

Working Paper 2

The Role of Victims in Negotiated Settlements

Stéphane Bonifassi | Lincoln Caylor | Grégoire Mangeat | Léon H. Moubayed
Jonathan S. Sack | Andrew Stafford KC | Wolfgang Spoerr | Thomas Weibel

The International Academy of Financial Crime Litigators
34 Boulevard Haussmann | 75009 Paris, France
contact@financialcrimelitigators.org | www.financialcrimelitigators.org



Foreword

Plea deals and other forms of non-conviction resolution can represent a pragmatic response to corporate offending and often lead on to high monetary penalties which include the disgorgement of profits.

However, it is becoming increasingly apparent that in reaching these settlements, the role of the victim is marginalized. Internationally, the path to victim compensation when settlement agreements are made overseas remains obscure.

The spectacle of huge fines being paid to wealthy countries whilst the victims look on is jarring.

This paper from the Academy, which draws attention to the practices for victim compensation in non-trial resolutions in six different jurisdictions, is a welcome and necessary step towards opening the conversation to discuss how victims can be heard and adequately compensated in settlement procedures.

The contributing authors, who are practitioners and academics from each country discussed in this paper, provide unrivaled experience and knowledge regarding non-trial resolutions.

It is our hope that this paper will serve as an invaluable resource to scholars and practitioners around the globe.

Karen E. Woody

Associate Professor of Law, Washington & Lee University School of Law

Jonathan Spicer

Senior Specialist, Asset Recovery, Basel Institute on Governance

About the Authors



Stéphane Bonifassi

Partner

BONIFASSI Avocats

Stéphane Bonifassi specializes in international litigation in the areas of business crime and fraud, economic sanctions, corruption, asset recovery, forfeiture and confiscation, as well as transnational enforcement of judgments and internal investigations. He regularly represents individuals or companies accused of international corruption in multiple jurisdictions and is familiar with the anti-corruption laws of France, the Foreign Corrupt Practices Act of the United States and similar laws of other countries. He also frequently represents sovereign states that are victims of corruption or fraud. Bonifassi is a co-founder of The International Academy of Financial Crime Litigators, a collaboration of litigation professionals working with the Basel Institute on Governance to expand worldwide access to solutions in economic crime cases.

Email: s.bonifassi@bonifassi-avocats.com



Lincoln Caylor

Partner

Bennett Jones

Litigator Lincoln Caylor focuses on economic crime matters. He is recognised by peers and clients as the premier asset-recovery lawyer in Canada. He co-founded The International Academy of Financial Crime Litigators, a collaboration of litigation professionals working with the Basel Institute on Governance to expand worldwide access to solutions in economic crime cases. Caylor is a Queen Elizabeth II Diamond Jubilee Medal recipient for his distinguished contributions to Canada.

Email: caylorl@bennettjones.com



Grégoire Mangeat

Founder, Partner
MANGEAT

Grégoire's main practice areas are litigation, arbitration and White Collar Crime and Investigations. He specialises in assisting and representing clients in Swiss and International proceedings, enforcing and defending against claims and taking preliminary measures (seizing of properties, obtaining bans, prohibiting media releases etc.). He has proven experience in gathering preliminary evidence and representing clients in white-collar crime, extradition, inheritance or bankruptcy proceedings. He also specialises in the delisting of people or entities from sanction lists and in legal and administrative assistance (tax, criminal and financial matters) and has appeared in several cross-border and multi-jurisdictional proceedings.

He is a member of the European Criminal Bar Association (ECBA) and a member of the European Fraud and Compliance Lawyers (ECFL). Grégoire has also served as Chairman of the Human Rights Commission of the Geneva Bar Association (ODA). He is a lecturer at the University of Geneva (ECAV) and has been teaching litigation skills since 2011.

Email: gregoire.mangeat@mangeat.ch



Léon H. Moubayed

Partner
Davies Ward Phillips & Vineberg LLP

Léon is a partner in the Investigations & White Collar Defence and the Dispute Resolution practices. Léon is retained in complicated high-stakes domestic and international white-collar criminal cases, usually encompassing significant commercial, civil and administrative ramifications.

He represents clients in high-profile investigations and prosecutions relating to white-collar and regulatory offences. His particular expertise includes challenging search warrants, wiretaps and other investigatory techniques. He also represents corporations and individuals in multijurisdictional investigations, conducts confidential internal investigations and carries out asset recovery in extraordinary circumstances.

Email: lmoubayed@dwpv.com



Jonathan S. Sack

Partner

Morvillo Abramowitz Grand Iason & Anello PC

Jonathan S. Sack has extensive experience litigating complex civil and criminal cases. He represents individuals and companies in federal and state criminal, civil, and regulatory matters, and conducts internal investigations.

Jonathan is co-author of *Federal Corporate Sentencing: Compliance and Mitigation*, Rev. Ed. (2017), a frequently cited one-volume treatise updated semi-annually, co-author of the “White Collar Crime” column in the *New York Law Journal*, and is a regular contributor to The Insider Blog on Forbes.com. Jon is the recipient of The Burton Awards’ prestigious “Distinguished Legal Writing Award” for his article, “Cybersecurity and Individual Liability: ‘U.S. v. Sullivan’ and the Criminalization of a Cyber Attack Response.” He is an Adjunct Professor of Law at St. John’s University School of Law, where he teaches a course in white collar crime.

Email: jsack@maglaw.com



Andrew Stafford KC

Lawyer

Kobre & Kim LLP

Andrew Stafford KC is an English barrister and King’s Counsel who represents corporations and ultra-high-net-worth individuals in complex, high-value disputes spanning multiple jurisdictions.

Admitted to practice in England & Wales, the British Virgin Islands (BVI) and the Dubai International Financial Centre (DIFC) Courts, Mr. Stafford KC has deep experience acting in matters that have elements across key onshore and offshore jurisdictions, including the UK, the U.S., the BVI, Dubai, Hong Kong, São Paulo and Seoul.

He has particular expertise in international judgment enforcement, developing and executing strategies designed to secure effective collection of arbitral awards and judgments, including awards made against sovereign judgment debtors. In addition, Mr. Stafford KC’s expertise is of great value to high net-worth individuals needing advice in relation to complex problems and disputes affecting their assets, reputation and liberty.

Email: andrew.stafford@kobrekim.co.uk

**Wolfgang Spoerr**

Partner

Hengeler Mueller

Wolfgang advises clients in critical situations. An expert in administrative and regulatory matters, he represents companies in contentious matters before state agencies, courts and arbitration tribunals, including the constitutional and administrative court system, and before the European Court of Justice. He defends his clients in company-related investigation proceedings conducted by public authorities and prosecutors, in criminal law hearings, in mutual legal assistance (MLAT) proceedings and, together with U.S. counsel, in proceedings before the U.S. Department of Justice. He assists companies that are faced with unusual legal challenges in law-making and technical standardisation processes, both at a German and European level, representing them in regulatory disputes before civil courts.

Email: wolfgang.spoerr@hengeler.com

**Thomas Weibel**

Partner

VISCHER

Thomas Weibel advises and represents clients in complex commercial disputes before state courts and arbitral tribunals.

He has a wealth of experience in complex national and transnational commercial disputes, with a particular focus on the financial industry, aviation, and shareholder disputes. In addition, he specialises in high-profile and bet-the-company disputes, internal investigations, private client litigation, fraud cases (including asset freezing), recognition and enforcement of judgments and awards, and injunctive relief. He also regularly sits as expert for Swiss law in high-stake disputes before foreign courts and arbitral tribunals, including cross-examination as Part 35 Expert under the UK CPR.

Email: thomas.weibel@vischer.com

About this Working Paper

This Working Paper was prepared by the International Academy of Financial Crime Litigators. ISSN: 3038-950X.

You may share or republish the Working Paper under a Creative Commons Attribution-NonCommercial-NoDerivatives 4.0 International License (CC BY-NC-ND 4.0).

Suggested citation: Stéphane Bonifassi, S., Caylor, L., Mangeat, G., Moubayed, L., Sack, J., Stafford, A., Spoerr, W. & Weibel, T. (2024). *The Role of Victims in Negotiated Settlements*. The International Academy of Financial Crime Litigators Working Paper No 2. Available at <https://financialcrimelitigators.org/publications>.

This Working Paper is intended for general informational purposes and does not constitute legal or other professional advice. We cannot guarantee the paper's accuracy and completeness even though we have made reasonable efforts to ensure its accuracy and completeness.

For questions or to report any inaccuracies or missing and necessary information, please contact the authors or email contact@financialcrimelitigators.org.

Acknowledgements

The International Academy of Financial Crime Litigators is deeply indebted to each of our authors, who have generously shared their legal expertise through insightful and thought-provoking contributions to this paper. They were aided and supported by Karen Woody, Ben Eberhardt, Nicola Bonucci and Elizabeth Ortega. We appreciate their invaluable content review and recognize that this working paper could not have come to fruition without them.

Table of Contents

1	Introduction	9
2	Background	9
2.1	Canada	10
2.1.1	Guilty Plea Negotiations and Agreements	11
2.1.2	Remediation Agreements	13
2.1.3	Alternative Measures Agreements	14
2.1.4	Analysis of the Canadian Approach	15
2.2	France	16
2.2.1	CRPC	17
2.2.2	CJIP	18
2.2.3	Analysis of the French Approach	19
2.3	Germany	20
2.3.1	Non-prosecution of Petty Offenses Without Sanction	21
2.3.2	Non-Prosecution of Offenses Subject to Conditions	22
2.3.3	Victims' Rights	22
2.3.4	Analysis of the German Approach	23
2.4	Switzerland	24
2.4.1	Reparation	24
2.4.2	Abbreviated Procedure	25
2.4.3	Analysis of the Swiss Approach	27
2.5	United Kingdom	28
2.5.1	Deferred Prosecution Agreements (DPAs)	29
2.5.2	Guilty pleas	29
2.5.3	Glencore Example	30
2.5.4	Analysis of the UK Approach	31
2.6	United States of America	32
2.6.1	Declinations	33
2.6.2	NPAs and DPAs	34
2.6.3	Guilty Pleas	35
2.6.4	Analysis of the American Approach	36
3	Conclusion	37

1 Introduction

The role of victims in non-trial resolutions of financial crimes is a complicated and often multi-jurisdictional issue that generates debate amongst scholars and practitioners. Complicating the debate is the fact that criminal laws vary from country to country. And while criminal law is prosecuted domestically, the impact of criminal law is global.

White-collar crimes resolved without a trial often involve victims from different countries. Victims can be individuals, companies, state entities, or even sovereigns. For instance, proceedings stemming from matters of international corruption can involve a number of different victims, and the issues are exceedingly complex.

During the evolution of this area of the criminal law, countries around the world have had to determine the role that victims should play and, more generally, how they can be compensated, if at all.

2 Background

To understand the importance of both the role of the victim and the issue of victim compensation in the context of a white-collar criminal prosecution, it is helpful to look at the recent Deferred Prosecution Agreement (DPA)¹ between the United States Department of Justice and the Boeing Corporation. In 2021, the Boeing Company and the U.S. Department of Justice entered into a DPA after an investigation into two Boeing airline crashes. Victims of the crashes later came forward asserting that the government failed to properly consider their victim rights prior to entering into the DPA with Boeing.²

The role of victims in a non-trial prosecutorial agreement is an issue that routinely arises in the United States, as evidenced in the above Boeing example. The issue also arises in other jurisdictions that allow for some form of non-trial resolution.

Although there is no mandated international procedure addressing the role of victims in non-trial prosecution agreements, there are a few international standards from which best practices can be gleaned. For example, the United Nations Convention Against Corruption Coalition has called for member states to establish “legal frameworks to

1 A Deferred Prosecution Agreement is a form of non-trial resolution that is often used in the United States. Similar non-trial resolution processes in other jurisdictions, or the lack thereof, is detailed in this paper.

2 Our fellow Jonathan S. Sack has written a comprehensive and insightful article on this case, explaining that this ruling brought to light an important procedural issue regarding DPAs about whether the right of victims to be informed about non-trial resolutions attaches after a case is filed, or before, when consideration of the DPA (or other settlement/deal) begins. The author concludes by affirming that these types of issues only “increase the risks and uncertainties of DPAs”. (E. Abramowitz, J. S. Sack, E. Smit “Not So Fast: The Rights of Victims in Corporate Deferred Prosecutions”, March 3, 2023, New York Law Journal)

enable and facilitate the participation of victims in proceedings and the reparation of both individuals and collective damage caused by corruption to victims”.³ Moreover, the Coalition has proposed that States should consider “setting up dedicated funds and mechanisms to provide timely compensation to victims of corruption”.⁴

The Open-ended Intergovernmental Working Group on Asset Recovery has found that overall, there is a “wide range of legislative and other measures taken by State parties to ensure that victims of corruption are identified and compensated.”⁵

However, the Organization for Economic Co-operation and Development (OECD) has found that achieving adequate victim reparation is hindered by a number of complexities. For example, it can be difficult to identify victims, and even when victims are identified, control measures must be taken to ensure that the reparation awarded is not “re-corrupted”.⁶

Furthermore, the OECD has warned that, while non-trial resolution is considered a valuable option and often a best-case scenario, it carries a “risk of being too lenient with offenders that systematically come forward and cooperate with enforcement authorities.”⁷

Given the varying interests involved in a non-trial resolution, different nation states have taken a variety of approaches in attempts to balance these interests. The International Academy of Financial Crime Litigators is well-suited to provide a comparative overview of this difficult topic, and to assess the differences among approaches across jurisdictions. This paper explores the extent to which the jurisdictions of Canada, France, Germany, Switzerland, the United Kingdom, and the United States allow victims to play a role in non-trial resolutions of financial crimes. Based on the information contained in each jurisdiction-specific chapter, the Academy has drawn conclusions and recommendations, detailed in the conclusion. The following analysis by country is a helpful guide to further the analysis and is a practical guide for international practitioners.

2.1 Canada

In Canada, victims of financial crimes do not have standing either in criminal proceedings or in the non-trial resolution process. The only parties with standing in the Canadian justice system are the Crown prosecutor and the accused. The Canadian Criminal Code

3 UNCAC Coalition's Victims of Corruption Working Group, “*Recognizing Victims of Corruption*”, December 1, 2021.

4 Ibid

5 UNCAC, Open-ended Intergovernmental Working Group on Asset Recovery, “*Open-ended Intergovernmental Working Group on Asset Recovery*”, 25–26 August 2016

6 OECD, “*Resolving Foreign Bribery Cases with Non-Trial Resolutions*”, 2019

7 Ibid.

does not grant those affected by the offense status as parties to the proceedings.⁸ As a result, victims are afforded few if any avenues by which to exert tangible influence in the non-trial resolution process.

Plea negotiations and agreements,⁹ remediation agreements, and alternative measures agreements are the principal non-trial resolution measures utilized in cases involving financial crime. Under all three of these mechanisms, victim participation is limited. Similarly, victims do not have the right to bar non-trial resolution of a criminal investigation. One of the underlying principles used for justifying the limiting of active victim participation in criminal proceedings is the desire to protect an accused's right to procedural fairness. Allowing substantive victim intervention comes with a palpable risk that an accused will effectively face two prosecutors.¹⁰

Notwithstanding their lack of standing, however, victims of financial crimes may participate in non-trial resolutions to the limited extent provided for in the Criminal Code,¹¹ the Competition Act,¹² and other relevant statutes. For example, Section 14 of the federal Canadian Victim Bill of Rights provides that every victim has the right to convey their views about decisions made by the Government in the criminal justice system if those decisions affect the victim's rights under the Act. It also mandates that the Court consider the victim's opinion.¹³ While this right may be clarified over time, it currently remains largely unenforced and the Act does not provide mechanisms for its exercise.

The scope of financial crime victim participation in the formation and execution of guilty plea agreements, remediation agreements and alternative measures agreements are discussed below.

2.1.1 Guilty Plea Negotiations and Agreements

A guilty plea is a process by which an accused admits criminal liability to an offence charged, thereby resolving the case with by forfeiting a trial and stipulating to a conviction. Guilty plea agreements are the consequence of negotiations that typically result in an accused pleading guilty to an offence in exchange for a recommendation

8 As the Nova Scotia Court of Appeal explained in *R. v. Fraser*, 2010 NSCA 106 at para 7: "[...] is trite to say that as a general principle in our adversarial system of justice only the actual parties to the litigation may make written or oral submissions or otherwise participate in legal proceedings before any court or tribunal. See also: *R. v. Antler*, 1982 CanLII 386; *Canadian Broadcasting Corporation v. Canada Border Services Agency*, 2022 NSPC 22, para. 35; *R. v. Reddick*, 2020 ONSC 7156, para. 82 (reversed but not on this point).

9 Remediation agreements are Canada's equivalent of Deferred Prosecution Agreements.

10 "Where the proceeding is criminal, there is a heightened concern about the fairness of permitting intervention lest the accused end up, in effect, facing two prosecutors"; *R. v. Fraser*, 2010 NSCA 106; *R v Finta*, 1990 CanLII 6824 (ON CA) (per Morden ACJ); *R v Neve*, 1996 ABCA 242 (CanLII), 108 CCC (3d) 126 (per Irving JA)

11 R.S.C., 1985, c. C-46 (the "Criminal Code").

12 R.S.C., 1985, c. C-34.

13 *Canadian Victims Bill of Rights*, SC 2015, c 13, s 2, s 14.

by the prosecuting authority to the court that a lesser sentence be rendered.¹⁴ While entering a guilty plea agreement with the Crown may reduce the severity of the penalties rendered upon sentencing, it does not prevent a conviction.

Due to their lack of standing, victims of financial crimes have no right to participate in plea negotiations. Such negotiations thus remain an exclusively bilateral process between the Crown and the accused. There is one caveat, however: the province of Manitoba allows victims to “give views on prosecution,” including on “any agreement relating to a disposition of the charge” and “any position taken by the Crown in respect of sentencing.”¹⁵

While all but one Canadian province precludes victims from expressing substantive opinions on prosecutorial negotiation positions, the Crown must nevertheless inform the victim in the event a plea agreement has been reached regarding a crime punishable by imprisonment of five years or more, e.g., fraud. Subsection 606(4.2) of the *Criminal Code* requires the court to inquire as to whether the Crown took reasonable steps to inform the victim of a plea agreement.¹⁶ If the victim was not informed, the prosecutor will be required, as soon as is feasible, to inform the victim of the agreement. However, a failure of the Crown to inform the victim of the agreement will not impact the validity of the plea agreement.¹⁷

While the Canadian justice system generally militates against victim intervention, the Criminal Code nevertheless grants victims two avenues for participation during the sentencing phase of a case resolved via the entry of a guilty plea — namely filing a victim impact statement and making a request for restitution.

(i) Victim Impact Statements

Pursuant to Section 722 of the Criminal Code, victims are entitled to submit a “victim impact statement” to be considered by the court during sentencing. This procedure gives victims an opportunity to describe the impact of the offence in their own words so as to better inform the sentencing judge of the severity and consequences of the crime. For financial crimes, this could include all manner of economic, proprietary, and emotional harm.¹⁸

Sentencing judges may give more or less weight to victim statements, but this leeway does not dilute their duty to be guided by the appropriate sentencing principles as articulated

¹⁴ Government of Canada, “Victim Participation in the Plea Negotiation Process in Canada”, https://www.justice.gc.ca/eng/rp-pr/cj-jp/victim/rr02_5/p0.html#sec0_3.

¹⁵ *The Victims' Bill of Rights*, CCSM c V55, ss 14(1)(e)(f).

¹⁶ *Criminal Code*, s 606(4.2)

¹⁷ *Criminal Code*, s 606(4.4)

¹⁸ Justice Quebec, Victim Impact Statement (SJ-753B) - Additional information, <https://www.justice.gouv.qc.ca/en/documentation-center/forms-and-models/victims/sj-753b/sj-753b-additionnal-information>

by Parliament and the courts. Indeed, Canadian appellate courts have expressed in no uncertain terms that the victims of a criminal offence should have no role in determining either the type of sentence or the quantum of punishment that should be imposed on the offender. As the B.C. Court of Appeal articulated in *R. v. Bremner*: “There is nothing in the sections of the Code that permits a victim to have a role in suggesting the length of sentence or kind of sentence to be imposed... I do not wish to detract in any way from victims’ ability to put forward to the court “the harm done” or “the physical or emotional loss as a result of the crime” but the Code does not enable a tripartite procedure with regard to recommendations for sentencing. The parties on sentencing remain the same as at the trial.”¹⁹ In sum, victims’ entitlement is limited to being heard at sentencing through victim impact statements.

(ii) Restitution Orders

Section 738(1)(a) of the Canadian Criminal Code provides the statutory basis for restitution orders in cases of fraud, theft, and other financial crimes. Restitution orders are not meant to be compensatory but instead are intended to rehabilitate the offender by making him immediately responsible for the loss of the victim and to simultaneously “*deprive the offender of the fruits of his or her crime.*”²⁰

When a victim chooses to file a restitution request detailing the financial losses incurred, the court is required by law to consider making a stand-alone restitution order at sentencing.²¹ The right to judicial consideration should not be confused with a right to the remedy itself —restitution requests must be considered in light of broader sentencing principles which include a consideration of the “totality of the punishment”.²²

However, it is important to note that the Canadian Courts have cautioned that restitution orders should be issued with restraint.²³ As a result, restitution orders have become a statistically uncommon remedy.²⁴

2.1.2 Remediation Agreements

Introduced in 2018, remediation agreements serve as an alternative to prosecution for accused corporations or entities. A remediation agreement is an agreement between an accused entity and the responsible prosecuting authority. Under a remediation

¹⁹ *R. v. Bremner*, 2000 BCCA 345 para. 23.

²⁰ *R. v. Fitzgibbon*, [1990] 1 SCR 1005 (Per Cory J); *R. v. Castro*, 2010 ONCA 718 paras 26, 43 *R. v. Johnson*, 2010 ABCA 392 para. 29.

²¹ Canadian Victims Bill of Rights, S.C. 2015, c. 13, s. 16.

²² *R v Siemens*, 1999 CanLII 18651 (MB CA), per Huband JA.

²³ *R v Zelensky*, 1978 CanLII 8 (SCC), [1978] 2 SCR 940 (Laskin C.J.); *R. c. Lavallée*, 2016 QCCA 1655 para. 16; *R. v. Stinchcombe*, 1990 ABCA 216.

²⁴ For instance, for of all Canadian court files pertaining to adult offenders in 2014-2014, the court ordered restitution in only 2.3% of cases; Maxwell, A. (2017). Adult Criminal Court Statistics in Canada, 2014/2105. Juristat, 37 (1) Statistics Canada.

agreement, the prosecution agrees to grant the corporation amnesty in exchange for the entity's adherence to certain terms and conditions. Upon fulfillment of such terms and the expiration of the remediation agreement, the relevant charges will be withdrawn (with no criminal conviction). If the entity does not comply with the terms of the remediation agreement, the charges may be reinstated, and the entity may be prosecuted and possibly convicted.

Remediation agreements can be entered into for only certain offences; those offenses are listed in the schedule of Part XXII.1 of the Criminal Code and include fraud as well as bribery of foreign officials. A remediation agreement is not available for Competition Act offences.²⁵

The remediation agreement regime emphasizes victim involvement in various stages in the process, including:

- (i) The Crown must take reasonable steps to inform any victim that a remediation agreement may be entered into;²⁶
- (ii) Victims may give impact statements which must be considered during the court's consideration of whether to approve the plea agreement;²⁷
- (ii) Victim surcharges of 30% may be claimed in some circumstances.²⁸

2.1.3 Alternative Measures Agreements

An Alternative Measures Agreement ("AMA") is an alternative to conviction for offenses provided for in the Criminal Code, the Competition Act, R.S.C. 1985, c.34, and by other statutes. Under such an agreement, the accused acknowledges responsibility for the offense and complies with the conditions set by the Crown in exchange for a dismissal of the charge. AMAs may be ordered if they are not detrimental to the goals of societal protection and the requirements under s. 717(1) of the Criminal Code have been met.

In determining whether to enter into an AMA, the Crown must consider the interests of victims and of society more generally.²⁹ Moreover, according to the Attorney General's guidelines for prosecutors, the Crown has been directed to reject AMAs when the physical, psychological, or financial harm caused by the offence is considered to be severe.³⁰

²⁵ *Criminal Code*, RSC 1985, c C-46, Schedule to Part XXII.1, s 1(s).

²⁶ *Criminal Code*, s. 715.36(1).

²⁷ *Criminal Code*, 715.36(4)

²⁸ *Criminal Code*, 715.36(5)

²⁹ *Criminal Code*, s. 717(1)(b).

³⁰ Directive of the Attorney General Issued under Section 10(2) of the Director of Public Prosecutions Act (2014), 3.8 – Alternative Measures.

While the consequences of the crime for the victims must part of the calculus during an AMA decision, victims do not have a substantive role in influencing the outcome of AMA negotiations.

2.1.4 Analysis of the Canadian Approach

In Canada, 90% of criminal cases are resolved through the acceptance of guilty pleas as a following successful plea negotiations between the Crown and defence counsel. Parties to plea negotiations have *de facto* power to exercise a considerable degree of influence over the sentence that is imposed.³¹

While the process of plea negotiations personally affects victims of crime, victims have a limited opportunity for meaningful participation in the process. In 1987, the Canadian Sentencing Commission recognized the need to address victims' interests during plea negotiations. The Commission proposed that plea negotiations should be opened to a formal process of judicial scrutiny and that victims be accorded a role during the decision-making process. However, this recommendation has yet to be adopted.³²

In addition, further work needs to be done to define the meaning of the term 'victim' in relation to remediation agreements. It is currently unclear whether this categorization includes a company's employees, pensioners, and / or shareholders. This is important in the context of anti-competitive and financial crimes, as the 'victim' may not be an identifiable individual, but rather the employees, stakeholders of the company, or one of a company's competitors.³³

Nevertheless, the remediation agreement regime prioritizes victim interests and participation. Notably, denunciation and repair of the harm caused to victims or the community are among the stated objectives in the statutory provision allowing for remediation agreements. This objective of repair is exemplified by the statutory requirement that the prosecutor take reasonable steps to inform victims that a remediation agreement may be entered into.³⁴

Section 715.3(1) of the statutory framework adopts the *Criminal Code's* definition of 'victim' but, also includes any person outside of Canada if the offence committed was an offence under sections 3 (bribing a foreign public official) or 4 (accounting offences in

31 Government of Canada, "Victim Participation in the Plea Negotiation Process in Canada", https://www.justice.gc.ca/eng/rp-pr/cj-jp/victim/rr02_5/p0.html#sec0_3.

32 Government of Canada, "Victim Participation in the Plea Negotiation Process in Canada", https://www.justice.gc.ca/eng/rp-pr/cj-jp/victim/rr02_5/p0.html#sec0_3.

33 Joanna Harrington, "Providing for Victim Redress within the Legislative Scheme for Tackling Foreign Corruption Tackling Foreign Corruption" (2020) 43:1 Dal LJ.

34 *Criminal Code*, RSC 1985, c C-46, ss 715.31(a)(e), 715.36(1).

relation to bribing a foreign public official) of the *Corruption of Foreign Public Officials Act*.³⁵ This is an important requirement to ensure that victims of financial crimes who reside outside of Canada have their interests considered and are able to participate in the process.

One of the prerequisites for the Government to enter into negotiations for a remediation agreement is that negotiating the agreement must be in the “public interest”.³⁶ Section 715.31(2) sets out a number of factors that must be considered under the public interest analysis including “the nature and gravity of the act or omission and its impact on any victim”.³⁷

Additionally, an important feature of the remediation agreement regime is that agreements must obtain court approval. This is meant to ensure transparency by having the courts oversee, endorse, and enforce agreements rather than the prosecutor or regulator as is done in the United States.³⁸ To determine whether to approve an agreement the court must consider a number of victim-focused factors, including:

- any victim or community impact statement presented to the court
- any reparations, statement and other measures contained in the agreement
- the possibility of a victim surcharge of 30% or such other appropriate percentage³⁹

The important place of victims in the remediation agreement process was affirmed in *R. v. SNC-Lavalin Inc.*,⁴⁰ the first case to approve a remediation agreement under the new regime. In his reasoning, the Honourable Justice Eric Downs noted the importance of victims in the process and the role of victim participation, specifically, the victim’s provision of impact statements to include a detailed description of their monetary loss.⁴¹ In approving the agreement, the Court noted that the very purpose of the agreement proposed by the parties was to repair the harm caused to the victim.⁴²

2.2 France

In France, there are two main non-trial resolution procedures of financial crimes: comparution sur reconnaissance préalable de culpabilité (“CRPC”), which is the equivalent of a guilty plea, and the convention judiciaire d’intérêt public (“CJIP”), which is the equivalent of a DPA.

³⁵ *Corruption of Foreign Public Officials Act*, SC 1998, c 34, ss 3-4.

³⁶ *Criminal Code*, RSC 1985, c C-46, 715.32(1)(c).

³⁷ *Criminal Code*, RSC 1985, c C-46, 715.32(2)(b).

³⁸ *Criminal Code*, RSC 1985, c C-46, 715.37(1).

³⁹ *Criminal Code*, RSC 1985, c C-46, 715.37(3).

⁴⁰ *R v SNC-Lavalin Inc.*, 2022 QCCS 1967.

⁴¹ *R v SNC-Lavalin Inc.*, 2022 QCCS 1967, ¶116-118.

⁴² *R v SNC-Lavalin Inc.*, 2022 QCCS 1967, ¶1183.

Both procedures can be initiated with an investigating judge (*instruction*), or led by a prosecutor without an investigating judge (*enquête*). In both proceedings, the victim is invited to draft submissions. The prosecutor will not be bound by the victim's request for damages and may award less than the amount requested.

French lawmakers are now clearly in favor of the development of negotiated justice by giving the power to conduct the CRPC and CJIP procedures to the investigating judge, the public prosecutor and the accused, without requiring the consent of the victims, albeit while preserving victims' right to compensation. This position of French lawmakers to significantly limit the possibilities of opposition on the part of the victim to these two procedures shows that French law adopts a rather favorable view of negotiated justice for financial crimes.

2.2.1 CRPC

The CRPC was introduced by an Act of March 9, 2004 (Perben II Act). Although the role of the victims in the CRPC procedure has not disappeared, it has been reduced. The Act of December 22, 2021, removed the victims' right to object this procedure. Now, only victims who filed a complaint that initiated an *instruction* in a CRPC procedure can object to the CRPC. The other victims are informed of the CRPC and can only make observations. However, victims can claim damages at the approval hearing.

As part of the *enquête*, the public prosecutor must inform the victim without delay of the use of the CRPC procedure. The victims are invited to appear, together with the perpetrator, before the president of the judicial court in charge of approving the CRPC, in order to request compensation for their damage.

If the victim has not been able to exercise this right at the approval hearing, the public prosecutor must inform the victim of his or her right to request that the perpetrator be summoned to a subsequent hearing of the criminal court to allow the victim to claim compensation.

At the *instruction* stage, before the Act of December 22, 2021, the victims could object to the CRPC procedure. Since then, article 180-1 of the French Code of Criminal Procedure (CCP) distinguishes between the situation of the victim who initiated the criminal proceedings, who may refuse this procedural solution, and the victim that is not at the origin of the public action and who may only make observations.

Since 2021, in the context of an *instruction*, only victims who have filed a complaint can oppose the CRPC. In all other cases, the victims are informed of the procedure and are invited to appear before the president of the judicial court in order to request compensation for their damage.

The law does not require, in the case of multiple defendants, that each of them accept this procedure.

2.2.2 CJIP

The CJIP was introduced into French law by the Act of December 9, 2016, in order to aid in transparency, the fight against corruption, and the modernization of economic life. From the beginning, French lawmakers chose to not give victims the power to object to the CJIP procedure. However, victims can participate in the procedure and their interests are taken into consideration in the CJIP.

The CJIP consists of an agreement between the public prosecutor and a legal entity accused of certain offences, such as corruption or tax fraud. When the victim is identified, and unless the defendant proves that full reparation has been made of the victim's loss, the CJIP provides for the amount and terms of reparation for the damage caused by the offence, within a maximum period of one year.⁴³

The fair compensation of the victim before a CJIP is proposed is a mitigating factor that will be taken into account. The public prosecutor informs the identified victims of the proposal of a CJIP. This information does not constitute a request for approval and occurs even if the company establishes that it has already fully compensated the victims' damage.

In order to determine the amount of damages in the CJIP, the public prosecutor invites the victim to provide any information that may help to establish the reality and extent of the residual damage. It is up to the public prosecutor to set the amount and the terms of the compensation, which may be different from those requested by the victim.

Once the legal entity has given its consent, the president of the court proceeds with a public hearing of the defendant and the victim. At the end of the hearing, the victim is immediately notified of the court president's order. The decision of the president of the court is not subject to appeal.

The victims cannot therefore oppose the proposal of a CJIP, nor can they appeal the decision that validates it. Nevertheless, the validation of the CJIP by the judge does not prevent the victims from bringing an action before civil courts.

In the case of a CJIP, the victims' agreement is not required to initiate the procedure. Nor can they appeal the decision that validates it. However, the victims are informed of the procedure and are invited to submit observations to allow the damages to be assessed in the CJIP.

⁴³ article 41-1-2 CCP.

2.2.3 Analysis of the French Approach

In 2010, the Minister of Justice sustained that the rights of the victim in the CRPC procedure appeared to be taken into account satisfactorily. Indeed, the rules provide that the victim must be closely involved in the procedure. The public prosecutor must not choose the CRPC if it is likely to harm the victim's interests.

In addition, the situation of a victim who was not able to participate in the CRPC procedure is more favorable than in the case of a judgment before the criminal court in a judicial proceeding: in the latter case, if the victims are absent and were unable to assert their rights during the criminal trial, they can only initiate proceedings before the civil courts. In the CRPC procedure, the victim can claim compensation at a subsequent hearing.⁴⁴

Moreover, according to François Molins, Attorney General to the French Supreme Court, the CRPC is an effective instrument that contributes to reducing the number of criminal proceedings before the criminal courts and to save time on the simplest cases. Molins considers that this procedure fully respects the rights of the victim, since they will be able to request compensation for their damages, either immediately, by appearing before the judge in charge of approval, or later, at the request of the public prosecutor. Moreover, the fact that the accused accepts the sanction can facilitate the compensation of the victim.⁴⁵

Some authors consider that, although the right to compensation under the CRPC procedure has not disappeared, the expectations or prerogatives of the victims have been harmed. However, the fact that the victim's agreement is not required is consistent with the French principle that victims do not have the "right to a criminal trial".⁴⁶

Other authors consider that negotiated justice mechanisms are not adapted to cases such as ill-gotten gains cases and, more generally, to economic crimes, because the CRPC shifts the judicial debate from guilt to punishment.⁴⁷

As for the CJIP process, it acts to reinforce the efficiency of the system for handling criminal cases, particularly as regards the speed and execution of the sanction; the CJIP provides for the effective and rapid payment of a fine, as well as compensation for identified victims.⁴⁸

44 Question to the National Assembly n°73351

45 AJ Pénal, 2003, Plaidoyer pour le « plaider coupable » : des vertus d'une peine négociée, F. Molins

46 Gaz. Pal. 31 dec. 2011, « The place of the victim in the CRPC procedure » (« La place de la victime dans la procédure de CRPC »), F. Fourment.

47 D. Actualités, 2020, « Les inconvénients de la justice négociée en matière de criminalité financière », L. Rousseau & M. Méric.

48 National Financial Prosecutor Guidelines, Jan. 2023

According to Transparency France, this legal tool is essential in the fight against corruption because it is more suited to the challenges of this fight. It encourages companies responsible for corruption, money laundering or tax fraud to cooperate. This procedure will oblige them to set up appropriate remediation programs under the supervision of the French Anti-Corruption Agency or the competent tax authorities. In addition, the savings in time and money will allow the justice system to deal with corruption and fraud cases more quickly.⁴⁹

However, some authors consider that the place of victims is limited in the CJIP because they do not have the right to object to the use of the procedure and do not have any power of negotiation. In addition, victims do not participate in any open debate during the negotiation of the CJIP and cannot challenge the amount of damages.⁵⁰

Other authors consider that the law is unclear. In particular, a provision states that “the agreement also provides for the amount and terms of compensation for damages caused by the crime”. It is not clear whether the failure to compensate the victim in the terms provided for in the CJIP will constitute a breach likely to justify the resumption of public prosecution.

Moreover, the authors note that the victim is informed late, because the information is only given when the possibility of entering a CJIP is confirmed. Finally, the victim’s compensation is fixed at the end of a negotiation in which the victim did not participate.⁵¹

The CJIP concluded at the end of 2021 by LVMH, which allowed it to avoid a trial by paying a fine of 10 million euros after having the newspaper “Fakir” spied on, has been criticized. The use of the CJIP has allegedly deprived victims of a compensation for the infringement of their freedom of expression and their right for privacy. Some have therefore considered that this procedure excluded the victims.⁵²

2.3 GERMANY

The German Code of Criminal Procedure does not provide for “agreements” regarding non-trial resolutions between the defense and the public prosecution office or court. Non-trial resolutions for criminal investigations are governed by Sec. 153 et seq. of the German Code of Criminal Procedure.

49 <https://transparency-france.org/actu/note-de-position-la-convention-judiciaire-dinteret-public-cjip/#.ZCwmHXZByUk>

50 D. Actualités, 2020, L. Rousseau et M. Méric., prec.

51 AJ Pénal 2021, « La victime dans la procédure CJIP : entre strapontin et siège éjectable ? », B. Quentin et F. Voiron

52 Le Monde, Feb. 2022, Espionnage de François Ruffin : « Une justice expéditive et complaisante aux intérêts des puissants, est-ce encore une justice ? »

The main purpose of Sec. 153a of the German Code of Criminal Procedure is the public interest in an efficient investigation of criminal allegations and the balancing of this interest with the rights of the accused persons. The interest of the victims to obtain financial redress in non-trial resolution scenarios is protected by private law.

Sec. 153a of the German Code of Criminal Procedure was enacted in 1974. The last change regarding the section was made in 2012. Sec. 153a of the German Code of Criminal Procedure was instituted as a flexible and practicable instrument in terms of criminal policy in order to be able to react appropriately to petty crimes. There are numerous cases in the area of minor crime in which a discontinuation of trial under Sec. 153 of the German Code of Criminal Procedure was ruled unavailable only because the court deemed it irresponsible to exempt an offender from punishment without any kind of sanction.⁵³

Most relevant within the scope of white collar crimes are the (1) non-prosecution of petty offenses without any kind of sanction, governed by Sec. 153 of the German Code of Criminal Procedure, and (2) the non-prosecution subject to imposition of conditions and directions, governed by Sec. 153a of the German Code of Criminal Procedure. Both are only applicable for less serious offences (“Vergehen”). This includes typical white collar crimes such as fraud, accepting and granting benefits, taking and giving bribes, embezzlement or misappropriation. While Sec. 153 of the German Code of Criminal Procedure requires for the offender’s guilt to be considered as minor, Sec. 153a of the German Code of Criminal Procedure is also applicable to middle scale crime.

2.3.1 Non-prosecution of Petty Offenses Without Sanction

According to Sec. 153 para. 1 of the German Code of Criminal Procedure, the public prosecution office may dispense with prosecution in the investigation stage without imposing sanctions on the accused when the offender’s guilt is considered to be minor and there is no public interest in the prosecution. The consent of the court regarding whether to dispense with prosecution is required unless the offense is a less serious criminal offense not subject to an increased minimum sentence and consequences of the offence are minor. The term “increased minimum sentence” refers to crimes where more than one month of imprisonment is imposed as minimum sentence. After the public prosecution office makes a decision pursuant to Sec. 153 para. 1 of the German Code of Criminal Procedure, the possibility to reopen the investigations remains.

If an indictment has already been filed with the court, the court may discontinue the trial at any stage thereof under the conditions of Sec. 153 para. 1 of the German Code of Criminal Procedure.⁵⁴ However, in this stage, the termination of investigations depends

⁵³ Sec. 153a para. 1 sent. 1 No. 5 of the German Code of Criminal Procedure is intended to help exploit the existing potential of victim-offender mediation at an early stage

⁵⁴ Sec. 153 para. 2 of the German Code of Criminal Procedure

on the consent of the public prosecution office and defendant. The consent of the defendant is not required in all cases; exceptions can be found in Sec. 153 para. 2 sent. 2 of the German Code of Criminal Procedure. In case of a termination of investigations pursuant to Sec. 153 para. 2 of the German Code of Criminal Procedure, the investigations can only be reopened when new facts or evidence appear.

2.3.2 Non-Prosecution of Offenses Subject to Conditions

According to Sec. 153a para. 1 of the German Code of Criminal Procedure, the public prosecution office, with the consent of the defendant and of the court, may refrain from indicting the accused subject to conditions related to public policy and the public interest in criminal prosecution. The degree of guilt may not present an obstacle thereto. The consent of the court is not required when the offense is a less serious criminal offence not subject to an increased minimum sentence and consequences of the offence are minor.⁵⁵ All impossible conditions and instructions are listed in Sec. 153a para. 1 of the German Code of Criminal Procedure. They allow the prosecution to take into account the interests of victims of the crime, e. g. by imposing on the accused directions to make reparations for damage caused by the offense or to make a serious attempt to reach a mediated agreement with the aggrieved person.⁵⁶ Without the victim's consent, a victim-offender mediation cannot be conducted.⁵⁷ The investigations can only be reopened if it turns out that instead of a less serious criminal offence a serious criminal offence ("Verbrechen") has been committed.⁵⁸

Sec. 153a para. 2 of the German Code of Criminal Procedure enables the court to terminate the trial and concurrently impose the conditions on and issue directions to the indicted accused under the conditions of para. 1 after the indictment. The public prosecution office and the indicted accused need to consent.

2.3.3 Victims' Rights

Apart from the victim-offender mediation mentioned above, before deciding on non-prosecution, the public prosecution office can hear the victim. However, there is no obligation to do so. Against a non-prosecution decision by the public prosecution office pursuant to Sec. 153, 153a of the German Code of Criminal Procedure the applicant (the victim) may lodge a supervisory complaint or demand counter-performance.⁵⁹ If the supervisor shares the opinion of his subordinate, he will issue a negative decision. In

⁵⁵ Sec. 153a para. 1 sent. 7, Sec. 153 para. 1 sent. 2 of the German Code of Criminal Procedure

⁵⁶ Victim-offender mediation, "Täter-Opfer-Ausgleich", Sec. 153a para. 1 sent. 1 No. 5 of the German Code of Criminal Procedure.

⁵⁷ Sec. 155a sent. 3 of the German Code of Criminal Procedure

⁵⁸ Sec. 153a para. 1 sent. 5 of the German Code of Criminal Procedure

⁵⁹ Sec. 172 para. 1 sent. 1 of the German Code of Criminal Procedure

general, the victim then can apply for a court decision.⁶⁰ However, this is not possible if the procedure has been discontinued under Sec. 153, 153a of the German Code of Criminal procedure.⁶¹

The orders of the court pursuant to Sec. 153 para. 2, 153a para. 2 of the German Code of Criminal Procedure are not contestable at all.⁶² The victim of a crime has no right to lodge a complaint, even if there is a procedural violation.⁶³

Victim compensation, however, can be claimed through the civil courts. The claim is irrespective of the termination of the criminal investigations according to Sec. 153 et seq. of the German Code of Criminal Procedure. Therefore, excluding the victim from participating in the non-trial resolution does not influence claims for damages. Thus, it does not lead to a loss of rights.

Victims' rights are sufficiently ensured through the right to access the prosecutor's file. Pursuant to Sec. 406e, 475 of the German Code of Criminal Procedure, an injured person's lawyer may inspect files available at court or which would need to be submitted if public charges were preferred. They may also view items of evidence in official custody. Both rights presuppose a legitimate interest therein.

2.3.4 Analysis of the German Approach

The German approach offers a coherent system involving the right of aggrieved persons to access the file and obtain information about the investigations regardless of non-trial resolutions and to obtain financial compensation through putting forward a claim for compensation within civil proceedings.

Sec. 153 et seq. of the German Code of Criminal Procedure were enacted because the criminal prosecution authorities would not be able to handle the large number of offences to be prosecuted due to the shortages of resources, if it weren't for the possibility to overcome the obligation to prosecute. In case of minor culpability it is also deemed appropriate to terminate the investigations in order to reduce the stigmatisation associated with a public trial. Sec. 153, 153a of the German Code of Criminal Procedure only apply to small and middle scale crime.

Unlike Anglo-Saxon legal systems, private law redress before the civil courts is cost efficient and straightforward. The principles of civil procedure, such as the principle of speedy trial and the principle of party control, just as the fundamental guarantees like the right to legal recourse, to a fair trial according to the rule of law and to be heard

⁶⁰ Sec. 172 para. 2 sent. 1 of the German Code of Criminal Procedure

⁶¹ Sec. 172 para. 1 sent. 3 of the German Code of Criminal Procedure

⁶² Sec. 153 para. 2 sent. 4, 153a para. 2 sent. 4 of the German Code of Criminal Procedure

⁶³ Sec. 400 para. 2 sent. 2 of the German Code of Criminal Procedure

before court, enable victims of financial crimes to obtain compensation and provides a fair balance with the rights of the accused defendant.

The primary aim of German criminal law is the protection of legal interests and the enforcement of the public interest to sanction whereas the private interests of the victims are fully protected by private law and the jurisdiction of the civil law courts.

2.4 SWITZERLAND

Switzerland does not have an equivalent of a “deferred prosecution agreement” (“DPA”) in criminal proceedings against companies. An attempt to introduce DPAs into the Swiss legal system, launched by the Swiss AG and the Swiss Bar Association, was aborted by the Federal Government in 2019 as a result of a considerable amount of criticism. The main reasons for the criticism were the following: (i) it was considered to be problematic that companies could “buy” impunity; (ii) the fact that no Court was supposed to be involved in DPAs was viewed as an unnecessary strengthening of the prosecution’s position, without adequate checks and balances; and (iii) no involvement of victims was provided, even though civil claims would have been an indispensable element of the DPA.

That said, there are two instances of non-trial resolutions of criminal proceedings that are not limited to, but can also operate in the context of, financial crimes. One is “reparation” according to art. 53 of the Swiss Criminal Code (SCC), and the other is the “abbreviated procedure” according to arts. 358 et seqq. of the Swiss Criminal Procedure Code (CPC).

2.4.1 Reparation

“Reparation,” a tool whose legitimacy is, from time to time, hotly debated in politics since it enables offenders to “buy” immunity,⁶⁴ only comes into question where the accused has either compensated the loss suffered by the victim or, at least, made all reasonable efforts to make up for the injustice caused. In addition, the interests of both the victim and the general public need to be minor for “reparation” to come into play. The interests of victims are, thus, taken into account. The primary purpose of “reparation” is the making up of injustice and the restoration of social peace. In the instance of “reparation,” there is no judgment (sentencing).

“Reparation” has been contained in the SCC for decades but has been on the decline in recent years. Due to pressure exerted by the OECD, the Swiss AG has decided to no longer apply “reparation” in the instance of transnational companies.⁶⁵ In 2019, art. 53 SCC was further limited in two instances. First, the provision can only apply to offences for which the maximum custodial sentence is one year (as opposed to two years, as before).

⁶⁴ Cf., e.g., [Finanzdepartement stellt Strafverfahren gegen Vekselberg ein](#) - SWI swissinfo.ch.

⁶⁵ Cf. [OAG annual reports \(bundesanwaltschaft.ch\)](#) [2017].

Second, the offender must acknowledge the facts and the offence. The Swiss Federal Supreme Court has made clear that such is incompatible with a “not guilty” plea.

“Reparation” according to art. 53 SCC, requires that the loss suffered by the victim is compensated, or that the offender, at least, made all reasonable efforts to make up for the injustice caused. Whether or not this is the case is verified by the prosecution or the Court. The victim has no say, or right of participation, in these proceedings.

In the “reparation” context, the application of the remedy has as a condition that the interest of the victim in a prosecution is minor and the loss suffered by the victim is compensated for. However, the victim has no formal role, or possibility to object, if the proceedings are closed based on art. 53 SCC.

2.4.2 Abbreviated Procedure

The “abbreviated procedure” was introduced in 2011 when the CPC entered into force, replacing the former cantonal CPCs, only few of which had known similar tools. The Federal Government had argued that the “abbreviated procedure” was primarily suited to finish large and complex cases of economic crime within relatively short time and using adequate resources. The law in action now shows that the “abbreviated procedure” primarily applies in large narcotics cases, *i.e.*, in cases where there are no victims (in the narrow sense).

In the “abbreviated procedure,” a model similar to “plea bargaining”, there is a criminal sentence but based on a deal, not a Court judgment. The Court merely reviews, and approves, the deal agreed upon between the prosecution and the accused; its role is thus limited. In recent years, the Swiss AG further undermined the role of Courts by conducting “abbreviated procedures” against companies but then concluding them via penal order.⁶⁶

The “abbreviated procedure” requires an agreement between the accused and the prosecution on offences, sentencing, and ancillary effects. The “abbreviated procedure” only comes into question where the accused acknowledges the relevant facts as well as civil claims, at least in principle. Victims have the possibility to reject the indictment and, thereby, obstruct the “abbreviated procedure.”

The “abbreviated procedure” is launched upon application by the accused, and it requires an approval by the prosecution. Victims are not involved in the opening of an “abbreviated procedure” and have no possibility to intervene at this stage. If the prosecution approves the “abbreviated procedure,” victims (“private plaintiffs”) are invited to assert their (monetary) claims within ten days.⁶⁷ This, however, only applies to such victims that,

⁶⁶ Cf. David Mühlemann, *Der (unzulässige) Strafbefehl im abgekürzten Verfahren*, recht 2018, 83 *et seqq.*, dealing with a bribery case.

⁶⁷ Art. 359(2), CPC.

up and until the opening of the “abbreviated procedure,” formally claimed the right to participate in the proceedings as “private plaintiffs.” By contrast, other potential victims need not be formally invited by the prosecution to assert claims. However, the prosecution must inform them, to the extent they are known, that they have the possibility to become “private plaintiffs.” The prevailing doctrinal opinion is, therefore, that victims should invariably have a possibility to participate in the proceedings and assert their claims, it being understood that the ten days’ time-limit for doing so is inordinately short.

The deal between the accused and the prosecution is negotiated without involvement of the “private plaintiffs.” Ultimately, the “private plaintiffs” need to consent⁶⁸ which requires the prosecution to reveal the indictment to all the parties. “Private plaintiffs” have ten days to express their consent or refusal, which can be done without the need to indicate any reasons. If they refuse, the “abbreviated procedure” fails, and the prosecution has no choice but to conduct ordinary proceedings. The Swiss Federal Penal Court however only considers a refusal to be valid if it pertains to an individual interest of the “private plaintiff” worthy of protection. Therefore, refusals based on the imputation of blame and the financial agreements are considered valid whereas refusals based merely on sentencing are without effect.

As a result, a victim who has formally become a “private plaintiff” has a relatively strong position in the “abbreviated procedure” but no actual say in the sense of an involvement in the proceedings. If the victim refuses the deal with regard to the financial agreements, the deal between the accused and the prosecution fails.

Where there is a large number of victims, things become complex. In principle, the refusal by one single victim suffices as a deal killer for the entire “abbreviated procedure.” It is, however, conceivable to separate that victim’s case from the remainder of the matter in order to at least close the overwhelming part of the matter, which in turn may severely impair that victim’s position.

In practice, matters with more than 50 victims are known to have been successfully concluded in an “abbreviated procedure.” The prosecution (e.g., the Swiss AG or the Prosecutor’s Office III of the Canton of Zurich) had made sure, by taking an active role in the negotiations, that all victims were ultimately satisfied and expressed their consent. This confirms that the victims’ position in the “abbreviated procedure” is strong and requires both the prosecution and the accused to take victims, and victims’ rights, into due consideration.

Victims who do not become “private plaintiffs” or do not assert their claims within the time-limit are not barred from asserting civil claims against the offender.

68 Art. 360(2), CPC.

If the prosecution closes an “abbreviated procedure” by virtue of a penal order, the victim has the right to oppose within a ten days time-limit. The “opposition” is not an appeal but forces the prosecution to take the matter into consideration once more. The prosecution can, but need not, amend the penal order to accommodate to the victim’s rights and opposition. As a result, the victim’s position is impaired in this type of setup. Legal doctrine is thus split as regards the possibility of combining the “abbreviated procedure” with a penal order.

Normally, an “abbreviated procedure” is in the interest of victims. The matter can be concluded more swiftly, and a deal requires an acknowledgment of the relevant facts as well as the civil claims by the offender, at least in principle.

The revision of the CPC, entered into force in 2024, has introduced the possibility for the prosecution to formally decide upon civil claims (*i.e.*, claims by victims) within the framework of a penal order, provided that such claims are either acknowledged by the accused or else in an amount of no more than CHF 30’000.

2.4.3. Analysis of the Swiss Approach

Victims are not excluded *per se* but still have limited participation. Their participation is best safeguarded in the context of an “abbreviated procedure” where they have a right to consent or refuse. The statute does not require them to be involved by either the prosecution or the accused, but in practice they need to be involved since, otherwise, no deal can be reached. In the “reparation” context, by contrast, there is no involvement provided for; “reparation” presupposes that the loss suffered by the victim is compensate, which the legislator appears to consider sufficient.

Overall, the “abbreviated procedure” is, arguably, more favourable for victims than “reparation,” and there is certainly a greater degree of involvement in the proceedings than in “reparation” cases. That said, the prosecution has no right of choice between “reparation” and “abbreviated procedure;” the two have an entirely different scope.

In the “abbreviated procedure,” the victim who assumes the role of a private plaintiff in the proceedings has the possibility to refuse the deal between the accused and the prosecution, and thus to prevent the closure of the proceedings. This puts the victim in a considerably strong position and forces the prosecution to take victims’ rights into due consideration in the interest of being able to close the deal, and thus the proceedings. For victims, it is key that the “abbreviated procedure” can only take place where the offender acknowledges the relevant facts as well as civil claims, at least in principle. The victim can benefit from the swift and unbureaucratic proceedings and need not initiate separate proceedings where he or she may have issues proving their case.

However, the time-limit for asserting civil claims and/or becoming a “private plaintiff” in the proceedings is only ten days in each instance. This can be disadvantageous for victims. Also, where the prosecution combines the “abbreviated procedure” with a penal order, this has the potential to impair the position of victims.

In addition, there are no statutory provisions dealing with victim participation in the narrow sense. While victim participation is indispensable to some degree, in the context of an “abbreviated procedure,” there is a risk that victim participation varies to large degree as a function of the prosecution office in charge.⁶⁹

There is also no clear rule, or legal consequence, in the instance that it is difficult or impossible to identify the individual victims. In the Alstom corruption case, a payment to the Red Cross was considered to be adequate “reparation” in spite of the fact that, clearly, the Red Cross had not been the victim of the bribery.⁷⁰

Finally, it might be advantageous to create a rule that applies to corporate offenders; there is only a relatively short catalogue of offences for which corporate offenders can be held criminally liable (such as, e.g., bribery, money laundering, or participation in a criminal organisation). That type of offences might require a different framework for the safeguarding of victims’ rights.

2.5 UNITED KINGDOM

The adversarial system of law and its development under English common law has resulted in the exclusion of victims from formally participating in legal proceedings against a defendant. In the mid-late 19th century, the police force became responsible for the investigation and prosecution, essentially separating victims from the criminal courts. By the mid-1980s the Crown Prosecution Service took responsibility for prosecuting police cases. The only side in which victims can participate is as a witness for the prosecution, but the interests of the prosecution are not always those of victims.⁷¹ As such, a standard for victim participation and victim rights was established in 2006, with the publication of the Code of Practice for Victims of Crime (“Victims Code”). Under the Victims Code, victims’ voices are heard via the Victims Personal Statements (discussed above). In October 2012, the EU passed the Directive for Victims of Crime 2012/29/EU. This requires all EU countries to establish minimum standards on the rights, support and protection of victims of crime. Before Brexit, the UK fulfilled this requirement under its Victims’ Code. The Code is still in place.

69 Cf. Moritz Oehen, *Der Strafkörper im Strafbefehls- und im abgekürzten Verfahren*, Bern 2019, 23 et seqq.

70 Cf. *Strafverfahren gegen Alstom-Gesellschaften abgeschlossen* ([admin.ch](#)). In the case described by Mühlemann (footnote 1 above), another bribery case, the company established a “fund for integrity” in the industry, which was considered to be sufficient compensation of civil claims in spite of the fact that this was clearly not the case.

71 Sanders, A., CJM No 49 (2002) *Victim Participation in Criminal Justice*, page 30.

The overriding principle under English law is that criminal investigations, and any subsequent prosecutions, are actions by the state against individuals or legal entities: they do not invoke formal standing for victims within the legal process. There are two forms of non-trial resolutions of financial crimes: 1) Deferred Prosecution Agreements and 2) Decisions made concerning compensation of victims, following the entry of guilty plea(s) to offences. Whilst there is no formal recognition by way of legal standing, the rights of victims are nevertheless protected in other ways.

2.5.1 Deferred Prosecution Agreements (DPAs)

Schedule 17 of the Crime and Courts Act 2013 states that DPAs may impose (but are not limited to) the requirement of consideration for victims' compensation.⁷² This comes in the form of a financial order, the terms of which may include: compensating victims; payment of a financial penalty; payment of the prosecutor's costs; donations to charities which support the victims of the offending; disgorgement of profits. There is no requirement to include all or any of these terms all of which are a matter of negotiation between the prosecution and the offender, but the final terms of the DPA are subject to judicial oversight.⁷³ The court's function is to ensure that a negotiated DPA is in the interests of justice, and its terms are fair, reasonable and proportionate.⁷⁴

The Code of Practice on DPAs states that one of the factors that the prosecutor may consider when deciding whether to enter into a DPA is the "significant level of harm caused directly or indirectly to the victims of the wrongdoing or a substantial adverse impact to the integrity or confidence of markets, local or national governments."⁷⁵ However, victim participation is not a requirement, but a recommendation.

2.5.2 Guilty pleas

In cases where a guilty plea has been entered thus averting the need for a contested trial, the sentencing judge must consider whether compensation to a victim is appropriate. A compensation order requires the offender to pay compensation for any personal injury, loss, or damage resulting from the offence.⁷⁶ The court must give reasons if it decides not to order compensation.⁷⁷

Finally, the court will also take into account any Victims Personal Statement, which allows victims to register the impact the offending had on them, details of which may be taken

⁷² Crime and Courts Act 2013, Schedule 17 Deferred Prosecution Agreements, Section 5(1)(b).

⁷³ Serious Fraud Office, Deferred Prosecution Agreement Code of Practice, Section 7(9).

⁷⁴ Crime and Courts Act 2013, Schedule 17 Deferred Prosecution Agreements, Section 7(1)(b).

⁷⁵ Serious Fraud Office, Deferred Prosecution Agreement Code of Practice, Section 2(8)(1)(vii).

⁷⁶ Sentencing Act 2020, Sections 133-134.

⁷⁷ *Ibid.*, section 55.

into account by the court during sentencing. This would necessarily include the impacts of any financial loss.

2.5.3 Glencore Example

The lack of power of victims to influence a court resolution was brought to the fore in *Serious Fraud Office v Glencore Energy UK Ltd* [2022] EWCR 2. In November 2022, the international mining commodities giant, Glencore, was sentenced to a GBP 183 million fine for bribery to secure access to oil in operations in South Sudan, Equatorial Guinea, Cameroon, Nigeria and Ivory Coast.⁷⁸ However, a week before the final sentence was passed, the Federal Republic of Nigeria (“FRN”) brought a claim against the Serious Fraud Office and Glencore, demanding compensation it argued it was entitled to under the Sentencing Act 2020.⁷⁹ The FRN considered itself to be a victim of Glencore’s offence, arguing that Glencore had effectively tried to control the Nigerian oil market through bribes and creating a less competitive environment which in turn led to reduced prices and economic damage to its developing economy.

The FRN faced two obstacles in seeking to influence the court on the question of compensation for victims. First, FRN had to prove it had standing, as a third party and non-direct victim, to make such an application for compensation. Second, FRN had to quantify the compensation it was seeking.

The FRN attempted to argue that the current legislation on sentencing, and the leading appellate authority⁸⁰ left open the possibility for third parties to have standing in relation to applications for compensation. These arguments failed. The court affirmed the ratio in *Beswick* and noted that as a matter of statutory interpretation, it was clear that only the prosecution and offender have standing, and therefore at the clear exclusion of third parties. Fraser J reiterated the Crown Court “is not a suitable venue for hearing representations from the wide range of victims (or those who submit that they are victims) who may want to have compensation orders made in their favour... Compensation orders are ancillary; they are not the main purpose of sentencing.”⁸¹

The court alluded to another avenue for victims to influence compensation orders. Fraser J observed that civil redress was available and the FRN did at least have the opportunity to make oral submissions in open court. In complex cases such as this one, claims by third parties that have suffered loss are more suitably dealt with in civil proceedings

78 In June 2022, Glencore pleaded guilty to seven counts of bribery under sections 1 and 7 of the Bribery Act 2010. The SFO originally launched its investigation in 2019, exposing that Glencore, through its employees and agents, paid bribes of over US \$28 million for preferential access to oil, including increased cargoes, valuable grades of oil and preferable dates of delivery.

79 Sentencing Act 2020 Sections 133-135.

80 *R v Beswick* [2007] EWCA Crim 3297.

81 *Serious Fraud Office v Glencore Energy UK Ltd* [2022] EWCR 2, para 19.

where both liability, causation and loss can be properly ascertained.⁸² In practice, victims in the UK will seek a range of measures, both criminal, civil and regulatory, to obtain compensation for losses suffered. It may also be possible for victims to pursue a private prosecution through the criminal courts. However, few victims have the resources or stamina to do so; successful private prosecutions for financial crimes remains very rare.

2.5.4 Analysis of the UK Approach

The UK has robust guidance which takes into account victims' interests. For example, the SFO established general principles⁸³ with the aim to ensure that overseas victims of bribery, corruption and economic crime are able to benefit from asset recovery proceedings and compensation orders made in England and Wales. These principles encourage cooperation between different government departments to identify victims from overseas states, obtain evidence which may include statements in support of compensation claims, and ensure the process for the payment of compensation is transparent, accountable and fair.

However, in *FRN v SFO*, Fraser J noted that in practice, compensation orders (which to date have been the main method of redress) are only "intended for clear and simple cases".⁸⁴ Hence in complex financial crime matters, and especially in matters involving large scale bribery and corruption, a more developed set of principles is needed in order to provide redress to victims. For instance, in 2022, the UK published its first ever framework for transparent and accountable asset return which builds on the Global Forum for Asset Recovery principles.⁸⁵ The framework was devised according to the UN Convention Against Corruption ("UNCAC"). As a signatory to the UNCAC, the UK is obligated to return funds to the requesting State party, to its prior legitimate owners or to compensate the victims of crime when conditions for return are met.⁸⁶ The purpose of the framework is to ensure consistency, transparency, and accountability in the UK's process of returning funds to other countries and sets out the stakeholders to be engaged throughout the return process including the involvement of civil society organizations.

To date, the SFO has issued 12 DPAs since their introduction in February 2014. However, the use of such agreements to tackle economic crime has not been uncontroversial and the regime has come under the scrutiny of various victims' groups.

⁸² *Ibid.*, para 29.

⁸³ Serious Fraud Office (2018) General Principles to compensate overseas victims (including affected States) in bribery, corruption and economic crime cases.

⁸⁴ *Serious Fraud Office v Glencore Energy UK Ltd* [2022] EWCR 2, para 25 (quoting Director of the Serious Fraud Office v Airbus SE [2020] Case No.U20200108, para 95). See further guidance provided in *R v Michael Brian Kneeshaw* (1974) 57 Cr.App.R 439; *R v Kenneth Donovan* (1981) 3 Cr.App.R (S) 192; *R v Ben Stapylton* [2012] EWCA Crim 728; *SFO v XYZ* (U20150856) 8 July 2016 at para 41.

⁸⁵ UK Home Office (2022) *Framework for Transparent and Accountable Asset Return*.

⁸⁶ UN Convention Against Corruption, Article 57(3)(c).

First, the lack of any successful prosecution of individuals for the underlying activity for which DPAs were granted has led to serious criticism. The question of holding senior executives accountable for bribery, corruption and other economic crimes was raised by two advocacy groups, Spotlight on Corruption and Transparency International UK. In a letter to the SFO following its DPA with Airbus SE, they urged the SFO to be transparent about the process, arguing that DPAs provide protection to senior managements which fails to hold them accountable for wrongdoing.⁸⁷

To date, there has only been one DPA where compensation was granted to victims.⁸⁸ Various victims' groups raised questions as to whether DPAs imposed penalties large enough to deter wrongdoing and whether victims of corruption were being properly compensated. On 7 December 2022, Spotlight on Corruption sent a letter to the Secretary of State for Justice regarding the need for legal reform following the sentencing of Glencore Energy (UK) Ltd.⁸⁹ The letter urged the Government to revise its current compensation regime (including under DPAs) by (i) broadening the definition of harm to include financial, economic, environmental, and social damage caused by foreign bribery; (ii) establishing a methodology for identifying different forms of harm in complex cases; (iii) implementing a transparent system of delivery of compensation to those affected.

2.6 UNITED STATES OF AMERICA

Victim standing in the United States depends on the type of non-trial resolution in question. In a Department of Justice (DOJ) investigation, a company would typically anticipate one of these three resolutions, depending on the facts and circumstances: (1) a declination under the Justice Department's Corporate Enforcement and Voluntary Self-Disclosure Policy ("Corporate Enforcement Policy"), which ordinarily requires a company to make victims whole for provable damages; (2) a deferred prosecution agreement (DPA) or non-prosecution agreement (NPA), which may give rise to statutory procedural rights of victims under the Crime Victims' Rights Act (CVRA); and (3) the filing of formal charges in court and a guilty plea, pursuant to which victims have procedural rights under the CVRA and a court may order the payment of restitution under the Mandatory Victim Restitution Act (MVRA) to compensate victims for financial losses caused by the defendant's criminal conduct.

These laws, policies and practices described above have evolved over time. The MVRA was enacted in 1996 as Title II of the Antiterrorism and Effective Death Penalty of 1996 to expand the scope of mandatory restitution on the federal level and provide consolidated procedures for the issuance of restitution orders and enforcement of those orders.

⁸⁷ *Director of the Serious Fraud Office v Airbus SE* [2020] Case No. U20200108.

⁸⁸ *SFO v Standard Bank*

⁸⁹ [7 December 2022 Letter from Spotlight on Corruption to Secretary of State for Justice](#)

The CVRA was enacted in 2004 to give crime victims specific rights and standing to assert those rights in court. The CVRA is a culmination of a crime victims' rights movement which undertook various efforts to give victims a more meaningful role in criminal proceedings.

The Corporate Enforcement Policy came into being in 2016 as the Foreign Corrupt Practices Act Pilot Program. In 2018, the Pilot Program became formal Criminal Division policy, and the Criminal Division said that the same principles would be applied to all white-collar corporate investigations. Recent revisions to the Policy (announced in January 2023) gave companies additional opportunities for declinations of prosecution and incentives for cooperation. In March 2023, DOJ updated the Justice Manual, as described above, to direct prosecutors to expand their consideration of victims' rights. These revisions align with DOJ's general emphasis on victims in recent years.

Overall, victims can influence a resolution, but they do not have the right to bar a result sought by the government and a corporate defendant.⁹⁰

Each of the types of possible non-trial resolutions is discussed in more detail below.

2.6.1 Declinations

Under the Corporate Enforcement Policy, a company may be eligible for a declination of prosecution if the company voluntarily reports the misconduct, fully cooperates and satisfactorily remediates the conditions that gave rise to the misconduct. To qualify for a presumption of a declination, a company must "pay all disgorgement, forfeiture, and/or restitution resulting from the misconduct" and take "steps that demonstrate recognition of the seriousness of the company's misconduct," which would ordinarily include making victims whole for injuries suffered as a result of the company's misconduct.

Earlier this year, the DOJ revised Section 9-28.1400 of the Justice Manual ("Principles of Federal Prosecution of Business Organizations") to instruct federal prosecutors to consider, in deciding on an appropriate resolution, what steps a company has taken to identify potential victims and to mitigate any harm that they have suffered due to the misconduct at issue. In general, DOJ policy has become more concerned over time with victim-related considerations in the resolution of corporate investigations.

⁹⁰ See, e.g., *Boeing*, Dkt. No. 185, Case No. 4:21 CR 05 (Feb. 9, 2023) (concluding court's supervisory power over DPA limited to "determining whether the agreement was reached for a legitimate or illegitimate purpose."); *Fokker Servs.*, 818 F.3d at 738 (reversing district court's disapproval of DPA based on concerns about the government's charging decisions); *HSBC Bank USA*, 863 F.3d at 129 (finding "district court impermissibly encroached on Executive's constitutional mandate to 'take Care that the Laws be faithfully executed,' U.S. Const. art. II, § 3," by overseeing government's entry into and implementation of the DPA).

2.6.2 NPAs and DPAs

Unlike a declination, a DPA or NPA requires a company to admit certain facts or agree to certain stipulated facts. Though such a resolution does not result in a guilty plea or conviction, victims may have statutory procedural rights.

The CVRA specifies eight rights that federal courts are obliged to “ensure” crime victims are “afforded.” 18 U.S.C. § 3771. Under the CVRA, crime victims have “the right to be informed in a timely manner of a plea bargain or deferred prosecution agreement,”⁹¹ and “officers and employees of the Department of Justice and other departments and agencies engaged in the detection, investigation, or prosecution of crime” must use their “best efforts” to “see that crime victims are notified of, and accorded, the rights described in subsection (a).”⁹² Additional rights include “[t]he reasonable right to confer with the attorney for the Government in the case[.]” and “[t]he right to be treated with fairness and respect for the victim’s dignity and privacy.”⁹³ A crime victim seeking to vindicate her rights under the CVRA may proceed by motion “in the district court in which a defendant is being prosecuted” or, “if no prosecution is underway, in the district court in the district in which the crime occurred.”⁹⁴

The statutory procedural rights of victims afforded by the CVRA, together with the Corporate Enforcement Policy discussed above, create incentives and, in some instances, requirements for companies to remediate harm done to victims even in the absence of the filing of charges and a conviction.

An important procedural issue has remained unresolved: precisely when, under the CVRA, the right to be informed of a “plea bargain or deferred prosecution agreement” attaches – only after charges are filed in court, or earlier, such as during discussions about a possible DPA or NPA. The issue was raised in litigation involving Jeffrey Epstein in which victims claimed that they should have been consulted before prosecutors entered into an NPA with Epstein in 2008.⁹⁵ Last year, in the case of a DPA entered into by Boeing Co., a federal district court held that a victim’s right to consult with prosecutors under the CVRA attaches before formal charges are brought against a defendant.⁹⁶

Following the 2022 Boeing decision, the DOJ revised its internal guidance to direct DOJ personnel to “make their best efforts to accord to victims the rights set forth in the [CVRA]... as early in the criminal justice process as is feasible and appropriate, including prior to

⁹¹ § 3771(a)(9).

⁹² § 3771(c)(1).

⁹³ See §§ 3771(a)(5) and (8).

⁹⁴ § 3771(d)(3).

⁹⁵ See *In re Wild*, 994 F.3d 1244 (11th Cir. 2021).

⁹⁶ See *Boeing v. United States*, 2022 WL 2972231 (N.D. Tx. July 27, 2022).

the execution of a non-prosecution agreement [and] deferred prosecution agreement.”⁹⁷ This guidance does not have the force of law, and the question of when a victim has the right to consult with prosecutors remains unclear.

An additional unresolved issue is the appropriate remedy for a violation of the CVRA’s procedural rights. In *Boeing*, the victims asked the district court to withhold approval of the DPA until the government conferred with the victims, and order Boeing to be publicly arraigned to give the movants an opportunity to be heard on the appropriate conditions of release during the term of the DPA. The victims also requested that the district court impose an independent compliance monitor to oversee Boeing’s compliance with the DPA, supervise implementation of the DPA to ensure their rights under the CVRA are protected, and order the government to disclose to the victims information about Boeing’s crimes and the DPA’s negotiation history. At bottom, the victims argued that the \$500 million fund created by the DPA was not sufficient to compensate for the loss of life that resulted from airline crashes, which the victims alleged resulted from a fraud committed on the Federal Aviation Administration.⁹⁸

The court denied the request to impose conditions and limitations beyond those set forth in Boeing’s DPA or withhold approval of the DPA until the government conferred with the victims, citing other court decisions that limited a court’s supervisory authority over a DPA chiefly to “determining whether the agreement was reached for a legitimate or illegitimate purpose.”⁹⁹ The district court was not given proof that the government had acted in bad faith or improperly.

2.6.3 Guilty Pleas

Under the MVRA, a defendant convicted of certain federal crimes, including violations of the Foreign Corrupt Practices Act and fraud, is required to pay restitution to eligible “victims.”¹⁰⁰ The amount of restitution is the value of the property fraudulently obtained. To qualify as a “victim,” a “person” must be “directly and proximately harmed” “as a result of the commission of an offense for which restitution may be ordered”¹⁰¹ To establish “direct[] and proximate[]” harm, a “victim” must prove that the loss would not have occurred “but for the conduct underlying the offense of conviction,” and “that the causal connection between the conduct and the loss is not too attenuated (either factually or temporally).”¹⁰²

97 Attorney General Guidelines for Victim and Witness Assistance, 2022 Edition (emphasis added).

98 Notably, the vast majority of the movants are also plaintiffs in approximately 75 separate civil actions for compensatory damages that have either settled or are headed to potential trial.

99 *Boeing*, Dkt. No. 185, Case No. 4:21 CR 05 (Feb. 9, 2023) (citing *United States v. Fokker Servs.*, 818 F.3d 733, 744-45, 747 (D.C. Cir. 2016); *United States v. HSBC Bank USA, N.A.*, 863 F.3d 125, 129 (2d Cir. 2017)).

100 18 U.S.C. § 3663A

101 *Id.* at § 3663A(a)(2)

102 *United States v. Robertson*, 493 F.3d 1332, 1334 (11th Cir. 2007).

When criminal charges are filed and a guilty plea entered, victims are often allowed to participate in the sentencing process. The degree of participation depends on the particular judge and circumstances. Before a sentence is imposed, victims have the opportunity to submit a Victim Impact Statement to the U.S. Probation Department which describes the emotional, physical, and financial impact victims have suffered as a direct result of the crime. The Probation Department, an arm of the judiciary, uses this information, among other things, to help the judge determine the proper sentence to impose, including restitution. Often victims will submit a financial loss statement that assesses the financial impact of the crime upon the victim and is utilized to determine an appropriate amount of restitution. In addition to written submissions, victims may also give an oral statement at sentencing for the judge's consideration.

In the case of guilty pleas, victims can have a direct and substantial impact on sentencing and restitution. A restitution order issued by the U.S. District Court for the Southern District of New York in February 2023 highlights the effect victims can have at sentencing.¹⁰³

With the assistance of a valuation expert, victims of Glencore International's FCPA violations were able to convince the court to award victims an additional \$13.6 million in restitution beyond the injury Glencore admitted in its plea agreement. Glencore had paid a bribe to dismiss a lawsuit brought against one of its subsidiaries; in its plea agreement, Glencore admitted that the lawsuit had a value of \$16 million. Claimants came forward and requested additional damages beyond the amount the company admitted to in its plea agreement, claiming that not receiving the \$16 million in settlement proceeds had caused their business to fail. The court was persuaded and awarded claimants an additional \$13.6 million in restitution for a total award against Glencore of almost \$30 million.

2.6.4 Analysis of the American Approach

Once a "victim" is identified by the U.S. government, the Victims' Rights and Restitution Act ("VRRRA") describes services the federal government is required to provide to victims of federal crimes, such as information regarding counseling programs, medical services, and the status of the investigation, as well as reasonable protection from a suspected offender.¹⁰⁴ The Act does not create a cause of action for any person if the government fails to meet its obligations.

When an investigation is resolved without a guilty plea, as described above, the involvement and impact of victims is harder to gauge and predict. In the Boeing case,

¹⁰³ United States v. Glencore Int'l, Dkt. No. 38, Case No. 22 CR 297 (S.D.N.Y. Feb. 27, 2023).

¹⁰⁴ 34 U.S.C. § 20141.

victims delayed and complicated the proceedings but ultimately did not affect the outcome. The CVRA gives victims procedural rights, but the timing of when those rights attach, and the remedy for a violation of those rights, remain unclear, as noted above.

If a corporate resolution results in a guilty plea, then victims will have the opportunity to participate and seek restitution. If an investigation does not result in a guilty plea, the arguments for limiting victim participation relate chiefly to the potentially conflicting aims of the government and victims. The government seeks to reach an appropriate resolution consistent with its view of the facts and the law. Victims have separate goals. They may have a different view of the facts and the law and, above all, may seek a financial recovery which is not central to the work of prosecutors. The differences between the interests of the government and victims can cause significant delays and complications in the resolution of criminal matters, as seen with victims' intervention in the Boeing case. Under federal law, as described above, victims should not be excluded from the process entirely, but the timing and nature of their involvement is variable and not fully determined.

The benefit of the approach in the United States is generally that it gives victims a voice in criminal cases and allows victims to be compensated for the harm done by criminal misconduct. Yet this benefit comes with the potential cost that the coercive nature of a criminal proceeding leads to an unfair outcome for defendants. For example, the criminal process is generally not suited to deal with complicated issues of civil liability, such as causation, standing, reliance, and damages.

In sum, the participation of victims, while appropriate and important, can sometimes complicate achieving an appropriate resolution and infringe on defendants' rights to litigate issues of civil liability. The law and practices described above can add a good deal of complexity and uncertainty to the process of resolving corporate cases through non-trial resolutions.

3 Conclusion

Of the six jurisdictions analysed above, each acknowledges the importance of redressing victims' injuries. In most jurisdictions, victims have a separate process of redress, often in a civil suit. In criminal processes, however, the role of the victim is much less clear, regardless of jurisdiction.

In a world where victims' right to redress is a priority, all jurisdictions appear to agree that victims have a role to play in the context of non-trial resolutions in criminal matters. For example, victims' compensation is often seen as a mitigating factor and, consequently, as a good way to obtain a favourable resolution for both the government and the defense. As noted above, in Canada, a victim impact statement and proof of restitution are important features in sentencing.

But how far should the rights of victims extend? There is a danger that if victims are given too much importance in non-trial resolutions, they will assume disproportionate leverage and, possibly, stymie resolutions or claim excessive damages. In other words, the right of victims to obtain redress must be balanced against the need for efficiency and finality in criminal proceedings.

The use of non-trial resolutions has been proven effective and necessary in most jurisdictions, particularly the United States, the UK, Canada and France. Prosecutors should not be barred from using a tool that has proven to be efficient and is now being promoted globally. Thus, although victims should have a say in criminal proceedings, they cannot be allowed to prevent non-trial resolutions in criminal matters.

In each jurisdiction, what is the best way to balance victims' rights against the efficiency of non-trial criminal resolution? Given that victims often have access to compensation and redress in a civil suit, as opposed to a criminal matter, there are a few issues for prosecutors, attorneys, and victims' rights advocates to consider when seeking a non-trial criminal resolution that may not provide redress to victims:

- (1)** What is the carryover effect from agreements in criminal matters to civil proceedings? Will these resolutions be considered *res judicata*? In countries where different outcomes in civil and criminal proceedings are perfectly acceptable, this might not raise issues, but in other countries, it will.
- (2)** Will victims be allowed to access the criminal file and the government's evidence for the purpose of proving their claims? More generally, how can victims obtain evidence? Are discovery/disclosure proceedings available? Are blocking statutes or privacy laws going to hinder efficient access to evidence?
- (3)** In cases involving many victims, are there mechanisms in place that allow for bringing claims jointly?
- (4)** Finally, and probably most importantly, is the criminal resolution going to benefit the prosecuting government but leave hardly any assets for the victims? This is particularly true when government authorities are the intended beneficiaries of confiscation and forfeiture.

The list of issues to consider highlights the complexity and competing legal cultures in various jurisdictions. Regardless of jurisdiction, the fact remains that victims should and do play a critical role in prosecution of offenses, even if the resolution of the matter does not occur in a trial. While there is not full harmonization of the process or procedures across the six jurisdictions described above, the international community has emphasized the need for prioritizing victims when considering non-trial resolutions. Because of this, The Academy recommends that attorneys, scholars, lawmakers, and victims' rights advocates consider the rules and regulations for each jurisdiction detailed above as a guidepost for handling non-trial resolutions, while balancing the interests of victims.