of a **corporation's reputation**, in fact, as well as the aim of avoiding victimisation, suggest the necessity to **manage the harmful effects from the very beginning phase**.

Investments and actions put in place or developed to prevent further damages and eliminate the sources of risks are a key factor in preventing repeated victimization.

A **post-investigation action plan** must be set out specifying objectives, action steps, responsible persons, and commitment dates. The **remediation plan** should include, **at least**, organizational actions to avoid further similar cases happening (**revising internal HSE procedures** to make sure that an adequate system is in place; **full remediation of breakdowns in internal controls**), but, and better, also all the necessary initiatives to make the workplace, the products, and the environment safe. **No confidentiality obstacles exist** in this case to **planning, discussing**, and **disclosing the action** with the interested parties.

Outside criminal proceedings, **remediation activities may not necessarily include economic compensation** to individual victims, which is a desirable, but not always a possible, additional step. Such an outcome, in fact, implies a number of favourable circumstances, such as: the identification of individual victims, the quantification of economic and moral damages, and the cooperation of victims in starting negotiations and accepting a reasonable offer.

Where identification of victims is uncertain or the attempt at negotiation fails, it would be useful to arrange alternative forms of compensation, such as collective funds addressed to research or to the health care of the community involved, as well as for victims suffering from the pathology in question.

Victims' associations and community representatives may have an irreplaceable role in case of negotiation, as well as in finding alternative forms of compensation.

Where negotiation is possible, consideration must be given to the vulnerability that characterizes the victims of corporate violence (see § 2), which manifests itself with greater intensity in the context of negotiations occurring outside the judicial context and without the need for the judiciary's due verification. Again, associations and community representatives may have an irreplaceable role with respect to the right of victims to be assisted, informed, and supported.

Especially in this context, access to restorative justice programs (where available) affords both parties additional guarantees about the fairness of outcomes and the protection of victims (see above, § 5).

Therefore, this route should be encouraged.

6. The disclosure of non-financial information to the public*

6.1. The role played by so-called non-financial statements

Directive 2014/95/EU adopted by the European Parliament and by the Council, dated 22 October 2014, regulates the disclosure of non-financial and diversity information on the part of certain large corporations or groups of companies, and partially amends Directive 2013/34/EU.

The importance of the disclosure, on the part of business organisations, of information concerning sustainability has been highlighted by the European Parliament in its resolutions of 6 February 2013, respectively dealing with “Corporate social responsibility: accountable, transparent and responsible business behavior and sustainable growth” and “Corporate social responsibility: promoting society’s interests and a route to sustainable and inclusive recovery”. This kind of information may cover, for instance, **social and environmental factors involved in the business**, with a view to identifying potential risks in terms of sustainability and enhancing investors’ and consumers’ trust.

The European Parliament has deemed the disclosure of non-financial information as a fundamental step in the transition to a sustainable global economy, combining long-term productivity, social justice, and environmental protection, and this especially in that it contributes to measuring, monitoring, and managing the results of business activities and the relevant impact they have on society.

* By MATTEO CAPUTO (translation from Italian by BENEDETTA VENTURATO)

Furthermore, giving investors access to non-financial information contributes to getting closer to the goal of creating, by 2020, **market and political incentives able to reward those companies who invest in more efficient structures**: in other words, it also represents a step forward in the roadmap leading to a Europe which makes a more efficient and responsible use of energy and social resources.

The Directive acknowledges this background and requests the Member States to bind large corporations and groups of companies to a significant change in the way they draft their balance sheets.

Starting from 2017, those groups of companies and large corporations who represent public-interest entities and who, at the reporting date, have an average number of people employed in the previous year equal or superior to 500, have to include in their report on budgetary and financial management a non-financial statement containing material information on the environmental and social aspects of their activity, employee-related matters, human rights protection, and the efforts made to prevent and fight against active and passive bribery and corruption. Such information should permit an understanding of the business activity, its trends, outcomes, and social impacts.

The statement must include:

- a brief description of the company's business model;
- a description of the corporate policies relating to the aspects mentioned above, also detailing the risk prevention and management procedures adopted;
- the outcome of the adoption of such policies and procedures;
- the main risks relating to the areas mentioned above, connected with the company's activity, also with respect to – where appropriate – its relationships, products, and commercial services which may negatively affect these areas, as well as the measures adopted by the company to manage these risks;
- the fundamental performance indicators with respect to the non-financial aspects of the specific industry sector.

Companies or groups which do not adopt any measures or policies in relation to the aspects listed above, have to provide, in their non-financial statements, a clear and detailed explanation of the reasons underlying their choice. By way of exception, the Member States may allow the withholding of information concerning upcoming developments or issues which are a matter of negotiation if the disclosure would be seriously prejudicial to the company's commercial situation, and provided that the omission does not prevent a fair and balanced understanding of the company's development, performance, and position, as well as of its activity's impact. In the drafting of their non-financial statements, corporations and groups will have to refer to

domestic, European, or international standards, specifying which parameter they have decided to adopt.

6.2. Transparency with respect to victims

The reporting of non-financial information allows corporations to make stakeholders aware of the extent to which the company is actually investing in order to minimise the adverse impacts connected with the carrying out of its business activity. It shows that the directors have addressed a number of problems and looked for or identified the means and the resources to solve them.

The awareness of the fact that – even unintentionally – business activities may pose a threat to the goods of both current and future generations has imposed a **significant change within corporate communication**.

It is no longer sufficient to map and manage risks; rather, it is now necessary to disclose sufficient information on the type of risks arising from the business activity as well as on the measures taken and the investments borne by the company to prevent those risk factors developing into actual harms.

Such a transparent approach to corporate information creates a direct connection between companies and stakeholders. Workers, shareholders, consumers, investors, suppliers, and the public are thus put in a position to exercise deeper control over complex organisations.

Moreover, should the business activity trigger victimisation processes, the non-financial statement would allow a more objective assessment of the veracity of the assumptions underlying them.

In defining the business impact on the environment or on health and safety, as associated with the main risk factors or with other factors pertaining to environmental and health risks, the non-financial statement may include a **number of observations relating to the measures that the company will take in order to mitigate any unintended consequences** which are produced despite its efforts to avoid them.

In the event that deaths, diseases, or injuries occur relating to the business activity and being such as to lead to litigation, in the phase preceding the start of possible judicial proceedings, **the corporation can make itself available to reach an agreement with the victims**, hinging on:

- a **review of the non-financial statement**, to the extent that, in the specific context of what happened, it turned out to be untruthful and led stakeholders to rely on it in a manner which was flawed;

- ❑ the **enhancement of the company's efforts** aimed at the prevention of new adverse events;
- ❑ the **indemnification of victims**, potentially including psychological, symbolic, and non-economic forms of support.

Under such a scenario the company has two options: it can either admit the “failure” of its non-financial statement, declaring that the latter did not fully disclose the risks arising from the business activity and the pursuit of profit, or it can deem and declare that the statement accurately reflected the company’s attention to compliance and sustainability and that **the harms to be indemnified should not call into question the efforts made up until that point**. Rather, the remedial actions to be adopted are part and parcel of the company’s compliant attitude and provide **clear evidence that attention is focused not only on the prevention of adverse events** but also on **compensation for “uncaught” harmful effects, consolidating the search for consistency between what is said and what is done**.

In the course of the proceedings, the company may use the non-financial statement to provide documentary evidence of the genuine nature of its attempts to protect the stakeholders’ interests threatened by negative business externalities.

Moreover, again with a view to the company’s defense within the trial, the non-financial statement may serve to show that the harmful effects produced were the result of isolated conducts which do not reflect the company’s overall approach and policies, but rather conflict with the company’s guidelines and investments developed to prevent reputational damages.

On the other hand, the Prosecution might also refer to the non-financial statement precisely to support the idea of a significant discrepancy between stated and actual objectives. If they can show a **cause–effect connection between the company’s broken promises and the harmful event that occurred**, they may point to the insincerity of the contents of the statement.



IV.

DEALING WITH VICTIMS WITHIN THE CRIMINAL PROCEEDINGS*

1. The relationship between victims and corporations

According to the national procedural systems investigated within the scope of this project (Italy, Germany, and Belgium), victims have the right to take full part in the criminal proceedings as a directly injured party (or as members of a victim's family), depending on three conditions: a criminal offence must have been committed; the injury or loss must have been caused directly by the offence; the damage must be personal to the victim, existing and current. The precise mechanisms of participation, as well as the formal role attributed to victims in the relevant criminal justice system, are determined by national law. Participation implies the right to make a declaration, to present evidence, to access the court files, to disclose and file supporting documents, to interview witnesses, to appeal, to be informed about decisions, to participate in inspections, and the right to be duly summoned to the main trial.

In summary, the project results highlight that the **victims' role within the criminal proceedings is not minor** (for a detailed analysis, see *Cases of corporate violence victimization. Midterm Report*, available at www.victimsandcorporation.eu). Victims usually participate actively as witnesses, and, in general, they provide active support in the gathering of evidences. In many cases, victims claim for damages as a directly injured party within the criminal proceedings.

When the relationship between victims and corporation is transferred into the context of a criminal proceeding **victims' and corporations' different positions inevitably collide**. As already mentioned (see § III.1) **accusation and defence strategies** – often mediated by lawyers, prosecutors, and the mass media – **normally prevail over any other considerations** and **change the perspectives, expectations, and aims of both parties**.

Certain exogenous factors contribute to feeding the conflict. It must be taken into consideration, for example, that the relationship between the two parties often **exists and persists outside the trial**, both spatially and temporally. Frequently, **corporation's activities are still in place** despite being under investigation, often with no remediation

* By STEFANIA GIAVAZZI

measures having been put in place; or frequently, we see products suspected of being harmful still available on the market. **Victims may continue to work or live** in the relevant environment, **close to the same sources of risks** which caused the damages. Consumers may indeed **need to continue to use products** which are suspected of being harmful.

There are also **endogenous factors** which amplify the dimension of conflict, with a significant impact on the corporation's reputational dimension and victims' expectations. Some of these factors are related to the **peculiarities of these types of criminal proceedings**, such as:

- proceedings on corporate violence almost always involve the general **public, and attract media attention**
- corporate violence often affects a whole community, with all inhabitants more or less directly harmed by the events concerning which the proceedings were brought. Therefore, **the individual victim's needs blend with others', forming a kind of collective action which reinforces the demand for justice**
- at the court hearing stage, the trial often takes on the character of a media spree and becomes a **forum for protest**, where it is even difficult to maintain respect for the accused and for the bench.

Other endogenous factors are related to the **status of these victims** within the criminal proceedings. In fact:

The criminal proceedings may become fraught, since they are bound up with the victims' needs and expectations, related to the fact that any OTHER PATH OF JUSTICE MAY BE IMPOSSIBLE AND PRIOR DIALOGUE WITH THE CORPORATION HAS OFTEN FAILED (see § III.5).

Victims manifest a particular **need to ascertain the truth and gain recognition of their status from the State and the corporation itself**. In the absence of this recognition, criminal justice becomes the only path to satisfy these needs, and the only forum where the demand for justice is manifested, with a high level of strength.

Another peculiarity of the status of these victims within criminal proceedings is the significant **gap between the victims' expectations and the mechanisms and outcomes of the criminal proceedings themselves**. Their strong expectations for justice invested in the criminal proceedings are often disregarded, with potential negative effects in terms of secondary victimisation.

It is remarkable that in cases of acquittal or non prosecution judgements, **victims continue to demand 'justice.'** All this data indicate that in the context of corporate violence, victims **need to be informed and supported, including by the corporation itself, and even after the criminal proceedings are over**, especially when the judgement was not able to answer to the victims' requests.

It is a matter of fact that the conflict with the corporation tends to **increase inevitably** until less the criminal proceedings is the only possible path route to reconstructing the truth, calling public attention to the case, preventing future damages and attaining a decision on the compensation for the damages.

It is a matter of fact that, given the role of victims within cases of corporate violence, the conflict with the corporation tends to proceed inevitably to the point that criminal proceedings become the only possible route to reconstructing the truth, calling public attention to the case, preventing future damage, and attaining a decision on compensation.

One of the assumptions of this project is that, due to the specific characteristics of these crimes, it is desirable **as soon as possible** to establish a relationship or a channel for dialogue between the victim and the corporation (see, in particular, § III.5). **This relationship is even more desirable when an investigation starts**: a proactive dialogue might **mitigate the level of conflict during the trial**, and decrease the number of parties and claims for damages that need to be adjudicated. This result may have a relevant effect on the **corporation's reputation**.

Victims and court staff who have shared their experiences for our empirical research report that corporations usually take action vis-à-vis the victims almost exclusively after criminal proceedings have been initiated, that is, when a trial is forecast against corporate representatives or against the corporation, specifically where this potentially involves a large number of victims and associated associations (consumers' associations, environmental associations, victims' associations) or public institutions (such as public municipalities) bringing a civil action against the corporation.

But, as already said, it must be taken into consideration that when a criminal investigation opens, the victims and the corporation are no longer the only parties involved, and many external factors or subjects may influence the attitude of both parties towards cooperation and negotiation. For example, the reconstruction of facts and liabilities, the **identification of victims** (or at least of those directly harmed by the crime charged. For the difficulties in identifying victims, see *Cases of corporate violence victimization. Midterm Report*, available at www.victimsandcorporation.eu), and the **determination of consequences and damages** caused by the crime, are the duty of the Public Prosecutor. The sizes and the objects of damages also depend on the type of offence charged. Due to the **extent of interests** in question, and at the same time the **limitations of the issues at stake**, **the relationship is more complicated and the chances of opening a dialogue with a positive attitude are lower**.

It is also conceivable that, from the victim's perspective, having to **establish a dialogue with all those individually accused**, each with their own individual position and defence strategy, will be much more complex than having only the corporation as the sole representative. On the contrary, from the corporation's perspective, the

proliferation of interlocutors – lawyers, prosecutors, and the mass media – complicate the approach and decreases the chance to understand effective victims' needs and requests addressed to the corporation.

In the context of the criminal proceedings, the dialogue is often forced into a predetermined framework, dictated by the offences charged, the judicial mechanisms, and the grounds for accusation and defence.

Victims' requests are reduced to a claim for the compensation for damages (see § IV.2), while corporations' actions and behaviours are influenced by the expectations in terms of judicial outcome. Everything comes into the public domain.

2. Compensation for damages

According to Art. 16 of the Directive, victims have the right to obtain a decision on damages and to obtain this within a reasonable time in the course of the criminal proceedings.

Art. 16 Dir.

Right to decision on compensation from the offender in the course of criminal proceedings

1. Member States shall ensure that, in the course of criminal proceedings, victims are entitled to obtain a decision on compensation by the offender, within a reasonable time, except where national law provides for such a decision to be made in other legal proceedings.
2. Member States shall promote measures to encourage offenders to provide adequate compensation to victims.

The favour of the Directive for the criminal justice system, where that option is available, is quite evident. In cases of corporate violence, this path seems to be the physiological output. In fact, even in those systems where a civil action is an option provided by national law, empirical research has shown that victims often consider an order in a civil court as an impossibility, due to the length of the proceedings and the non-viability of costs, mainly related to the almost constant need, in this type of crime, to satisfy the burdens of proof through extremely complex technical and scientific tests to which only criminal prosecutors could have access. Therefore, criminal proceedings seems to be the most favourable path to attain a decision on the compensation for damages.

Victims' access to justice together with the claim for damages is frequently negotiated with the corporation outside the criminal trial, through extrajudicial agreement. Leading cases show that the existence of criminal proceedings does not preclude, but on the contrary seems to favour, attempts to agree at least monetary compensation during the investigations phase, before the trial (*Cases of corporate*

violence victimization. *Midterm Report*, available at www.victimsandcorporation.eu). These agreements undoubtedly imply **significant withdrawals of some of the victims' rights**: in particular, in exchange for economic compensation, victims **withdraw their right to participate** in the criminal proceeding as a party, or withdraw their lawsuits as a civil party when these have already been brought. In the environmental field, remediation activities are sometimes negotiated between the corporation and the public authorities. Even in this case, the “bargaining chip” is the withdrawal of public entities' rights to participate in the criminal proceeding.

When the agreement is closed in the initial stages of the proceedings, the risk of accepting an “unfair deal” is borne by both the parties. In fact, neither victims nor corporations are aware of the outcome of the final judgment. Nevertheless, many cases confirm the primary role of extra-judicial negotiations. This is probably for many reasons.

In this type of criminal proceedings, it is in the **corporation's interest** to attempt to open negotiations with the victims at the investigation stage, not only to prevent a future civil action, but also in terms of **protecting its reputation**, as well as for **defensive strategy reasons**, linked for example to obtaining a plea bargain or any other bargain in its favour. From the corporation's perspective, the decision to negotiate compensation and remediation activities may be also reasonable, based on the **convenience of accessing the incentives** offered by the judicial systems where the criminal investigation or the criminal proceedings takes place.

It is also conceivable that, from the victim's perspective, the early settlement of the issue tied to damages may be the **only possible form of compensation**, should the criminal trial end with a ruling dismissing the proceedings due to the crime's statute of limitations. Obtaining compensation at an early stage may also represent an advantage for victims, because proceedings may last several years, with a high probability of incurring the statute of limitation. These **agreements guarantee compensation to victims even in the case of acquittal or in the case of no prosecution sentences**. The right to obtain a decision in the course of the criminal proceeding may also be denied to the victim in the event of plea bargaining.

The compensation for damage is an issue that specifically and directly involves the corporation's decisions and, more generally, its attitude to victims.

In the interest of both parties, from an early stage of the criminal proceedings, and regardless of the possible outcomes of those proceedings, corporations should attempt to contact victims and negotiate with them.

Corporations with a victims-sensitive approach should take into consideration that in the EXTRA-JUDICIAL NEGOTIATIONS individual victims are particularly vulnerable, especially because of the asymmetry of information concerning substantially all the data which would support a critical evaluation of the proposal.

In this context, access to RESTORATIVE JUSTICE PROGRAMS, where available, offer a route that provides guarantees to both parties concerning the fairness of outcomes, while also protecting victims, and this approach should be encouraged (see above, § 5). This route also incentivizes victims to negotiate, which should be one of corporation's own aims.

In case a relationship never starts, if it fails, or should victims not accept any form of dialogue, the inclination of the corporation to indemnify and compensate for damages should be encouraged by the State. Accordingly, in light of the instruction in Art. 16, para. 2 of the Directive (Member States shall promote measures to encourage offenders to provide adequate compensation to victims), the legislator should introduce effective tools to achieve this goal.

Many judicial systems, however, still contain **judicial mechanisms** to attain the goal of promoting dialogue between the victims and the corporation. In fact, it is highly likely that the company's willingness to negotiate with the victims and to compensate for the consequences of the crime will generally be greater where **the corporation itself is investigated or charged** (corporate criminal liability), and in those legal systems which **encourage and reward the corporations' remediation measures**. Many punitive models for legal entities have, in fact, the purpose of **rewarding** not just corporations that *ex ante* implement crime prevention systems, but **also corporations that ex post** – once investigated – **prove their intent to remedy and repair**, both in terms of internal reorganisation as well **compensation for damages**. Some punitive models also require, for the purpose of **granting a reduced sentence**, not only the full and effective compensation for damage, but also the **elimination of the crime's harmful or dangerous consequences**.

There are also punitive models which provide for similar incentives only to defendants as individuals or only for specific crimes (e.g. environmental crimes). But, in sum, these incentives are conditional on remediation and compensation activities which are executable only by the corporation (which is the holder of the interests and advantages, and the owner of activities).

In this sense, what is useful is a **judicial approach aimed at enhancing the corporation's activities**, both compensatory or reparatory, within the forums envisaged by current national provisions.

For example, in those systems which admit this option, one form of incentive could be to condition the granting of a "plea bargain" for this type of crime upon the **perpetrator's or the corporation's full compensation for damages**, or upon the fact

that the corporation had at the very least attempted to do this (a fair offer unfairly refused by the victim).

Corporations should always consider attempting to compensate victims where there are favorable incentives provided by the criminal law system: such systems may grant, for example, a reduced sentence when it is proven that the corporation has compensated victims and/or repaired the adverse consequences of the crime under investigation, or at least made effective and concrete attempts to reach this goal.

Where the attempt to negotiate fails, a victims-sensitive approach and the safeguarding of the reputational dimension suggest the corporation arrange ALTERNATIVE FORMS OF COMPENSATION, SUCH AS COLLECTIVE FUNDS for relevant research, the health care of the community involved, and for victims suffering from the pathology in question.



V.

RESTORATIVE JUSTICE*

Art. 2 Dir.

1. 1. For the purposes of this Directive the following definitions shall apply:

[...]

d) '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.

Art. 12 Dir.

1. 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:

(a) 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) 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;

(c) the offender has acknowledged the basic facts of the case;

(d) any agreement is arrived at voluntarily and may be taken into account in any further criminal proceedings;

(e) 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.

2. 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.

Recital 46 Dir.

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.

1. Restorative justice: a promising tool

The **definition of restorative justice** contained in **Directive 2012/29/EU (Article 2, paragraph 1(d))**, see above) is inspired by the wider notion, relevant worldwide, found in the **United Nations *Basic Principles on the Use of Restorative Justice Programmes***

* By CLAUDIA MAZZUCATO

in Criminal Matters (Economic and Social Council Resolution No. 12/2002).¹ Restorative justice has a **participatory and voluntary nature**, and consists in the direct involvement and participation, “together”, of the “**offender**” and the “**victim**”, along with “members of the **community**” where appropriate, in the “**resolution of matters arising from the crime**”, with the support of one or more independent and impartial facilitators. The aim of restorative justice, as stated by the United Nations, is to achieve a **restorative outcome**, i.e. a voluntary agreement reached as a result of the direct encounter and dialogue of the parties (*cf* also Article 12, paragraph 1(d), Directive 2012/29/EU). Reparation, restitution, community service and other forms of settlements aimed at redressing the consequences of the offence are examples of restorative outcomes, which, in turn, aim at “meeting the individual and collective needs and responsibilities of the parties and achieving the reintegration of the victim and the offender”.

Restorative justice services can be established by public, national or local authorities, or by non-governmental and non-profit organisations, on either a professional or voluntary basis. Access to restorative justice services should be free of charge for the parties. Restorative justice services should be **evenly distributed throughout the European Union**.

According to the UN *Basic Principles*, **restorative justice** may be **used at any stage of the criminal justice system** (Article 6), potentially **regardless the type or severity of the crime**, with the informed consent of the parties.

Consistent with the UN standards and with Article 12, paragraph 1(d), of the Victims Directive, restorative agreements may be **taken into account in subsequent criminal proceedings**. Therefore, subject to national law, restorative outcomes generally do influence criminal proceedings and judicial decisions, as a result of the juridical relevance of the voluntary conducts aimed at the **redress of the consequences of the crime**, and/or of the **commitment to preventing further or future harms**. These restorative behaviours and compliance activities either **avert** prosecution, are a form of diversion, **inhibit conviction**, **mitigate punishments**, or allow **non-custodial measures** and other **alternatives** to imprisonment or more severe sanctions.

¹ “1. ‘Restorative justice programme’ means any programme that uses restorative processes and seeks to achieve restorative outcomes. 2. ‘Restorative process’ means any process in which the victim and the offender, and, where appropriate, any other individuals or community members affected by a crime participate together actively in the resolution of matters arising from the crime, generally with the help of a facilitator. Restorative processes may include mediation, conciliation, conferencing and sentencing circles. 3. ‘Restorative outcome’ means an agreement reached as a result of a restorative process. Restorative outcomes include responses and programmes such as reparation, restitution and community service, aimed at meeting the individual and collective needs and responsibilities of the parties and achieving the reintegration of the victim and the offender. 4. ‘Parties’ means the victim, the offender and any other individuals or community members affected by a crime who may be involved in a restorative process. 5. ‘Facilitator’ means a person whose role is to facilitate, in a fair and impartial manner, the participation of the parties in a restorative process.”

The UN *Basic Principles* state that voluntary obligations stemming from restorative processes must be reasonable and proportionate (Article 7), and furthermore that failure to reach an agreement shall not itself be used in subsequent criminal proceedings (Article 16), nor shall the failure to implement it be used as a justification for a harsher sentence in subsequent criminal proceedings (Article 17).

In addition to the said general conditions for carrying out restorative justice programmes, **Article 12 of the Directive** further establishes a set of **safeguards** with a victim-oriented slant, notably including **the victim's interest** in the use of restorative justice and the provision that the **offender acknowledges the basic facts of the case**. Even so, the **Directive promotes restorative justice**, consistent with the United Nations guidelines and the Council of Europe's recommendations (see: Recommendation (99)19 concerning mediation in penal matters), and encourages its use, which must be "facilitated by the Member States" (Article 12, paragraph 2).

The **Council of Europe Commission for the Efficiency of Justice** emphasises the decisive role of criminal justice authorities, social authorities and lawyers in ensuring the availability and accessibility of restorative justice (see CEPEJ, *Guidelines for a better implementation of the existing Recommendation concerning mediation in penal matters*, CEPEJ (2007) 13, Strasbourg, 2007). Yet the **level of awareness of enforcement agencies, the judiciary, lawyers and social services of the existing provisions regarding restorative justice is still insufficient**: this has affected the level of access to restorative justice throughout Europe.

Directive 2012/29/EU encourages the use of restorative justice. As stated in the UN *Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters*, restorative justice programmes should be made available at any stage of the criminal justice system, potentially for all criminal offences.

2. The potential of restorative justice in managing disputes involving corporations

The preamble of the UN *Basic Principles*, and the UN *Handbook on Restorative Justice Programmes* (UNODC, *Handbook on Restorative Justice Programmes*, Vienna, 2006: https://www.unodc.org/pdf/criminal_justice/06-56290_Ebook.pdf), stress the importance of restorative justice and underline its **objectives**, which for the purposes of these particular Guidelines may be listed in the following order of priority:

- **"identifying factors that lead to crime**, and informing authorities responsible for **crime reduction strategy"**
- **"identifying restorative, forward-looking outcomes"**;

- “**repairing the relationships** damaged by the crime, in part by arriving at a consensus on how to best respond to it”;
- “**encouraging responsibility taking** by all concerned parties, particularly by offenders”;
- “**supporting victims** [...], encouraging them to express their needs, **enabling them to participate in the resolution process**”;
- “denouncing criminal behaviour and **reaffirming community values**”.

These objectives are certainly relevant in the field of **economic crime** and **corporate violence**.

The above goals resonate strongly with the issues raised in **§§ III and IV** with regard to corporate social responsibility, business and humans rights, prevention of victimisation, remediation, etc. In this case, the identification of factors that lead to crime in order to mould a preventive strategy might, for instance, involve the **corporation’s internal bodies**, such as the board of directors, auditors, compliance auditors, risk managers, etc.

Restorative justice indeed seems to offer a practical response capable, to some extent, of reconciling the corporation’s legitimate perspective and interests with the needs and rights of corporate victims. The **trend towards restorative approaches may prove crucial for victims** who need to be effectively protected from repeat or new victimisation, or relieved from their feelings of dissatisfaction: imagine, for example, the importance of remediation activities carried out voluntarily by a corporation at the end of a restorative justice programme that involves the victims and the community in the decision-making process.

Restorative justice’s potential in cases of corporate crime and corporate violence is still largely unexplored.

Restorative justice’s potential in cases of corporate crime and corporate violence is still **largely unexplored**, although **some foreign experiences** have proven to be **extremely promising** (e.g., the US and Canadian experiences of restorative justice in the environmental field). It is worth **encouraging the initiation of restorative justice practices**, even in areas such as those mentioned above that present **particularly complex features**, from which peculiar **disputes** arise that **do not always find an answer in the judicial proceedings**.

The application of restorative justice programmes in these circumstances demands **ad hoc expertise and practices**.

Launching restorative justice programmes in cases involving corporate crimes, and especially in cases of corporate violence, calls for facilitators with **special insight and specific skills, which will in part require appropriate initial and in-service training**.

The use of restorative justice in cases of disputes involving corporations in general, and specifically in cases of corporate crimes and of corporate violence, must be encouraged by adopting models of intervention adjusted to the particular circumstances and complying with all the guarantees and safeguards listed below:

- ▶ **restorative justice programmes** must be conducted **in compliance with the guarantees for safeguarding victims** laid down by **Directive 2012/29/EU (Article 12)**, guaranteeing:
 - **protection** from **secondary and repeat victimisation**, from **intimidation** and from **retaliation**;
 - **concern** for the **interest of the victim** and his/her **safety**;
 - **the victim's free and informed consent**, which may be withdrawn at any time;
 - **acknowledgement of the "basic facts of the case"** by the **offender** and/or by the **corporation charged with the crime, without this implying the assumption of responsibility or a confession**;
 - the **confidentiality** of the **contents** of the restorative justice programme and of the **declarations** made by the participants during the programme, except with the agreement of the parties or as required by national law due to an overriding public interest;
- ▶ **restorative justice programmes** must be conducted in compliance with the **UN Basic Principles**;
- ▶ **restorative justice programmes** must be conducted (**only**) by **highly skilled facilitators** (Article 20 of the *UN Basic Principles*; Article 12 of the *Victims Directive*) with the **necessary independence and impartiality** (Articles 1, 17-18 of the *UN Basic Principles*). Facilitators may also be recruited in the community and must possess a "good understanding of local cultures and communities" (Article 17 of the *UN Basic Principles*), including, in the present case, **corporate cultures**;
- ▶ **cases** must be referred exclusively to **public or non-profit restorative justice centres with legal aid arrangements**. **Referrals** must be made **preferably by the judiciary**, also upon request of the **defence counsels**, of the parties themselves, or of victims' associations, consumers' associations, trade unions, NGOs and other organisations representing collective interests. Additionally, the public prosecutor, enforcement agencies and regulatory agencies (e.g., environmental protection agencies, occupational safety and health agencies), social services, and victim support services, may petition the criminal justice authority or refer cases on their own. **The criminal justice authority must, in any event, be informed of the programme's initiation** in all cases where there are

ongoing criminal proceedings or when criminal measures/sanctions are being used. In cases where **criminal proceedings are not initiated** or where they have been **concluded**, or where penalties were ordered, **restorative justice programmes may nevertheless be triggered** at the request of the **parties** or at the proposal and request of social services, victim support services, entities representing collective interests and victims' associations;

- ▶ **restorative justice programmes** are **voluntary and free of charge** and may, depending on the participation of the parties concerned, consist in:
 - **victim–offender mediation,**
 - **community circles and family-group conferencing,**
 - **victims' impact statements, within restorative processes or circles.**

These programmes **may involve** the following **parties**:

- **the victim(s),**
 - **the offender(s)** (to be understood within the meaning of Recital 12 of the Directive); where a **company** participates, the **legal representative** or another person designated and delegated by the latter will be referred to,
 - **the community** (meaning: family members, local communities, victims' associations, consumers' associations, trade unions, NGOs, etc.),
 - Governmental (national), regional and/or local **authorities** (for example: representatives of the Ministry of the Environment, mayor, etc.);
- ▶ The **restorative outcome** must be “arrived at voluntarily” (**Article 12, paragraph 1(d) of the Directive**) and **may consist of**:
 - **restorative obligations** strictly speaking, intended to **mitigate** or, where possible, to **remove the harmful or dangerous consequences of the crime** (e.g., damages, remediation activities, remedying environmental damage, etc.),
 - **compliance and forward-looking activities** consisting of **precise and solid behavioural commitments** specifically intended to ensure future compliance with the criminal provisions violated, to **prevent further criminal acts** and to potentially ‘**correct**’ **organisational factors** or other factors that **led to causing the damaging or dangerous event** (i.e., securing systems, adaptation of facilities, etc.);
 - ▶ the **restorative outcome** must be **communicated to the criminal justice authority concerned**. The **judiciary** may **take into account the outcome of**

the restorative justice programme and of the activities carried out thereafter **for the purpose of applying the relevant legal mitigating provisions** (Article 15 of the UN *Basic Principles*; for example, for the purposes of applying fine reductions). Furthermore, under **Article 12, paragraph 1(d) of the Directive**, “any agreement [...] may be taken into account in any further criminal proceedings”).



3. Operational guidelines for corporate legal officials and corporations' lawyers

Corporate legal officials and the corporation's defence counsel play a primary role: a) in enhancing awareness about the possibility of resorting to restorative justice programmes and in informing the shareholders about this possibility; b) in proposing and triggering restorative justice programmes, including by petitioning the criminal justice authorities concerned with referring cases to restorative justice centres; c) in safeguarding the authenticity of restorative programmes, notably including ensuring the voluntary participation of all parties involved; d) in collaborating with the aim of reaching a restorative outcome. Specifically:

- ▶ **Corporate legal officials, corporations' legal consultants and corporations' attorneys** shall acquire, including possibly through training courses, a **good understanding of restorative justice** (as envisaged in and regulated by the UN *Basic Principles*);
- ▶ **Corporate legal officials**, potentially assisted by the legal consultants and/or the corporation's lawyers, shall discuss with the Board of Directors and other relevant subjects the possibility of resorting to restorative justice;

- ▶ The **corporation's attorney, and the attorneys of suspects, the accused or convicted individuals, shall inform their clients** of the possibility of resorting to restorative justice programmes at every stage of the proceedings. They shall **encourage contact between their clients and centres for restorative justice** in order to solicit specific information from facilitators on how restorative programmes can be implemented, on their possible outcomes and on the possible relevance of the latter in court proceedings. The **corporation's attorney, as well as the attorneys of suspects, the accused or convicted individuals** shall **propose and encourage** the referral of the case to restorative justice centres, and the initiation of a restorative justice programme, in all cases where the persons concerned so require or wish, or in cases where the attorneys consider it in the interests of their clients;
- ▶ **Attorneys shall support their clients** during the restorative justice programme **in compliance with the principles of restorative justice** and according to the **procedures indicated by the facilitators**. Specifically, at the request of their clients or of the facilitators, the attorneys shall **attend the preliminary talks and the actual meetings** (mediation, conference, circle, etc.) **without ever substituting the individuals directly involved** (including the individuals delegated or authorised by the corporation to represent it during the restorative justice process) **nor standing in for those involved in direct and 'personal' discourse**, which characterises the 'dialogical' nature typical of restorative justice;
- ▶ **Attorneys shall cooperate** with the facilitators to ensure that the restorative justice programme is conducted **safely and comfortably** for all participants and with respect for their **dignity**.

Where restorative justice programmes are used in the case of corporate disputes and corporate violence, the corporate legal officials and the attorneys of the corporation involved must: a) accurately fulfil their legal advisory and consultancy role in accordance with the principles of restorative justice; b) know how to operate within the framework of restorative justice in very complex and highly conflictual contexts, with large organisations and potentially large numbers of individuals involved, informational and power imbalances, situations involving scientific uncertainty and exposure to repeat victimisation and retaliation, the involvement of national and/or local public institutions, and the impact of economic and social considerations which may be nationwide. In particular:

- ▶ the **corporation's legal officials and attorneys** shall **cooperate** with the **facilitators** to encourage their direct contact with the **eligible representatives inside the corporation** for the purposes of fostering the corporation's involvement in the restorative justice programme. To this end, **the corporation's attorneys** shall inform the decision-making bodies

and company managers, in addition to the supervisory bodies, of the starting of (or the request to start) a restorative justice programme, encouraging **direct dialogue between top management and the facilitators**, so as to promote the **effective participation of the corporation in the restorative dialogue**;

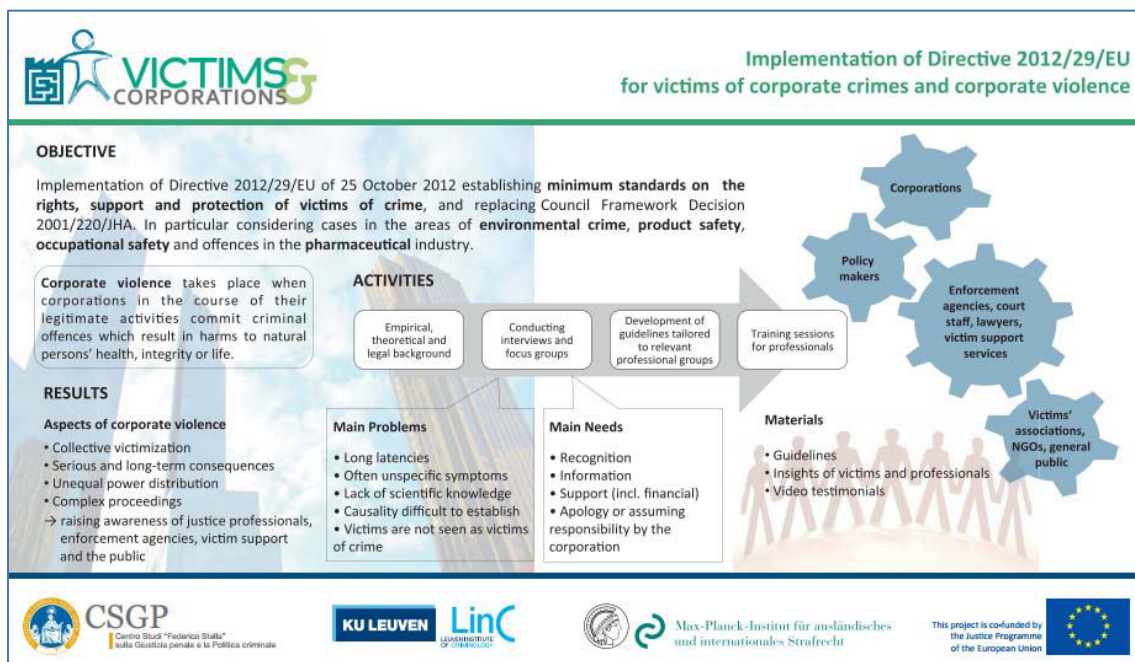
▶ **the corporation's legal officials and attorneys** shall endeavour to **ensure** that the **individuals appointed to represent the company**:

- have the **required decision-making powers** to make the necessary decisions **on behalf of the company** (even with a power of attorney), concerning the **restorative outcome and compliance activities** that might result from the restorative justice programme, as well as to participate in negotiations and in any out-of-court settlements that may be established;
- **voluntarily participate in the restorative justice programme**, having also been made aware of the **human and emotional impact of direct contact and of direct meetings with victims**;

▶ within the voluntary framework of restorative justice, and alongside the facilitators, the **corporate legal officials and attorneys** who assist parties in a **restorative justice programme in cases of corporate disputes and/or corporate violence** will be acting in **highly complex and conflictual situations**, resulting for example from:

- **the severity of the protected interests** undermined by the crime (life, physical integrity, public safety, etc.);
- possible **conflicts** within the corporation; the complexity and hierarchical ramifications of relationships inside the company; the **corporate culture** within the corporation, and within its subsidiaries in the case of a multinational company and/or holding; the **reputational impact** of any restorative or compliance conduct, settlements with victims, or activities and services for the community;
- the **involvement of collective entities** on the side of the corporation (medium-sized or large company, multinational company, presence of subsidiaries), as well as on the side of the victims (large groups of ill persons or workers, families, local communities, etc.), and on the side of the institutions (mayors, Ministry of the Environment, etc.);
- the frequent **organisational nature** of corporate crime and corporate violence and of the corporation's responsibility;
- **disagreements in the scientific world** concerning, for example, the toxicity of a substance or the noxiousness of a product; disagreements which, inter alia, impact on the identification and recognition of current and potential victims and on the unlawful

- classification of the event;
- **the complexity of any negotiations** during out-of-court settlement procedures;
- possible **conflicts among victims** and **among victims' associations**, also with reference to the positions to be adopted regarding settlement proposals or the restorative outcome;
- **social, economic and political unrest**, which may also be of **national importance** (e.g., tensions concerning workers' health and safety, environmental concerns or occupational issues; adverse nationwide economic or occupational effects in case of the interruption of industrial productions and/or closure of plants; role of trade unions; the advocacy or lobbying role of business associations, trade unions, or consumers associations, etc.);
- **ethical dilemmas** concerning, for example, the allocation of compensatory or economic remedies and of restorative activities in respect of harmful outcomes that are particularly widespread due to geographical scope or the number of subjects involved.



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"Federico Stella" Centre for Research on Criminal Justice and Policy (CSGP) – Università Cattolica del Sacro Cuore, Milan, Italy.

CSGP is the coordinator of the project. CSGP is a research centre on criminal law and criminal policy, committed to promote theoretical and applied interdisciplinary research, aiming at improving the criminal justice system. Its activities, projects and expertise cover a wide range of themes, including business criminal law, corporate liability, criminal law reform, restorative justice and victim support, environmental law, law and the humanities, law and the sciences. An Advisory Committee of prominent scholars, judges and leading experts in juridical, economic, philosophical and psychological disciplines coordinates its scientific activities.



Leuven Institute of Criminology – University of Leuven, Leuven, Belgium.

The University of Leuven (KU Leuven) is charter member of the League of European Research Universities; European surveys rank it among the top ten European universities in terms of its scholarly output. The Leuven Institute of Criminology (LINC) is composed of about seventy professors and researchers involved in criminological research and teaching. LINC continues the Leuven tradition of combining solid research with a deep commitment to society, a goal achieved through fundamental as well as policy-oriented research. LINC consists of eight 'research lines', one of which is on 'Restorative justice and victimology'.



Max Planck Institute for Foreign and International Criminal Law (MPICC), Freiburg i.B., Germany.

Research projects undertaken at MPICC are comparative, international, and interdisciplinary in nature, and focus on empirical studies of criminal law, crime, crime control, and crime victims. Research also involves: harmonization and assimilation of criminal law and criminal procedure in EU Member States; development of criminal law thanks to insights into existing legal solutions to social problems, and into functional criminal and extra-criminal law alternatives.

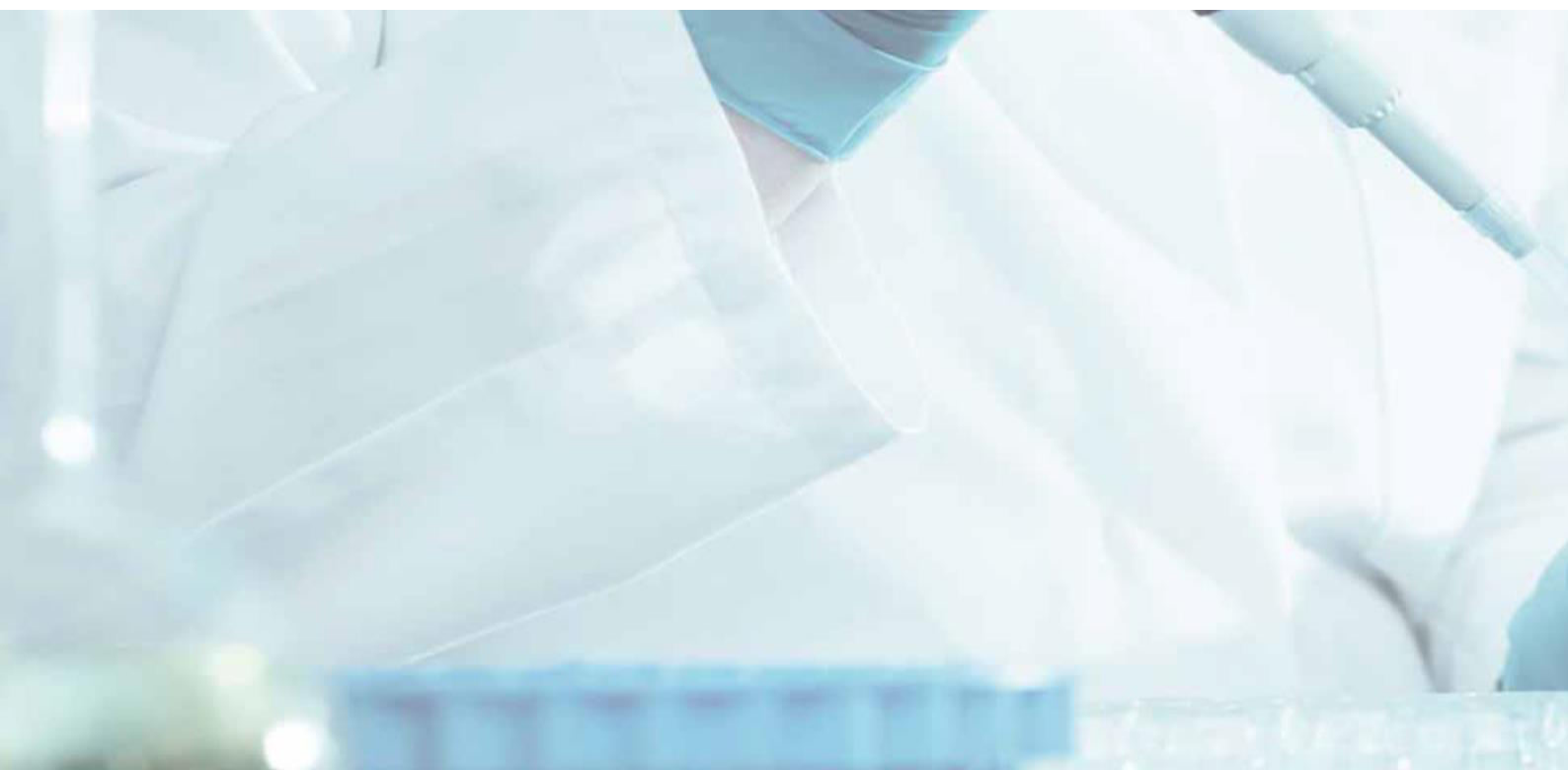
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